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THE ALL ENGLAND LAW REPORTS

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LAW TIMES REPORTS

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1959

VOLUME 1

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LONDON

BUTTERWORTH & CO. (PUBLISHERS) LTD.

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1959

Printed in Great Britain by R. J. Acford Ltd., Industrial Estate, Chichester, Sussex.

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Approximative cargo	502
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Associating—See " *Improperly associating with other men* ".	
Cargo. See " *Approximative cargo* "; " *Full and complete cargo* ".	
Claim	599
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Dispose (" *sell and convey or dispose of . . . land* ")	257
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Full and complete cargo	502
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Occupied	734
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CORRIGENDA

p. 124. WARNER *v.* SAMPSON. Line D. 5: after the words "By bringing a writ " read " of right on the disclaimer he could forfeit the tenant's interest altogether. This ".

p. 216. Re UNITED RAILWAYS OF THE HAVANA AND REGLA WAREHOUSES, LTD. Line 1: for " railway company " read " trustee ". Page 221. Lines F.4 to 6: substitute " Clause Eleventh and the second sentence of cl. Twelfth were in similar terms to cl. Eleventh of the lease, but the trust agreement contained no submission to the jurisdiction such as that in cl. Twelfth of the lease." Line I.4: for " $205,000 " read " $206,000 ". Page 224. Line D.1: for " Dec. 12, 1953," read " Dec. 1, 1953,". Page 234. Lines G.2, 3: for " p. 219, letter I, to p. 220, letter A " read " p. 221, letters D to F ". Line H. 5: for " which are printed at p. 220, letters D to F " read " as to which see p. 221, letter F ".

p. 460. ESPRESSO COFFEE MACHINE CO., LTD. *v.* GUARDIAN ASSURANCE CO., LTD. Line E.3: for " counsel for the tenants " read " counsel for the landlords ".

p. 613. Re STEED'S WILL TRUSTS. Solicitors: after " *Sharpe, Pritchard & Co.*" add " agents for *Barr & Co.*, Cambridge ".

p. 622. NEVILL *v.* NEVILL. Solicitors: read " *Edward Mackie & Co.*, Hayes (for the husband); *Collyer-Bristow & Co.*, agents for *Bird & Lovibond*, Uxbridge (for the wife)." instead of as printed.

THE
ALL ENGLAND
LAW REPORTS
INCORPORATING THE
LAW TIMES REPORTS
AND THE
LAW JOURNAL REPORTS

D

PAROJCIC (otherwise IVETIC) *v.* PAROJCIC.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Davies, J.), October 29, 30, 31, November 5, 1958.]

Nullity—Duress—Father of petitioner inducing her by fear to go through marriage ceremony with respondent.

E *Marriage—Consent—Foreign parties to civil marriage in England—Conduct of ceremony—Alleged misunderstanding by one party.*

The petitioner's father, after fighting with anti-communist forces in Yugoslavia, left the country in 1944; he reached England in 1947. The petitioner and her mother, after suffering many hardships, left Yugoslavia and arrived in England on Nov. 11, 1956. In London they were met by the F petitioner's father and the respondent, a Yugoslav refugee, whom the father introduced to the petitioner as the man whom she was to marry. The respondent was fourteen years older than the petitioner. The petitioner refused the proposal. During the period between Nov. 11 and Dec. 29, 1956, there were quarrels between the father and the petitioner concerning the proposed marriage. The father threatened to send the petitioner back G to Yugoslavia if she did not marry the respondent; she told her father that she would rather commit suicide than return there. On Dec. 28 there was an argument between them about the marriage and the father struck her. On Dec. 29, 1956, the petitioner and the respondent, in the presence of her father and two other Yugoslavs, went through a ceremony of marriage at a register office. The petitioner, so the court found, understood the nature H of the ceremony. After the ceremony the petitioner said that she did not agree, locked herself in her room, and did not thereafter see the respondent again. Both parties to the marriage ceremony were found to have acquired domicil of choice in England. On petition for nullity on the grounds of mistake and duress,

Held: though the petitioner had understood the nature of the ceremony, I she had established that she never consented to the marriage, but was driven to go through the ceremony by terror instilled in her by her father's threats; therefore, a decree of nullity would be granted.

Dictum of BUTT, J., in *Scott* v. *Sebright* ((1886), 12 P.D. at p. 31) applied.

SEMBLE: the effect of duress on marriage is to render it voidable, not void (see p. 3, letter I, post).

Observations on the method of conducting civil marriages between foreigners, where one party cannot speak English (see p. 5, letters B to E, post).

[As to consent and mistake in relation to marriage, see 19 HALSBURY'S LAWS (3rd Edn.) 775, para. 1242; and for cases on the subject, see 27 DIGEST (Repl.) 37, *138-145*.

As to duress in relation to marriage, see 19 HALSBURY'S LAWS (3rd Edn.) 776, para. 1243; and for cases on the subject, see 27 DIGEST (Repl.) 38, *146-157*.]

Cases referred to:

(1) *Kelly* (*otherwise Hyams*) v. *Kelly*, (1932), 148 L.T. 143; 27 Digest (Repl.) 37, *144*.

(2) *De Reneville* v. *De Reneville*, [1948] 1 All E.R. 56; [1948] P. 100; [1948] L.J.R. 1761; 11 Digest (Repl.) 479, *1075*.

(3) *Cooper* v. *Crane*, [1891] P. 369; 61 L.J.P. 35; 27 Digest (Repl.) 36, *137*.

(4) *Fulwood's Case*, (1638), Cro. Car. 482, 488, 493; 79 E.R. 1017, 1021, 1026.

(5) *Scott* v. *Sebright*, (1886), 12 P.D. 21; 56 L.J.P. 11; 57 L.T. 421; 27 Digest (Repl.) 38, *147*.

Petition.

In this case the wife petitioned for a decree of nullity of the marriage, celebrated between her and the respondent on Dec. 29, 1956, at the register office at Oxford. Grounds of the petition were (a) mistake as to the true nature of the ceremony, in that she, a Yugoslav who had recently arrived in England, believed it to be a ceremony of betrothal, and (b) duress. The court found on evidence that she had understood the nature of the ceremony. The facts appear in the judgment.

J. K. Wood for the petitioner.

The respondent did not defend the petition and was not represented.

DAVIES, J.: The petition, dated Jan. 20, 1958, contains in para. 4 what are really two grounds of attack on the validity of the marriage. That paragraph is in these terms:

> "The petitioner went through the ceremony set forth in para. 1 hereof under a mistake as to the true nature thereof in that she believed it to be a form of a ceremony of betrothal and was induced to take part in the aforesaid ceremony in fear of the threats of her father to send her back to Yugoslavia and by her own knowledge of the results likely to flow from such action."

It is contended, therefore, that the petitioner (a) was mistaken as to the nature of the ceremony, in that she believed that it was merely a betrothal service, and (b) was induced to go through it by duress on the part of her father. Cases of this sort are unquestionably important. To illustrate their importance it is unnecessary to go further than the judgment of LORD MERRIVALE, P., in *Kelly* (*otherwise Hyams*) v. *Kelly* (1) ((1932), 148 L.T. 143). LORD MERRIVALE, P., says (ibid., at p. 144):

> "In a country like ours, where the marriage status is of very great consequence and where the enforcement of marriage laws is a matter of great public concern, it would be intolerable if the marriage law could be played with by people who thought fit to go to a register office and subsequently, after some change of mind, to affirm that it was not a marriage because they did not so regard it."

These are the outline facts of this case. The petitioner's family hails from a small village called Jaruga in Bosnia, which is now part of Yugoslavia. The population of the village is largely communist. The petitioner's family are not communists. They were small-holders, farming some seventeen acres of land with some forty head of sheep and cattle. During the war the petitioner's father fought in the anti-communist forces and with their remnants left Yugoslavia in 1944. His wife and children (including the petitioner) were left behind. He reached England in 1947 and has remained here ever since. He has plainly acquired a domicil of choice here. At the time of the events with which this case is concerned, he was working on the railway at the ordnance depot at

A Bicester, where there is a considerable colony of Yugoslavs and other foreigners. In Yugoslavia his family went through a very bad time. Their cattle were taken from them. On two occasions his wife was sent to forced labour, as was the petitioner on at least one occasion. His wife's father was several times beaten up and eventually died. Two of his wife's brothers were shot.

After enduring many hardships, the petitioner and her mother were allowed B to leave Yugoslavia and come to England. They arrived here on Nov. 11, 1956. I have no sort of doubt that, whatever their technical position had been until then, when they came here they had abandoned any domicil of origin and acquired a domicil of choice here. At Victoria Station they were met by the petitioner's father and the respondent. The respondent is also a Yugoslav. He hails from a village near Jaruga and is an old friend of the petitioner's father, C but the petitioner had never met him before. He is fourteen years older than the petitioner, their respective ages at that time being, according to the marriage certificate, thirty-five and twenty-one. He works in a chocolate factory in Birmingham. The petitioner's father had promised to the respondent the petitioner's hand in marriage and at Victoria Station the petitioner's father introduced the respondent to her as the man she was going to marry. This proposal D the petitioner flatly refused then and there. After that the four of them travelled to Bicester, where the respondent left the others. According to the evidence, the petitioner never saw the respondent again until Dec. 29, the date of the ceremony.

For the moment I shall refrain from dealing with the events between Nov. 11 and Dec. 29.

E On the latter date the petitioner and respondent, accompanied by the petitioner's father, a cousin of the respondent called Nicola Parojcic, and a friend called Milos Balach travelled by 'bus to Oxford for the ceremony. The respondent had given notice of intended marriage the previous week. The ceremony was conducted by Mr. Barre, the superintendent registrar, in the presence of and assisted by Mr. Farr, the registrar of marriages. Immediately F after the ceremony the petitioner, according to her own evidence and that of her father, on being told that she was married, said that it could not be so and that she did not agree. She went home, locked herself in her bedroom and wept. Since then she has never seen or, apparently, communicated with the respondent. The marriage was, of course, never consummated. A few weeks after the marriage, the respondent went to the superintendent registrar to ask for advice, G because, as he said, his wife would not live with him. The registrar very wisely told him to consult a solicitor. On Mar. 11 the petitioner first consulted solicitors. Shortly afterwards she met another Yugoslav with whom she is now living and by whom she is now pregnant.

In the course of his most interesting and helpful argument, counsel for the petitioner submitted that the effect of each limb of the petitioner's attack on H the validity of this marriage, if successful, would be to render it void. The importance of the submission is that if the alleged defect in the marriage renders it void, then the court of the wife's pre-marriage domicil has jurisdiction to annul the marriage; but if the effect of the alleged defect is merely to render the marriage voidable, then the appropriate court is that of the husband's domicil (*De Reneville* v. *De Reneville* (2), [1948] 1 All E.R. 56). There is, of course, a I statutory exception to this rule now in s. 18 (1) (b) of the Matrimonial Causes Act, 1950. But this has no application to the present case. Counsel was, therefore, concerned to argue not only that a party's ignorance of the nature of a marriage ceremony renders such a ceremony void, but also that the effect of coercion or duress is the same. With the former proposition I agree; but, as at present advised, I am doubtful about the latter. I am inclined to think that the effect of duress on a marriage is the same as it is on a contract, viz., to render it not void but voidable. This is the view taken by the learned editors of the title DIVORCE in 12 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), p. 225, para.

420. But for the purpose of the present case it is unnecessary to express a concluded opinion on this point. For it seems to me, though there is no direct evidence on the point, that it is the only reasonable assumption that the respondent, like the petitioner's father and many other of his anti-communist emigré compatriots, has abandoned his domicil of origin and acquired a domicil of choice in England. This court has, therefore, jurisdiction over the whole of the present case. And it is plain that the law by which the validity of this marriage has to be tested is English law, the lex loci contractus.

On the effect of ignorance as to the nature of the ceremony on the validity of marriage it is not, I think, necessary to cite any authority at all; there are abundant cases on the point, a number of which were quoted to me by counsel for the petitioner. So far as duress is concerned it is sufficient, I think, to cite one passage in the judgment of COLLINS, J., in *Cooper* v. *Crane* (3) ([1891] P. 369). COLLINS, J., said (ibid., at p. 376):

> "The next point urged before me was that the facts showed that her will was overmastered by the influence of the respondent, and that there was, therefore, no real contract. In order to hold that the ceremony so performed was not binding, I think I should have to infer as a fact one of two things—either that she was so perturbed by terror that her mind was unhinged, and she did not understand what she was doing—and this, I think, is what is meant by the words 'not know what she is about' in the passage from BISHOP, cited in the argument, and which is based on *Fulwood's Case* (4) ((1638), Cro. Car. 482, 488, at p. 489)—or that though she understood what she was doing her powers of volition were so paralysed that, by her words and acts, she merely gave expression to the will of the respondent, and not her own."

It is the second point of that that is really the basis of the duress argument in the present case. Chronologically the point as to duress precedes the point as to want of knowledge and consent; but, logically, it is more convenient to deal first with the latter.

The case for the petitioner commenced by an attempt to show that in Yugoslavia all or many marriages are preceded by a betrothal ceremony and that—at any rate in the country districts—all marriages take place in church. But the evidence on this point was most imprecise and I was not impressed by it. Next, it is said, there was no trousseau, no bridal feast and no plan for a honeymoon. The absence of all these normal adjuncts to a wedding is indeed odd. It must be remembered, however, that these people were living in what might be described as unusual and emergency conditions and surroundings, so that perhaps these lacunae are not as significant as they might be in normal circumstances.

The head and front of the petitioner's case on this part of it is the evidence which she gave and called as to what took place at the register office. Her witnesses as to this were herself, her father and Balach. This evidence was so startling that I expressed the wish that the registrars should attend and give evidence.

The petitioner's evidence as to what took place at the register office was that the ceremony took place wholly in English, that she could not understand a word of it, that she could not remember whether any part was translated, that she could not remember the respondent or herself saying anything and that nobody asked her if she would take the respondent for her husband. Balach said that there was no interpretation except by the respondent, that the respondent spoke to the registrars in English, that at one stage the respondent turned to the petitioner and said in Serbian, semble by way of a question, "You marry Rade Parojcic?" but that the petitioner said nothing at all from first to last. The petitioner's father said that the respondent was the only one who could talk English and that he spoke to the registrars. "If there was any interpretation", he said, "it was very little and I cannot remember. If there was any respondent did it".

A It seemed inconceivable that registrars of any experience and appreciation of their responsibilities would permit such a ceremony to take place. Mr. Barre, the superintendent registrar, and Mr. Farr, the registrar of marriages—each of them with some fifteen years' experience in the Oxford register office—gave an entirely different account of the matter. They remember this particular marriage because of the call subsequently made on Mr. Barre by the respondent B and also because the police made some inquiries into the matter in the early part of this year. According to their evidence, this little party of five Yugoslavs were taken up to Mr. Barre's room by Mr. Farr. Mr. Barre was told by the petitioner's father, as was the fact, that she had been in England only a short time and could speak no English. Mr. Barre was told by Mr. Farr, repeating what had been said to him by the respondent downstairs, that Balach was the C interpreter. Mr. Barre asked Balach if he would interpret and Balach replied that that was what he had come for. The first declaration of the ceremony was repeated after Mr. Barre by the respondent in English. Mr. Barre then asked Balach to get the petitioner to repeat it word for word after Mr. Barre in English, which was done, and then to translate it into Serbian for her and get her to repeat it in that language, which was also done. The same procedure was then followed D with regard to the second declaration. And at the end of it all Mr. Barre got Balach to interpret to the petitioner a little message of good luck, which was done. One wonders incidentally why a foreigner who cannot talk or understand English is asked to repeat the declarations in English before doing so in his or her own language. What advantage is to be gained from this parrot-like repetition of what must to the person making them be meaningless noises it is E difficult to imagine; but Mr. Barre told me that this is regular practice.

It is the case for the petitioner that the evidence of the registrars is untrue and indeed impossible; for it is said that Balach can speak very little English and could not possibly have managed to do what the registrars say that he did. But I cannot help feeling that Balach and very probably the petitioner's father as well can get along in English a good deal better than they now pretend. F Their account of the matter is one which cannot, in my judgment, be accepted. It is quite impossible to believe that those two experienced registrars, whom I saw in the box and whom I considered were truthful witnesses, would allow a wedding ceremony to be performed without assuring themselves so far as they could that the bride was having everything interpreted and explained to her and that she was repeating the declarations and expressing her assent thereto. G They are not unfamiliar with marriages of foreigners, Yugoslavs in particular, as the settlement at Bicester is in the Oxford district. I find myself quite unable to accept the evidence of the petitioner and her witnesses on this part of the case. They were not, in my opinion, telling the truth. I accept the evidence of Mr. Barre and Mr. Farr as in substance an accurate account of what took place.

H Despite the subsequent conversation between the petitioner and her father outside the register office which I have already related, I have come to the conclusion that the petitioner knew at the time that the ceremony which she was going through was a marriage ceremony. The facts proved by the evidence of Mr. Barre and Mr. Farr are not perhaps wholly inconsistent with a belief on the part of the petitioner that the ceremony was a ceremony not of marriage but of betrothal, when one makes allowances for the petitioner's ignorance of I English. But the attempt by the petitioner and her witnesses to mislead the court as to what did take place at the register office makes it, in my opinion, wholly unsafe to credit the petitioner with the ignorance which she claims to have enjoyed. The petitioner's case, therefore, so far as it depends on the contention that she did not understand the nature of the ceremony, fails.

In my judgment, however, the other part of her case stands on a different footing. It would not, I think, be right to approach it from the point of view that as she and her witnesses have lied about one thing the remainder of their

evidence must be equally unreliable. It is not unknown for people, particularly simple and uneducated people such as these are said to be, to fall into the error of lying in order to improve an already good case. The evidence on this part of the case impressed me. The best witness was the petitioner's mother, and she, it is to be noted, gave no evidence about the actual marriage ceremony and so escapes any criticism on that score. A

I am quite satisfied and find that from and after Nov. 11, when this marriage was first mooted by the petitioner's father at Victoria right up till Dec. 29, the subject was the cause of constant quarrels between them. The father was always insisting that the petitioner should marry the respondent and the petitioner was constantly refusing. On more than one occasion, as he himself admits, he threatened her that if she persisted in her refusal he would send her back to Yugoslavia. Whether he could have done so or not, both of them believed it was possible, and the threat not unnaturally after her past experience terrified the petitioner. She told her father that she would rather commit suicide than return to Yugoslavia. There is no doubt that during this period of six weeks the petitioner was very unhappy and constantly crying, as also was her mother who was equally opposed to the match. Finally on the day before the wedding her father hit her in the course of an argument about the matter, no doubt when he was telling her that she must go to Oxford on the following day. On this evidence, which I accept, there is no doubt that this young woman was terrified into obedience by her father who was almost a stranger to her after years of separation and who may well have been imbued with ideas of patria potestas which were fundamentally foreign to his daughter. In the words of BUTT, J., in *Scott* v. *Sebright* (5) ((1886), 12 P.D. 21 at p. 31): B C D E

> ". . . long before the ceremony was gone through the feelings of this young lady towards the respondent were such that of her free and unconstrained will she never would have married him; that she had been reduced by mental and bodily suffering to a state in which she was incapable of offering resistance to coercion and threats which in her normal condition she would have treated with the contempt she must have felt for the man who made use of them; and that, therefore, there never was any such consent on her part as the law requires for the making of a contract of marriage." F

Every single word of that is applicable to the present case, except that in this case it was the father who exercised the duress on her. I am quite satisfied in accordance with that, and the other authorities, that this petitioner has shown that she never in fact consented to this marriage and she was driven to go through the ceremony by the terror instilled in her by the threats exercised and made to her by her father in the course of the six weeks preceding the marriage; indeed, the only six weeks of her life that she had spent in this country. G

The petitioner has, therefore, made out her case and is entitled to a decree.

Decree accordingly.

Solicitors: *Lovell, Son & Pitfield*, agents for *Alfred Truman & Son*, Bicester (for the petitioner).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

A

TOWNSENDS (BUILDERS) LTD. *v.* CINEMA NEWS & PROPERTY MANAGEMENT LTD. (DAVID A. WILKIE & PARTNERS Third Party).

[Court of Appeal (Lord Evershed, M.R., Lord Cohen and Sellers, L.J.), November 24, 25, 26, 27, 28, 1958.]

B

Building Contract—Bye-laws—Infringement of bye-law by building work—Whether contractor disentitled by illegality to recover payment for work done. Bye-law—Validity—Uncertainty—Bye-law requiring a builder constructing a closet to secure that it should not be entered from a room used for human habitation—Proviso allowing entry from room used as a bedroom—Water-closet bye-laws of the London County Council.

C

A building contractor did work for a building owner on two rooms, which were on the first and second floors of a dwelling-house, under a contract entered into in November, 1952. The contract required the contractor to complete work specified in an attached specification in accordance with the directions and to the reasonable satisfaction of an architect. The work

D

involved the construction or alteration of a bathroom and lavatory, contained together in one room, on each of the two floors; entry was to be had to each of these rooms from two adjoining bedrooms occupied independently. The water-closet bye-laws of the London County Council required a builder constructing a water-closet to comply with a requirement (contained in para. 2 (2)) that the water-closet should not be " entered from any room used

E

for human habitation . . . Provided . . . that a water-closet used exclusively with a bedroom or dressing-room may be entered directly from such room ". Breach of the bye-law was punishable by fine under s. 109 of the Public Health (London) Act, 1936. The product of the building work, when completed, infringed the bye-law. The contractor had not known until the work was far advanced that it would not comply with the bye-law. Having regard

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to the state of health and age of the wife of the building owner the local authority did not insist on compliance with the bye-law before her death, which occurred in 1955. In an action by the contractor against the building owner for payment for the work done the building owner contended that payment was not recoverable owing to illegality of the work done by reason of its being in breach of the bye-law; the building owner counterclaimed

G

for the prospective cost of reinstatement. It was also contended, on behalf of the architect who had been brought in on third-party proceedings, that the bye-law was invalid for unreasonableness, injustice and uncertainty.

Held: (i) though the terms of the bye-law were such as might create problems of difficulty, e.g., because rooms from which a closet in course of construction was entered might not be in use when the work was being done,

H

yet the court should approach the construction of the bye-law benevolently and would not hold it to be void.

Dictum of Lord Russell of Killowen, C.J., in *Kruse* v. *Johnson* ([1898] 2 Q.B. at p. 99) applied.

(ii) the contractor was entitled to recover payment for his work, though the result of the work infringed the bye-law, because there was no funda-

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mental illegality pervading the whole work, the construction of the water-closet did not render the building of the bathroom illegal and, indeed, the local authority had been prepared to refrain temporarily from enforcing the bye-law.

Appeal dismissed.

[As to the validity of bye-laws, see 24 Halsbury's Laws (3rd Edn.) 515 et seq., particularly, as regards certainty, at p. 517, para. 951; and as to the control of building by bye-laws, see 3 Halsbury's Laws (3rd Edn.) 409, para. 773.

As to illegality in relation to building contracts, see 3 HALSBURY'S LAWS (3rd Edn.) 447, para. 849; and as to illegality in relation to contracts generally, see 8 HALSBURY'S LAWS (3rd Edn.) 126, para. 218.]

Cases referred to:

(1) *Kruse* v. *Johnson*, [1898] 2 Q.B. 91; 67 L.J.Q.B. 782; 78 L.T. 647; 62 J.P. 469; 30 Digest (Repl.) 229, *735*.

(2) *Strongman (1945), Ltd.* v. *Sincock*, [1955] 3 All E.R. 90; 3rd Digest Supp.

(3) *Salt* v. *Scott Hall*, [1903] 2 K.B. 245; 72 L.J.K.B. 627; 88 L.T. 868; 67 J.P. 306; 38 Digest 196, *327*.

Appeal.

These were appeals by the plaintiff company and defendant company, with cross-notice by the third parties, from a decision of His Honour JUDGE SIR EDGAR DALE at Westminster County Court on May 12, 1958, in the action next mentioned. The plaintiff company, who were builders and are referred to hereinafter as " Townsend ", brought an action against the defendant company (hereinafter called " Harris "), which was owned and controlled by a Mr. Samuel Harris, to recover £150 for building work done in relation to two rooms at 92, Cheyne Walk, in the county of London, a house of which Harris was the owner. In this action Harris counterclaimed against Townsend for £493 for the cost of reinstating the two rooms to their original condition, since the product of the building work contravened bye-laws. By third-party notices served both by Harris and Townsend a firm of architects was brought in as third parties. As between Townsend and the third parties (of whom a Mr. Wilkie acted as architect in relation to the work at 92, Cheyne Walk, and who are hereinafter referred to as " Wilkie ") Townsend claimed to be indemnified against liability to Harris. As between Harris and Wilkie, Harris claimed damages for alleged negligence by Wilkie as Harris' architect, and Wilkie claimed £175 for unpaid fees. The case is reported only on the questions of the validity of certain building bye-laws of the London County Council and of illegality of the contract for building work, which in fact was not in accordance with the bye-laws, as a defence to a claim for payment for the building work.

The plan and specification of the work to be done at 92, Cheyne Walk was prepared by Wilkie. The work included fitting out a room on the first floor as a bathroom and lavatory with doors into two adjoining rooms. Mr. Harris was at that time seventy-eight years of age; his wife was an old lady and was in ill health. It was intended that the bathroom and lavatory should be available for Mrs. Harris, who would be occupying, as a bedroom, one adjoining room, and also would be available to the nurse or companion or, in the absence of either, to Mr. Harris himself, who would be occupying the other adjoining room from which entry would be had to the bathroom and lavatory. On the second floor an existing bathroom and lavatory was to be made accessible from an adjoining room which was intended to be occupied by a man and his wife in the service of Mr. and Mrs. Harris. The result would be that the bathroom and lavatory on the second floor were accessible from two rooms occupied independently. The plans, at a subsequent stage, suggested that the two rooms on the first floor were intended to be occupied as a bedroom and dressing-room for Mrs. Harris and that two rooms adjoining the bathroom and lavatory on the second floor were intended to be used as a bedroom and dressing-room for Mr. Harris. These suggestions from the plans bore no relation to the facts as they were or had ever really been intended.

Townsend entered into a contract with Harris on Nov. 18, 1952, to do the building work. The contract recited that certain drawings and the specification had been signed and identified by the parties thereto and the terms of the contract were stated in conditions appended to the document. So far as is relevant the conditions were as follows:

A " [Townsend] shall carry out and complete the work [i.e., the work specified on the attached specification] in accordance with the contract in every respect in accordance with the directions and to the reasonable satisfaction of the architect [i.e., Wilkie].

" 3 (a) [Townsend] shall comply with and give all notices required by any Act of Parliament or [*by] any regulation or bye-law of any local authority B or of any public service company or authority who have jurisdiction with regard to the work or with whose systems the same are or will be connected . . . (b) [Townsend] before making any variation from the contract drawings or specification necessitated by such compliance shall give to the architect written notice specifying and giving the reason for such variation and applying for instructions in reference thereto."

C Bye-laws made by the London County Council under s. 39 (1) of the Public Health (London) Act, 1891, and certain other statutory powers†, with respect to water-closets provided:

" Water-closets

" 2. A builder constructing a water-closet in connexion with a building D shall comply with the following requirements . . .

"(2) Entrance and entrance lobby. Such water-closet shall not be situated within nor entered from any room used for human habitation, or as a scullery, schoolroom . . . Provided always that a water-closet used exclusively with a bedroom or dressing-room may be entered directly from such room.

E " Notice of work

" 9. Every builder who is about to execute any work as defined in these bye-laws shall serve on the sanitary authority of the district, at their office, at least twenty-four hours' notice in writing of the day and time at which such work is to be commenced, together with such detailed description as shall sufficiently describe the proposed work."

F Work on the two rooms on the first and second floors of 92, Cheyne Walk, began in December, 1952, and was finished early in January, 1953. No notice was served as required by para. 9, before the work was begun. It came to the knowledge of Townsend, or some servant in his employ, before the work had been finished that, according to the local authority‡, the work on the two rooms involved non-compliance with para. 2 (2) of the bye-law. The work, however, was G continued and finished; and in April, 1953, the local authority made it plain that in their view there was non-compliance with para. 2 (2) of the bye-law, and there was some threat of proceedings against Townsend.

As a result of negotiation the local authority refrained from insisting on compliance with the bye-law during the occupation of rooms on the first floor by Mrs. Harris, and Mr. Harris undertook that subsequently he would do everything H possible to secure compliance with the bye-law. Mrs. Harris died in March, 1955. The infringement of the bye-law consisted in the fact that the bathroom, which included the water-closet as part of it, was accessible from two rooms and not

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* On the construction of this paragraph the county court judge, before whom the action was tried, held that the word " by " was a slip and that it should be disregarded for the purposes of construing the paragraph. On the appeal Lord Evershed, M.R., I expressed agreement with this and said that the result therefore was that it was a term of the contract that Townsend first had to give all notices which bye-laws required, and secondly, had to comply with the bye-laws themselves.

† The bye-laws also subsisted under s. 24 of the London County Council (General Powers) Act, 1928. Both this and the Public Health (London) Act, 1891, were repealed by the Public Health (London) Act, 1936, s. 308 and Sch. 7, but bye-laws made before the repeal continued to have effect as if made under the replacing provisions; see Public Health (London) Act, 1936, s. 307 (1), and s. 107.

‡ The local authority was the Chelsea Borough Council, as sanitary authority for the purposes of the Public Health (London) Act, 1936.

only from one, being a bedroom or a dressing-room. Compliance with the bye-law could be secured if the bathroom were enclosed by a separate partition, because then the water-closet would not be directly accessible from the bedroom, but would be divided from it by what was described as an " intervening entrance lobby ", viz., in fact, the bathroom. A

At the trial of the action the county court judge decided that Townsend was entitled to recover the £150 claimed from Harris and rejected the defence put forward by Harris that the contract for this work was affected by illegality, viz., the infringement of the bye-law, so that payment was irrecoverable. The counter-claim by Harris was treated as having failed. The claim by Townsend against Wilkie did not arise. On the issue between Harris and Wilkie the county court judge found that Wilkie had been negligent and that Harris was entitled to damages. Both Townsend and Harris appealed and Wilkie gave a respondent's cross-notice. All issues in the action were thus before the Court of Appeal. B C

M. A. B. King-Hamilton, Q.C., and *N. E. Wiggins* for the appellant (Harris).
H. H. V. Forbes for the respondent (Townsend).
D. H. Gardam for the respondent third party (Wilkie).

LORD EVERSHED, M.R., after stating the facts and referring to the bye-laws, and after outlining the nature of the proceedings, and stating the conclusions of the county court judge and his order, continued: I will first deal with the argument that counsel for Wilkie put, with great force, that the bye-laws* are void for unreasonableness, injustice and uncertainty, and can, therefore, be wholly disregarded. If that argument is right, there never was any breach of contract: nothing is wrong with the work done; and all this elaborate litigation has been based on a false premise. As was stated in one of the cases on which counsel for Wilkie particularly relied, this court will be always slow to hold that bye-laws are invalid. That case was *Kruse* v. *Johnson* (1) ([1898] 2 Q.B. 91). The short facts were that at a court of summary jurisdiction the respondent, a superintendent of police, preferred an information against the appellant for that he, on the day therein specified, did sing in a certain highway, within fifty yards of a dwelling-house there, after being required by a constable to desist, contrary to the bye-law. The question was whether the bye-law, which prevented not only Mr. Kruse but other vocalists from singing in the neighbourhood, was or was not invalid. The bye-law there the subject of attack was held not to be invalid. In the course of his judgment LORD RUSSELL OF KILLOWEN, C.J., said ([1898] 2 Q.B. at p. 99): D E F G

> " In this class of case it is right that the courts should jealously watch the exercise of these powers, and guard against their unnecessary or unreasonable exercise to the public disadvantage. But, when the court is called upon to consider the bye-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such bye-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, ' benevolently ' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered." H

I respectfully adopt all that passage, and, adopting it, express my conclusion that, in the present case, it has not been established to my satisfaction that we should treat these bye-laws as invalid, on the ground of unreasonableness, injustice, or indeed obscurity in their language; and I would add that a court will be all the slower to hold bye-laws invalid in proceedings to which the local authority concerned are not parties. I

* I.e., the water-closet bye-laws of the London County Council. The terms of the relevant bye-law are printed at p. 9, letter D, ante.

A Since, however, much argument has turned on these bye-laws, it would, I hope, not be entirely inappropriate if I said just this much about them, in case the matter should come to the attention of the local authority concerned. The bye-laws do, as framed, create some problems of difficulty. The bye-law of which I have read a part is one directed to builders, and it provides—" A builder constructing a water-closet . . . shall comply with the following requirements ". B As will be seen presently, if he fails to do so he is liable to have proceedings brought against him and to be fined. The phrase " a builder constructing a water-closet . . . " assumes that work is in the course of being carried out by a builder. What he has got to comply with is then set out in para. 2 (2), which provides that " such water-closet shall not be situated within nor entered from any room used for human habitation ", and makes a proviso that a water-closet C " used exclusively with a bedroom or dressing-room " may be entered directly from that room. If the present case is taken as an example, then at the time when Townsend was doing this work the water-closet which he was constructing was not being " used ". It is, moreover, equally clear that, though a builder may be told that the room into which access from the water-closet may be had will be used as a bedroom, it may be that the building owner will afterwards D decide to use it as a nursery, scullery, schoolroom, or in any other way. I mention these matters because I cannot help thinking that on some future appropriate occasion the language might be made more clear, in order to show the builder what he was intended really to do or not to do. What I have said has a further specific reference because of the words of the proviso—" Provided always that a water-closet used exclusively with a bedroom or dressing-room may be entered E directly from such room ". On that proviso, a wealth of argument was presented to the court below, and to this court, on the question whether the word " or " was, strictly speaking, disjunctive or not. It was said that, construing that proviso (as LORD RUSSELL OF KILLOWEN, C.J., said) " benevolently ", if a water-closet was accessible from two rooms, one being a bedroom and the other the dressing-room of the person using the bedroom as such, then that was some- F thing excepted by the proviso. As a matter of common sense there may appear to be quite a lot for the view that, if the bedroom and dressing-room are used by the same person, there would be no great harm in saying that he could get to his lavatory and bathroom from the dressing-room as well as from the bedroom. The learned county court judge indeed so construed this proviso; and it was G for that reason that he was able to assess the damages on the footing that the bathroom and lavatory on the first floor did not, as constructed and supposedly used, involve non-compliance with this regulation. My own inclination is in the opposite direction: that is to say, giving such benevolence to the art of construction as I can, I am not satisfied that this proviso exempts from the earlier prohibition a water-closet access to which may be had both from a bed- H room and from a dressing-room, albeit that the dressing-room is the dressing-room of the occupant of the bedroom. The difficulty in the way of the other view seems to me to arise principally from the last five words, " entered directly from such room "—*singular*. In any case, however, I for my part agree with counsel for Harris that, when the matter comes finally for determination, the point is here academic; for, although the local authority were told by Wilkie, I or someone in his service, that the two rooms [the rooms to the east and the south of and adjoining the bathroom and lavatory on the first floor], were respectively the bedroom and dressing-room of Mrs. Harris, that was not the fact. The intention was, and the fact was, that when the rooms came into use both rooms were used as bedrooms, so that, as regards the first floor, the situation was the same as it was on the second floor, namely, the work resulted in a bathroom-cum-lavatory directly accessible from two bedrooms occupied independently.

As I have referred to the plan, I will in passing note that that plan to which

I have alluded* was a plan bearing at the bottom right-hand corner the name of Wilkie's firm. It stated on the face of it what I have said, namely, that one room on the first floor was Mrs. Harris's bedroom and the other room Mrs. Harris's dressing-room. Equally it said, as regards the second floor plan, that one room was Mr. Harris's bedroom and the other room Mr. Harris's dressing-room. There is some question to what extent Mr. Wilkie personally saw the plan, or whether it was done by a Mr. Bransgrove, then his employee. It was sent to the local authority; and the representations contained in the drawings were quite plainly false. That fact was discovered because Mr. Harris so stated to the local authority shortly afterwards; and of course it is not to be wondered at that the local authority were not particularly persuaded to be helpful if they thought that they were (in the popular phrase) having dust thrown in their eyes.

It will be convenient for me to turn next to the argument founded on illegality. This is not a case where the contract can be said to be itself illegal, or to involve, on its face, the doing of something that was illegal, unless the specifications which are part of the contract showed, on the face of them, that what was going to be done, if it was done precisely as specified, would involve non-compliance with the bye-law. It was, on that ground, alleged by counsel for Harris (putting it picturesquely) that the work contracted for was work to make an "illegal" bathroom, and, that being so, it could not lie in the mouth of the contractor to claim payment for doing that illegal work. The learned county court judge rejected that argument; and so do I.

We were referred to the case, which was before this court in 1955, *Strongman (1945), Ltd.* v. *Sincock* (2) ([1955] 3 All E.R. 90); and we are all familiar with the many cases† which arose when building work was found to have been done without a building licence under the defence regulations having been obtained. Although it was not always other than distasteful, it enabled a defendant who had had work done and who had enjoyed the benefit of it to say that he was not bound to pay for it because he and the builder had been party to what was in effect an illegal contract. To make that point clear, it is worth noting what was the regulation which was invoked in *Strongman (1945), Ltd.* v. *Sincock* (2). It was reg. 56A‡ of the Defence (General) Regulations, 1939, which provided:

> "Subject to the provisions of this regulation the execution in the United Kingdom . . . of any operation specified . . . shall be unlawful . . ."

unless a licence had been obtained. That is a very clear, positive statement that the work without a licence is unlawful. The case with which we are concerned is of a somewhat milder complexion. The bye-law in question was expressed to be made under s. 39 (1) of the Public Health (London) Act, 1891§, which states that "The county council shall make bye-laws with respect to water-closets", etc.; and, in sub-s. (3), that "It shall be the duty of every sanitary authority to observe and enforce the bye-laws . . ."

The bye-laws provide that "A builder constructing a water-closet . . . shall comply with" certain requirements. If he fails to do so (as counsel for Wilkie observed), he is liable to have invoked against him the powers under the Public Health (London) Act, 1936, and in particular s. 109, which provides that if it is apparent on an examination that any such work has been made or provided by any person otherwise than in accordance with bye-laws then that person is liable to a fine; and it would be a question whether the petty sessional court before whom the case came thought the case deserved a fine or not. There is,

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* The plan was dated Jan. 16, 1953.

† These cases will be found grouped in CONSOLIDATED INDEX, 1936-1956, of the All England Law Reports under the heading BUILDING CONTROL (Licence).

‡ The text of this regulation is printed in 4 HALSBURY'S STATUTORY INSTRUMENTS 6; it was revoked on Nov. 10, 1954, by S.I. 1954 No. 1478.

§ Repealed; but the bye-laws are continued in force by the Public Health (London) Act, 1936, s. 307 (1).

however, no fundamental illegality pervading the whole work and the whole contract. It is true to say, no doubt, that, if I have correctly construed para. 2 (2) of the bye-laws, then the bathroom and lavatory, as eventually it was made and left, having the access from two independent rooms, was not in compliance with the bye-law; and that, therefore, being contrary to the bye-law, an offence had been committed. But the first thing to observe as regards Townsend (and the same applies to Harris) is that, according to the county court judge's finding, though Townsend knew of the existence of the bye-law he did not know until the work was far advanced, at any rate, that what he had been called on by his contract to do and what the architect had invited him to do involved non-compliance with the bye-laws. That obviously would have a very substantial effect in any proceedings which might be brought against him. It is, secondly, made quite clear by the course of events in this case which began in January, 1953, and ended with the compromise agreement in June and July (to which I have already adverted) that the local authority felt it to be within their power (and no doubt rightly) to relax, or not strictly to enforce, the bye-law; for they made the compromise arrangement in which they said that they would not take any steps, but would leave matters as they were during Mrs. Harris's occupation. I note also (though to what extent it was in the forefront of anybody's mind I do not know) that they were prepared not only (so to speak) to put the telescope to their blind eye when looking at the first floor, but they observed the same complacency on the second floor also. Thirdly, it is to be observed that the work as done was not (like work done without a licence) illegal per se without more. It would only not comply with the bye-laws so long as something else was also done: the work could be made to comply simply by partitioning the water-closet within the bathroom. If the matter is tested by asking whether, on July 3, 1953*, this bathroom was (in the phrase of counsel for Harris) "illegal", I think that the inevitable answer is that it was not. That being so, it seems to me that Townsend cannot be met, when he sues for the cost of the work that he has done, with this charge that he provided his client with an "illegal" bathroom, and therefore should not get paid for the work, which Mr. Harris and his wife proceeded thereafter to enjoy in exactly the same way as Harris had originally intended.

Without, therefore, saying more on that matter, I think that on the facts of this case the county court judge was well entitled to say that Townsend is not disabled from recovering the £150 on the ground of illegality. There was somewhat faintly presented (if counsel for Harris will allow me to say so) the suggestion that the work was quite worthless anyway; but I have perhaps said enough to show that the enjoyment by Mr. Harris for two years during his wife's life (and indeed ever since until he sold the house) seems to me to dispose of the notion that the work, which was done exactly as he had asked for it to be done, was worthless. It therefore follows that, so far as the appeal of Harris against the judgment sought to set aside the judgment for £150, that appeal fails.

[HIS LORDSHIP then discussed the measure of damages on the counterclaim by Harris against Townsend. He determined the measure of damages to be the cost of complying with the bye-law by partitioning the water-closet from the bathroom, and held that Harris was entitled to damages against Townsend on that footing, notwithstanding that according to custom in building operations the architect was regarded as responsible for seeing that the work complied with bye-laws. HIS LORDSHIP held further that as between Harris and Wilkie, Harris was entitled to damages for negligence and Wilkie was entitled to recover unpaid professional fees. As between Townsend and Wilkie HIS LORDSHIP held that Townsend was entitled to be indemnified by Wilkie against liability to Harris.]

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* This was the date on which Mr. Harris agreed to do everything possible to ensure compliance with the bye-law after the rooms would no longer be required by his wife.

LORD COHEN: I agree so entirely with what has been said by LORD EVERSHED, M.R., that I only desire to add one or two observations on the question of illegality. As the Master of the Rolls pointed out, it is quite plain from the terms of the contract that there is nothing inherently illegal in it. Indeed, it might be said that condition 3* was so framed as to prevent the possibility of any such illegality. The illegality relied on by counsel for Harris was solely in the performance, and it might well be that that would have been enough if there had been no subsequent waiver by the local authority of the strict enforcement of the relevant bye-law and if the arrangement that has been mentioned† had not been made. But, that having been made, it seems to me that the position is radically altered. Mr. Harris no doubt could have refused, before that arrangement was reached, to honour the final certificate, either on the ground of illegality or on the ground that, having regard to condition 3, the work done was not within the contract. It seems to me that when he has obtained that modification from the local authority and then continued to enjoy the benefit of the work done by Townsend at least for the period of his wife's lifetime and indeed, so far as we know, down to the date on which he sold the property, we are in no way deviating from the principles laid down in the cases cited (to which LORD EVERSHED, M.R., has referred) if we say that in those circumstances Mr. Harris cannot both have his cake and eat it and that the defence of illegality fails.

I do not think that I can usefully add anything on the other points. For the reasons which my Lord has suggested I concur in the order which he proposes.

SELLERS, L.J.: I agree so fully with the judgment of LORD EVERSHED, M.R., and the further observations of the noble Lord that I do not seek to add any words of my own to the judgment with regard to these matters. I am prompted, however, to refer to some observations of CHANNELL, J., and indeed to adopt them, having regard to the general observations that LORD EVERSHED, M.R., has made with regard to the bye-law. In *Salt* v. *Scott Hall* (3) ([1903] 2 K.B. 245 at p. 248), CHANNELL, J., said:

> " It seems to me that all bye-laws relating to the construction of buildings ought to have something in the nature of a dispensing power, enabling the local authority or its surveyor or other officer to say that a particular building is of an exceptional character, and that the hard and fast rules laid down by the bye-laws as to the mode of construction ought not to apply to it. But I think it would be most mischievous to hold that the absence of such a dispensing power necessarily made the bye-law bad."

The only justification for what happened in this case was that there were, perhaps, special circumstances relating to this particular property.

Order of the county court judge varied as follows. Judgment for Townsend against Harris for £150, with costs (party-and-party). Judgment for Harris on counterclaim against Townsend for £162 10s.‡, with costs (party-and-party). Declare Harris entitled to judgment against Wilkie for £162 10s., with costs (Harris not entitled to difference between solicitor-and-client and party-and-party costs). Declare Wilkie entitled to judgment against Harris for £175, with costs. Declare Townsend entitled to be indemnified by Wilkie against anything Townsend has to pay Harris, including party-and-party costs on counterclaim by Harris against Townsend (in satisfaction of the orders for judgment for damages, the £162 10s. to be set off against the £175). The costs here referred to were the costs in the court below.

Solicitors: *Dod, Longstaffe & Fenwick* (for the appellant, Harris); *W. J. Fraser & Son* (for the respondent, Townsend); *Sydney Redfern & Co.* (for the respondent third party, Wilkie).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

* The relevant terms of this condition are printed at p. 9, letter B, ante.

† This was the arrangement by which compliance with the bye-law was not insisted on during Mrs. Harris's lifetime; see p. 9, letter H, ante.

‡ I.e., the cost of partitioning the closet (see p. 13, letter H, ante.)

Re BERREY'S WILL TRUSTS. GREENING *v.* WARNER AND OTHERS.

[CHANCERY DIVISION (Danckwerts, J.), December 4, 1958.]

Administration of Estates—Fund for payment of legacies—No express direction as to payment—Share of residue undisposed of—Administration of Estates Act, 1925 (15 *Geo.* 5 *c.* 23), *s.* 33 (2).

Administration of Estates—Order of application of assets—Lapsed share of residue—Incidence of administration expenses—Gift of residue in shares "after" all testatrix' debts and "expenses" were paid.

A testatrix made her will on a will form which bore a printed direction that all the testatrix' debts and funeral expenses should be paid as soon as conveniently might be after her decease. The printed words "I give and bequeath unto" were followed in the will by the words "the following legacies free of duty" and the testatrix gave two pecuniary legacies of £500 each. The will continued:" After all my debts, and funeral, and expenses are paid I give and bequeath all the residue of my estate in equal shares" to four named persons. One of the residuary legatees predeceased the testatrix and the share bequeathed to her accordingly lapsed and passed as on the intestacy of the testatrix. On questions as to the incidence of debts, funeral expenses, testamentary and administration expenses and the legacies,

Held: (i) the term "expenses" in its context extended not only to testamentary expenses but also to administration expenses, and those expenses together with the debts and funeral expenses were (by reason of the use of the word "after") charged on the whole residuary estate and not merely on the lapsed share.

(ii) the legacies were payable primarily out of the share undisposed of by the will because the joint effect of s. 33 (1) of the Administration of Estates Act, 1925, and of s. 33 (2), which required a sufficient fund to be set aside to provide for pecuniary legacies, was to make the undisposed of share the proper fund for payment of these legacies.

Re Worthington ([1933] All E.R. Rep. 189) followed.

Re Beaumont's Will Trusts ([1950] 1 All E.R. 802) and *Re Midgley* ([1955] 2 All E.R. 625) considered.

[As to the order of application of assets of solvent estates, see 16 HALSBURY'S LAWS (3rd Edn.) 344, 345, paras. 666-668; and for cases on the subject, see 23 DIGEST (Repl.) 481-484, 504-506, *5476-5519*, *5683-5702*.

For the Administration of Estates Act, 1925, s. 33 (2), see 9 HALSBURY'S STATUTES (2nd Edn.) 734.]

Cases referred to:

(1) *Re Petty, Holliday* v. *Petty*, [1929] 1 Ch. 726; 98 L.J.Ch. 207; 141 L.T. 31; 23 Digest (Repl.) 544, *6071*.

(2) *Re Kempthorne, Charles* v. *Kempthorne*, [1930] 1 Ch. 268; 99 L.J.Ch. 107; 142 L.T. 111; 23 Digest (Repl.) 545, *6074*.

(3) *Re Harland-Peck, Hercy* v. *Mayglothing*, [1940] 4 All E.R. 347; [1941] Ch. 182; 110 L.J.Ch. 81; 164 L.T. 215; 23 Digest (Repl.) 540, *6051*.

(4) *Re Sanger, Taylor* v. *North*, [1938] 4 All E.R. 417 ; [1939] Ch. 238; 108 L.J.Ch. 165; 159 L.T. 603; 23 Digest (Repl.) 540, *6050*.

(5) *Re Gillett's Will Trusts, Barclays Bank, Ltd.* v. *Gillett*, [1949] 2 All E.R. 893; [1950] Ch. 102; 23 Digest (Repl.) 417, *4871*.

(6) *Re Beaumont's Will Trusts, Walker* v. *Lawson*, [1950] 1 All E.R. 802; [1950] Ch. 462; 23 Digest (Repl.) 539, *6045*.

(7) *Re Thompson, Public Trustee* v. *Husband*, [1936] 2 All E.R. 141; [1936] Ch. 676; 105 L.J.Ch. 289; 155 L.T. 474; 23 Digest (Repl.) 541, *6056*.

(8) *Re Boards, Knight* v. *Knight*, [1895] 1 Ch. 499; 64 L.J.Ch. 305; 72 L.T. 220; 23 Digest (Repl.) 519, *5828.*

(9) *Re Martin, Midland Bank Exor. & Trustee Co., Ltd.* v. *Marfleet*, [1955] 1 All E.R. 865; [1955] Ch. 698; 23 Digest (Repl.) 541, *6053.*

(10) *Re Midgley, Barclays Bank, Ltd.* v. *Midgley*, [1955] 2 All E.R. 625; [1955] Ch. 576; 23 Digest (Repl.) 539, *6044.*

(11) *Re Worthington, Nichols* v. *Hart*, [1933] All E.R. Rep. 189; [1933] Ch. 771; 102 L.J.Ch. 273; 149 L.T. 296; 23 Digest (Repl.) 540, *6049.*

Adjourned Summons.

By her originating summons dated June 16, 1958, the plaintiff, the sole surviving administratrix with the will annexed of the estate of the deceased and one of the persons beneficially interested in any property as to which the testatrix died intestate, asked for the determination of the following questions: whether on the true construction of the will and in the events which have happened (i) the funeral, testamentary and administration expenses and debts, (ii) the estate duty payable on the estate, and (iii) the pecuniary legacies bequeathed in the said will ought respectively to be paid (a) out of the lapsed share of the residuary estate in exoneration of the other shares in the residuary estate; (b) out of the whole of the residuary estate before the division thereof into four equal shares; or (c) in some other and if so what manner.

P. S. A. Rossdale for the plaintiff, the administratrix and one of the next of kin.

G. A. Grove for all defendants, the residuary legatees.

DANCKWERTS, J.: The testatrix made her will herself on Feb. 10, 1953, on a will form. She died on Feb. 12, 1957. She appointed an executrix, who died soon after the testatrix and never proved, and eventually letters of administration were granted to two persons, one of whom has since died.

The will form contained the direction which is always found in those forms. After the words revoking previous wills and referring to executors, there is the direction that all the testatrix' debts and funeral expenses should be paid as soon as conveniently might be after her decease. Then there are the printed words " I give and bequeath unto ", but, disregarding the grammatical intention of those words, the testatrix proceeds " The following legacies free of duty, namely " two legacies of £500. She continues:

> " After all my debts, and funeral, and expenses are paid I give and bequeath all the residue of my estate in equal shares to the following . . . "

and she names her sister Mabel Rose Birkett, who survived her, but died subsequently, her sister Maude Ethel Smith, who pre-deceased her, dying on Dec. 13, 1956, her niece June Eloise Waters, who has since married and whose name is now Warner, and her grandniece Pamela Elaine Waters of Sydney, Australia, " either in securities or money whichever they may prefer ". Then she gives two small specific legacies to certain persons.

The question that I have to decide is the incidence of debts, funeral expenses, testamentary and administration expenses, and also (though I am not dealing with that for the moment) the incidence of the legacies. Counsel for the plaintiff has referred me to a number of the cases on this subject which establish that the effect of the word " after " is to cast the debts and expenses on the whole of the residuary estate and not merely on the property undisposed of, as would be the effect of the Administration of Estates Act, 1925, Sch. 1, Part 2. That is the effect of the word " after ", as it seems to me, having regard to *Re Petty, Holliday* v. *Petty* (1) ([1929] 1 Ch. 726), *Re Kempthorne, Charles* v. *Kempthorne* (2) ([1930] 1 Ch. 268) and *Re Harland-Peck, Hercy* v. *Mayglothing* (3) ([1940] 4 All E.R. 347). But the question still remains what are cast actually on the whole of the residuary estate by the words the testatrix has used. It is perfectly correct, as argued by counsel for the defendants, and pointed out by SIMONDS, J., in *Re Sanger, Taylor* v. *North* (4) ([1938] 4 All E.R. 417), that the general direction

A to be found in the printed words of the will, directing payment of debts and funeral expenses, does not alter the order of application in the case of a solvent estate laid down by s. 34 (3) of the Act of 1925, and Part 2 of Sch. 1; but the effective part is the disposition beginning with the word " after ".

What does that second disposition mean ? Counsel for the defendants argued that it was merely repetition of the printed general direction which the testatrix B was attempting to copy and repeat, which she thought she ought to for the purpose of her residuary bequest. I do not reach that conclusion. It seems to me that I must pay attention to the actual words used by the testatrix in the will which she made herself. She has referred to three classes of things, " my debts ", " my funeral " and " my expenses ", or " the expenses of my estate ", to be more accurate. Counsel for the defendants also sought to cut down the ambit of the C word " expenses ", saying that the testatrix cannot possibly have meant to include the estate duty and that it would be giving a very technical meaning to the words which she has used out of her untutored mind. In the result, I have to deal with the words which I find, and as " expenses " (in the context) are something other than funeral expenses, then I cannot see why I should limit them more than would be the natural course in any ordinary will. It seems to me that " expenses " D must include not only testamentary expenses (which by reason of the rules which have been adopted in regard to wills, would include estate duty payable out of the general estate), but also would include the expenses of administration of the testatrix' estate.

Accordingly, it seems to me that the order of application of assets under s. 34 (3) of and Part 2 of Sch. 1 to the Administration of Estates Act, 1925, is varied E to this extent at any rate, that those expenses to which I have referred come out of the whole of the residuary estate before there is any division into shares, and that there is only an intestacy as regards one share in this division.

I now come to the question of the incidence of the legacies amounting to £1,000 given by the will of the testatrix. This appears to me to be a question of considerable difficulty, and not less so because of some rather varying decisions F of myself and some of my brother judges. It will be remembered that there was the general direction for the payment of debts and funeral expenses in the printed parts of this will, and then, after the bequests of the two legacies each of £500, the testatrix declared as follows:

> "After all my debts, and funeral, and expenses are paid I give and bequeath all the residue of my estate in equal shares . . ."

G among four persons, one of whom predeceased the testatrix; so there was an intestacy as regards one-quarter of the residuary estate. It is argued by counsel for the plaintiff on behalf of the next of kin (who take the one-fourth which is undisposed of by the will in the events which have happened) that the result of the decision which I have reached as regards expenses (liabilities, they might be called) is that there is nothing to which the words in s. 34 (3) of the Act of 1925 H could apply, as the Act only refers to debts and other liabilities and does not refer in terms to legacies at all. Consequently, owing to the variation made by the will, there is no reason to apply Part 2 of Sch. 1 in respect of liabilities, and there is no subject-matter to which the provisions of para. 1 of Part 2 of the Schedule could apply. Paragraph 1 reads:

I > " Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies."

There are four cases to which it is necessary to refer on those provisions. The first in time is a decision of ROXBURGH, J., in *Re Gillett's Will Trusts, Barclays Bank, Ltd.* v. *Gillett* (5) ([1949] 2 All E.R. 893). There the testator bequeathed annuities to four persons, and he provided

> " as to any balance remaining of my residuary trust funds after the provision and payment of all the aforesaid annuities my trustees shall stand

possessed thereof . . . In trust on the decease of the survivor of the above first named four annuitants . . ."

in varying specified proportions for seventeen named persons absolutely, but liable to be divested by certain substitutional gifts. He made no disposition of any surplus income there might be from the residuary trust funds pending the death of the survivor of the four annuitants; and after the death of two of them there was such a surplus. So the result was, as held by the court, that there was an intestacy as regards the surplus income undisposed of by the will. It was also held that there was no express direction in the will to displace the general rule in Sch. 1, Part 2, para. 1, to the Administration of Estates Act, 1925, that the undisposed income should be applied towards payment of legacies, since the testator was not aware that he was leaving it undisposed of, and it could not be inferred what disposition (if any) he might have made thereof had he been so aware. The judgment of ROXBURGH, J., on this point is as follows (ibid., at p. 897):

" The point which I now have to decide is whether the legacies bequeathed by the will ought to fall on the income to which the judgment which I have just given relates, in the first instance, if and in so far as it is sufficient for the purpose. Counsel for the fourth and fifth defendants submits that they should not. He concedes, I think, that they must unless I can find a contrary intention in the will. He concedes, and, indeed, it is obvious, that there is no express contrary intention in the will, but he submits that I ought to imply a contrary intention. His first submission is that the fact that the testator has disposed of the whole, or probably the whole, income of the residue for an undefined period shows that he did not want the legacies to be paid out of income other than possibly any surplus income available in the first year from his death. His alternative submission is that where a testator has made express dispositions which make it legally impossible to retain a fund out of the undisposed of interest, he must be taken to be varying the order of the application of assets set out in the Administration of Estates Act, 1925, Sch. 1, Part 2."

It was decided that the legacies were payable out of the undisposed of surplus income. Counsel for the plaintiff points out that the decision was reached on the footing of certain concessions made by counsel, and he says that those concessions ought not to have been made and at any rate he is not making them in the present case, and consequently *Re Gillett's Will Trusts* (5) is no authority on the present matter at all.

In *Re Beaumont's Will Trusts, Walker* v. *Lawson* (6) ([1950] 1 All E.R. 802), which was a decision of mine, a testatrix by her will made in 1947 bequeathed free of duty specific articles and pecuniary legacies, and proceeded:

" I give devise and bequeath all my real estate and all my personal estate not hereby otherwise disposed of (including all property over which I shall have power to appoint) unto my trustees upon trust that my trustees shall sell call in and convert into money the same or such part thereof so far as shall be necessary and after payment of all my funeral and testamentary expenses and debts shall stand possessed of the residue thereof in trust to pay and transfer the same equally between . . . [four persons]."

She died, and one of the four persons named in the will predeceased her. The trustees of the will issued a summons to have determined (among other things) whether, on the true construction of the will and by virtue of the Administration of Estates Act, 1925, s. 34 (3) and Sch. 1, Part 2, the lapsed one-fourth share was applicable, in exoneration of the other shares in it, towards any and if so which of the following liabilities: the funeral, testamentary and administration expenses, debts and liabilities, the pecuniary legacies bequeathed by the will, and so on. It was argued by counsel for the third defendant in *Re Beaumont's Will Trusts* (6)

A that there was no provision in s. 34 (3) which made the legacies payable out of the undisposed of share; and that the only provision which might have that effect was s. 33 (2), and he said that that was displaced, because there was an express trust for sale in that case.

At this stage perhaps it will be desirable to look at the provisions of the Act. Section 34 (3) provides:

B

> " Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part 2 of Sch. 1 to this Act."

C

I have already referred to Part 2 of Sch. 1. There is no reference to legacies in s. 34 (3); but, as I have already mentioned, in the order of application for liabilities which is referred to in s. 34 (3), the first property to be resorted to under para. 1 of Sch. 1, Part 2, is

D

> " Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies."

On the other hand, s. 33 provides:

> "(1) On the death of a person intestate as to any real or personal estate, such estate shall be held by his personal representatives—(a) as to the real estate upon trust to sell the same; and (b) as to the personal estate upon

E

> trust to call in sell and convert into money such part thereof as may not consist of money, with power to postpone such sale and conversion for such a period as the personal representatives, without being liable to account, may think proper . . . and so also that, unless required for purposes of administration owing to want of other assets, personal chattels be not sold except for special reason. (2) Out of the net money to arise from the sale and

F

> conversion of such real and personal estate (after payment of costs), and out of the ready money of the deceased (so far as not disposed of by his will, if any), the personal representative shall pay all such funeral, testamentary and administration expenses, debts and other liabilities as are properly payable thereout having regard to the rules of administration contained in this Part of this Act [which presumably is a reference to Part 2 of Sch. 1], and

G

> out of the residue of the said money the personal representative shall set aside a fund sufficient to provide for any pecuniary legacies bequeathed by the will (if any) of the deceased."

One of the peculiarities of this legislation is that there is no direction in terms for payment of the legacies out of that fund. There is simply a direction that a fund is to be set aside, which is not followed up, as one would expect, with a

H

direction that the fund set aside should be applied in payment of the legacies. That is one of the difficulties which have had to be considered in the course of these cases.

In *Re Beaumont's Will Trusts* (6) I came to the conclusion, in the circumstances of that case, that the old law in regard to legacies which was current before 1926 applied, and that there was no case for the application of a different

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rule by virtue of s. 34 (3) of the Administration of Estates Act, 1925. I said ([1950] 1 All E.R. at p. 803):

> " It seems to me, as argued by counsel for the third defendant that, in effect, no provision has been made in the Administration of Estates Act, 1925, s. 34 (3), with regard to such things as legacies. There is no doubt, on the authorities, that the funeral, testamentary and administration expenses, debts and liabilities come out of the whole residuary estate before division, because that is what the will says . . . but it seems to me that the position

of the legacies depends on the old law. Under the old law, before the Administration of Estates Act, 1925, legacies would plainly come out of the residuary estate, and, although in this will there is not in terms a gift of residue, there is a gift of 'all my real estate and all my personal estate not hereby otherwise disposed of', and it seems to me that the old law applies unless something can be indicated in the Administration of Estates Act which eliminates, or modifies, the old law as to the extent of such burdens. On this point I am assisted by a decision of CLAUSON, J., in *Re Thompson, Public Trustee* v. *Husband* (7) ([1936] 2 All E.R. 141), in which he held that the old law laid down in *Re Boards, Knight* v. *Knight* (9) ([1895] 1 Ch. 499) still remained operative after the Administration of Estates Act came into force so as to cast the primary burden of legacies on the personal estate. It seems to me, therefore, in the present case that the pecuniary legacies and the specific legacies and the duty on these legacies (which is in the form of an additional legacy, or has the effect of an additional legacy) are all payable out of the whole estate before the division into four equal parts, so that the lapsed share is simply a lapsed share of the estate after those burdens have been cleared."

That decision of mine was discussed to some extent in legal publications, and certainly the matter is one which admits of considerable doubt. In *Re Martin, Midland Bank Exor. & Trustee Co., Ltd.* v. *Marfleet* (9) ([1955] 1 All E.R. 865), which was decided by me, I had to consider these provisions again, and I need only refer to certain remarks of mine in which I appear to have given some explanation of my decision in *Re Beaumont's Will Trusts* (6). I said ([1955] 1 All E.R. at p. 868):

"I will mention in passing that I followed that case [*Re Thompson* (7)] in *Re Beaumont's Will Trusts* (6), which was very different from the present case, because there was in that case a trust for sale, and there was not, as there is in the present case, an intestacy as regards a particular asset of the testator's estate, but merely an intestacy as regards a share of the fund given in the will. Therefore, as it seems to me, *Re Beaumont* (6) has no application to the case which I have to decide now. There are no other cases which give me any real assistance at all."

A rather similar question came before HARMAN, J., in *Re Midgley, Barclays Bank, Ltd.* v. *Midgley* (10) ([1955] 2 All E.R. 625), and it appears from HARMAN, J.'s judgment that he was not entirely in agreement with the views which I had expressed in *Re Beaumont* (6). The facts of that case were that a testatrix, by a will made in 1951, after bequeathing certain pecuniary legacies, bequeathed her residue to her trustees on trust for sale and to hold the proceeds on trust to pay debts and funeral and testamentary expenses, and after such payment to hold the residue in equal shares absolutely on trust for six named persons (some of whom were next of kin while others were strangers), with a substituted gift of the share of any beneficiary predeceasing the testatrix to that person's issue if surviving the testatrix, followed by a proviso that the share of any beneficiary predeceasing the testatrix without issue surviving her should be held as an accretion to the other shares. The testatrix later by codicil revoked the bequest of one of the shares. In accordance with well-known authorities, it was held that the effect of the revocation was to cause an intestacy as regards that particular share. It was held that where, as in that case, it was apparent that there was a partial intestacy and no contrary intention appeared in the will, pecuniary legacies were payable out of the undisposed of estate by virtue of Sch. 1, Part 2, para. 1, to the Administration of Estates Act, 1925. HARMAN, J., in the second of his judgments, which deals with this particular point, said ([1955] 2 All E.R. at p. 628):

"The question now arises: Out of what sum are legacies to be paid? Having regard to the form of the will, it is clear that the debts, funeral and

testamentary expenses are to be paid out of the whole fund before the division of the shares, and that is conceded, but the trust for sale created by the will says nothing about legacies and they are not charged by the will on any specific portion of the estate."

That is rather like the position of the present case, except that in the present case before me there is no trust for sale. He continued (ibid.):

"I am to look, as it seems to me, to s. 34 of the Administration of Estates Act, 1925. Section 34 (3) deals with the method of administering the estate of a deceased person who is solvent. The section only purports to apply to the method of the discharge of the funeral, testamentary and administration expenses, debts and liabilities and there is nothing in the section about legacies. So far apparently the law about payment of legacies has not been altered, but in Part 2 of Sch. 1, referred to in s. 34 (3) as controlling the order of administration, I find: 'Order of application of assets where the estate is solvent. 1. Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies'. Therefore, one has first to retain out of the property undisposed of a fund sufficient to meet any pecuniary legacies, and one has to pay the debts, testamentary expenses and so forth out of the rest of the undisposed of property. What is one to do then with the fund that has been retained thereout? The answer, it seems to me, is that one must pay the pecuniary legacies because it has been retained to meet them. It is, if I may say so, a tortuous way of legislating, but that is what I should have thought it inevitably meant and so, indeed, DANCKWERTS, J., concluded recently in *Re Martin* (9). It is quite true that in that case there was undisposed of real estate, and no trust for sale which applied to it. Any trust for sale would have failed because of the failure of the gift. DANCKWERTS, J., said ([1955] 1 All E.R. at p. 868): 'It seems to me that here I am dealing simply with one asset, the undisposed of real estate, and out of that undisposed of real estate a fund is to be raised to provide for the pecuniary legacies, and if the fund is not to be raised for the payment of the pecuniary legacies, it is difficult to see what reason there is for setting aside the fund. Therefore, I am necessarily driven to the conclusion that according to the provisions contained in para. 1 of Part 2 of Sch. 1 to the Act, the proper fund to meet the legacies in the present case is the undisposed of property.' That seems to me, if I may say so, to be right. I am told, however, that that does not apply in a case where there is a trust for sale and I am referred to a former decision of the same judge, *Re Beaumont's Will Trusts* (6) . . . The argument that prevailed in *Re Beaumont's Will Trusts* (6) was apparently that a trust for sale imposed by the will excluded the Act altogether, because it excluded s. 33 of the Act. I confess that I do not follow that argument. The decision of ROXBURGH, J., in *Re Gillett's Will Trusts* (5), was not apparently cited to the learned judge. In the latter case, ROXBURGH, J. (it is true on some concessions from counsel), held that para. 1 of Part 2 of Sch. 1 made the legacies payable out of the undisposed of property. That rule may not apply when there is no intestacy apparent at the death of the testator. I am not suggesting that anything I say covers such a case, but where, as here, it is apparent that the testator is to some extent intestate at his death and where no contrary intention appears in the will, then, as it seems to me, the effect of para. 1 of Part 2 of Sch. 1 applies to make the pecuniary legacies payable out of the undisposed of property, and I so hold."

There is one other decision to which I must refer, and that is a decision of the Court of Appeal, in *Re Worthington, Nichols* v. *Hart* (11) ([1933] All E.R. Rep. 189). In that case, a testatrix by her will after appointing a sole executor thereof and bequeathing a number of pecuniary legacies gave, devised and bequeathed all the residue of her estate both real and personal to E.S. and L.M.H. in equal

shares absolutely. E.S. died in the lifetime of the testatrix, and her moiety lapsed and passed as on an intestacy. It is to be observed that in that case there was no trust for sale in the will, and neither is there an express trust for sale in the present case. It was held that the order of the application prescribed by the Administration of Estates Act, 1925, s. 33 (2) and Sch. 1, Part 2, being expressly subject, under s. 33 (7) and under s. 34 (3) and para. 8 (a) of Sch. 1, Part 2, to variation by the provisions of the will, and there being in that case no such provisions, the statutory order must be followed; and that accordingly, both the debts, funeral and testamentary expenses and the legacies were payable primarily out of the lapsed share of the residue.

Counsel for the plaintiff attempted to distinguish this case by pointing out that in *Re Worthington* (11), though there was no trust for sale, there was no provision as to the order of application of assets at all, or charge of the liabilities on any particular parts of the estate, and so plainly the statutory order of application did apply, which is perfectly true. But the importance of the case from my point of view is that s. 33 (2) is referred to by LORD HANWORTH, M.R. ([1933] All E.R. Rep. at p. 190) and I understand him as saying that the provisions of that sub-section will apply—and it means that sub-s. (1) must apply also—in the case of an estate in which there is only an intestacy as regards a share of the whole estate. Strong argument was put forward by counsel for the plaintiff that the provisions of the Administration of Estates Act, 1925, s. 33, which were relied on by counsel for the defendants, could not apply to a case where the only intestacy was not as regards particular assets of the whole estate but as regards a share in the residuary estate, as in the case now before me. It seems to me that *Re Worthington* (11) disposes of that argument; and, of course, what is said by the Court of Appeal is binding on me and I must apply it if it is properly to be applied in the present case. It is perfectly true that *Re Worthington* (11) was cited to me, it seems, in *Re Beaumont's Will Trusts* (6), but I do not think that I paid very much attention to it in that case, for the reason that I was persuaded, it seems, by the argument of counsel for the third defendant in that case that s. 33 was excluded by reason of the presence of an express trust for sale in the will that I was then considering. As I have already mentioned, there is no express trust for sale in the present case, and, therefore, the same considerations as were referred to in *Re Beaumont's Will Trusts* (6) and in the explanation of that case in particular which I gave in *Re Martin* (9) are not applicable in the present case. There is no trust for sale contained in the will, and, therefore, it seems to me that, following the decision of the Court of Appeal in *Re Worthington* (11), I must infer that as regards the undisposed of one-fourth share, in just the same way as regards the undisposed of one-half share in *Re Worthington* (11), the trusts creating a trust for sale and providing for the disposition of the resulting fund contained in the Administration of Estates Act, 1925, s. 33, must be applied in the present case. Therefore, it seems to me that I do get an express reference to the creation of a fund for the payment of legacies under the terms of para. 1 of Part 2 of Sch. 1 to the Act.

Reaching that conclusion, in spite of the peculiar way in which the legislation has been settled or directed, it seems to me that if a fund is formed for the payment of legacies, the intention of the Act must be that the legacies should be paid out of that fund, or perhaps one should say that that fund should be applied in the payment of the legacies. Be that as it may, it seems to me that the result is, whatever was decided in *Re Beaumont's Will Trusts* (6) and in *Re Midgley* (10) by HARMAN, J., and whether or not those cases are reconcilable, in the case I have before me now I must apply the decision of the Court of Appeal in *Re*

Worthington (11) and come to the conclusion that the legacies are payable out of the undisposed of share in the present case.

Order accordingly.

Solicitors: *Chalton Hubbard & Co.*, agents for *Marsh & Ferriman*, Worthing (for the plaintiff and third defendant); *Official Solicitor* (for the first and second defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

CHURCHER AND ANOTHER *v.* STREET AND ANOTHER.

[CHANCERY DIVISION (Roxburgh, J.), December 2, 3, 4, 1958.]

Husband and Wife—Deserted wife in occupation of husband's dwelling-house—Dwelling-house mortgaged to trustees—Sale of house by husband to his mistress—New mortgage by mistress to same mortgagees, the husband joining as surety—Mortgagees' right to possession on default by mistress and husband in paying interest on mortgage debt.

In 1937 a husband, an omnibus driver, purchased a dwelling-house as the matrimonial home, and mortgaged it for £405. In 1942 the husband deserted his wife, and in subsequent proceedings the husband was ordered to pay the wife £2 per week maintenance and 10s. per week for each of the two children until they respectively attained the age of sixteen years. The husband lived with Mrs. S., who had four children by him. In 1950 the husband wished to sell the house, which contained three bedrooms and was occupied only by the wife and the husband's grandmother, the children having left home. The husband found another house as accommodation for the wife and she agreed to move into it. The husband, therefore, contracted to buy it, but at the last moment the wife refused to move. The husband was obliged to complete the purchase of the second house, and he borrowed £950 from the plaintiffs (who advanced the money from trust funds in their hands as trustees of a will), to meet the purchase price and to repay the balance owing to the mortgagees of the first house. Repayment of the £950 was secured by a mortgage on both houses. The plaintiffs were aware of the occupation of the first house by the deserted wife, who remained alone in occupation of the house thereafter. The wife did no work, paid no rent and had a total income of £2 12s. 6d. per week (including the £2 per week payable by the husband). In 1952, in order to gain possession of the house, the husband sold the house to Mrs. S. for £1,500 (hoping thereby to nullify the deserted wife's right to remain in possession of the matrimonial home). The purchase price was provided as to £950 advanced by the plaintiffs to Mrs. S., repayment of which was secured by a legal charge on the house, the husband joining as surety and charging the second house as collateral security. The remaining £550 was advanced by the husband to Mrs. S., repayment being secured by a second charge. Mrs. S. then claimed possession against the wife, but the action was dismissed. In 1954, desiring to live nearer to his work, the husband sold the second house, and the plaintiffs, on payment of £200 to them, released their charge on that house. Mrs. S. ceased to pay the interest on the mortgage, and the plaintiffs as mortgagees claimed possession of the first house against Mrs. S. and the deserted wife. Mrs. S. did not defend the action. The deserted wife had no other accommodation available.

Held: (i) the granting or withholding of an order for possession against the deserted wife was a matter in the discretion of the court, which discretion was unlimited except that it must be exercised judicially (see p. 34, letter I, post); and in exercising that discretion in all the circumstances of this case (which included knowledge on the part of the plaintiffs that the mortgaged premises were occupied by the deserted wife when they took the mortgage) the following factors were important, viz.—(a) that the plaintiffs were mortgagees seeking to enforce their security for trust money lent on mortgage, and were not involved in the matrimonial dispute between the husband and the wife, (b) that the husband had acted reasonably in relation to his wife's accommodation before the sale to Mrs. S., and (c) that the wife had made no attempt to earn for many years and continuance of her existing occupation of the premises would be at the expense of the beneficiaries of the trust (see p. 33, letters D to G, and p. 35, letters D to H, post).

(ii) accordingly the court would make an order for possession to be delivered in six months' time, unless satisfactory proposals were made by the wife (on which the court would adjudicate if agreement could not be reached) for an arrangement with the plaintiffs under which her occupation could be continued.

Jess B. Woodcock & Son, Ltd. v. *Hobbs* ([1955] 1 All E.R. 445) and *Bendall* v. *McWhirter* ([1952] 1 All E.R. 1307) considered.

Observations on what might constitute satisfactory proposals by the wife (see p. 36, letters C to F, post).

[As to a deserted wife's right to remain in the matrimonial home, see 19 HALSBURY'S LAWS (3rd Edn.) 849, para. 1388; and for cases on the subject, see 27 DIGEST (Repl.) 81, *620*, *621*.]

Cases referred to:

(1) *Street* v. *Denham*, [1954] 1 All E.R. 532; 3rd Digest Supp.

(2) *Bendall* v. *McWhirter*, [1952] 1 All E.R. 1307; [1952] 2 Q.B. 466; 3rd Digest Supp.

(3) *Thompson* v. *Earthy*, [1951] 2 All E.R. 235; [1951] 2 K.B. 596; 115 J.P. 407; 2nd Digest Supp.

(4) *Woodcock (Jess B.) & Son, Ltd.* v. *Hobbs*, [1955] 1 All E.R. 445; 3rd Digest Supp.

(5) *Bull* v. *Bull*, [1955] 1 All E.R. 253; [1955] 1 Q.B. 234; 3rd Digest Supp.

(6) *Ferris* v. *Weaven*, [1952] 2 All E.R. 233; 3rd Digest Supp.

Adjourned Summons.

This originating summons was issued under R.S.C., Ord. 55, r. 5A, by the mortgagees of No. 58, St. Michael's Grove, Fareham, Southampton, claiming possession against the mortgagor and the occupier of those premises. The facts appear in the judgment.

J. A. Plowman, Q.C., and *D. G. Scott* for the plaintiffs, the mortgagees.

Lionel Edwards, Q.C., and *I. N. Duncan Wallace* for the second defendant, the occupier of the mortgaged premises.

The first defendant, the mortgagor, did not appear.

ROXBURGH, J.: The plaintiffs are the trustees of the will of William Emanuel Churcher, deceased, and they are the mortgagees of the freehold property known as No. 58, St. Michael's Grove, Fareham, Southampton. As such mortgagees they are seeking possession of the said property. The first defendant, Mrs. Street, who has not appeared before me, is the mortgagor thereof, and the second defendant, Mrs. Denham, is in occupation of the said property as the deserted wife of Peter Charles James Denham, hereinafter called " Mr. Denham ", who sold the property to Mrs. Street.

Mr. and Mrs. Denham were married in 1929 and have two children, who are both now of age. On June 3, 1937, Mr. Denham purchased the property, which became, and at all material times remained, the matrimonial home of himself and Mrs. Denham. By a mortgage dated June 4, 1937, made between Mr. Denham, of the one part, and the Woolwich Equitable Building Society, of the other part, Mr. Denham mortgaged the property to secure an advance of £405 with interest. In 1942 matrimonial differences arose between Mr. and Mrs. Denham, and in December of that year Mr. Denham left Mrs. Denham and the matrimonial home, where she remained and still remains. In 1943 Mrs. Denham began proceedings for maintenance and for the custody of the children of the marriage, and on May 7, 1943, it was declared proved that Mr. Denham had deserted Mrs. Denham, and Mr. Denham was ordered to pay her the weekly sum of £2, together with an additional weekly sum of 10s. in respect of each of the children while under the age of sixteen. When he left his wife, Mr. Denham went to live with Mrs. Street; they have lived together ever since, and she has had four children by him.

In 1949 Mrs. Denham and Mr. Denham's grandmother, Mrs. Emily Jane Denham, were living alone at the property, both children having left home, and at about this time Mr. Denham began to look for alternative accommodation for his wife as he wished to sell the house with vacant possession. This episode is of some importance, and I shall describe it by reading from the transcript of the shorthand note of the judgment of LYNSKEY, J., in *Street* v. *Denham* (1):

> " Eventually the husband saw an advertisement for . . . a house and I am satisfied that he and the defendant [Mrs. Denham] went to see that house and that she agreed to move into it if it was re-decorated throughout, modern fireplaces installed, electric light installed, and a bathroom put in. In addition, the living room was to be enlarged by demolishing a wall and throwing a passage into that room. All this the husband agreed to do, and upon that promise, the defendant agreed to move into that house. This was in September, 1950. In reliance on his wife's agreement, the husband contracted to purchase No. 39, Henrietta Street, Portsmouth, for £470. The lease was subject to a declaratory order made under the [town and country planning legislation*]. The defendant was informed of this and of the effect of this, and was prepared to agree to live in the house with this knowledge. The work required by the wife in the house apart from the installation of the bathroom and the enlargement of the living room had all been done, at a cost to the husband of £103 10s. He could not do the structural alterations until after completion. The defendant agreed to this and that such alterations should be done after she had moved in. The vendors agreed that possession should be given before completion and all arrangements were made for the defendant to move from St. Michael's Grove to Henrietta Street on Oct. 25, 1950. The removal van had been ordered, the furniture packed up, and the grandmother had gone to stay with her daughter . . . for a fortnight on Oct. 24 so that she would not be inconvenienced by the moving and the structural work. On Oct. 25 in the morning the defendant consulted her solicitors, and, according to her, on their advice, she refused to move and cancelled the order for the delivery van."

I have read that, because if I have, under the new equity evolved in relation to these matters, to make a far-roving inquiry, I do not regard that episode as unimportant. The result was that Mr. Denham was obliged to complete the purchase of No. 39, Henrietta Street, but did not obtain possession of No. 58, St. Michael's Grove. No. 39, Henrietta Street was conveyed to him on Dec. 22, 1950. The money for the purchase of No. 39, Henrietta Street, and for the repairs and improvements which he carried out there, was obtained by Mr. Denham by means of an advance of £950 from the persons, both deceased, who

* This seems to have been an order under the Town and Country Planning Act, 1944, s. 1, repealed; cf., para. 17 of Sch. 10 to the Act of 1947.

then were the trustees of the will of the said William Emanuel Churcher. Part of this £950 was used to pay off the balance then owing on the security of the building society's mortgage, to which I have already referred. The £950, with interest thereon, at four per cent. per annum, was secured by a legal charge on both properties, i.e., No. 58, St. Michael's Grove and No. 39, Henrietta Street, dated Dec. 22, 1950, made between Mr. Denham, of the one part, and the said trustees, of the other part. I observe that there is no humbug about that transaction. Mr. Denham had £950 from the trustees of the will, and by way of security for payment of interest and repayment of principal he did mortgage both houses. There is nothing odd about that transaction at all.

One of the then trustees of the said will was a solicitor and was a partner in the firm of Churcher & Churcher, in partnership with the plaintiff Churcher. The plaintiff Churcher is now the sole proprietor of that firm, and he concedes in his affidavit that the mortgagees, the then trustees of that will, made that advance and took the legal charge with notice that Mr. Denham had deserted his wife and that she was in occupation of the matrimonial home; hinc illae lacrimae.

At that time the law relating to the rights of a deserted wife to occupy the matrimonial home, as later stated by the Court of Appeal in *Bendall* v. *McWhirter* (2) ([1952] 1 All E.R. 1307) and other cases, was not commonly understood, and I have no doubt that when those trustees took that mortgage, although they knew as a fact that Mr. Denham had deserted his wife and that she was in occupation of the matrimonial home, they had no reason to suppose that they, as mortgagees, would have any difficulty in obtaining possession if default was made in compliance with the terms of the mortgage deed.

Mr. Denham continued to try to persuade his wife to go and live at No. 39, Henrietta Street, and to vacate No. 58, St. Michael's Grove, but as she continued to refuse, he and Mrs. Street went to live at No. 39, Henrietta Street, and they continued to live there until April, 1954. Mr. Denham's grandmother ceased to live at No. 58, St. Michael's Grove in October, 1950, i.e., very shortly after the alternative accommodation had been refused, and his wife—and I draw particular attention to this—has lived there alone since then. Considering the financial position of the parties and the circumstance that, as far as I am aware, the wife has never done any work or earned any money since the separation, I cannot but draw attention to the fact that this lady of very slender means is living at No. 58, St. Michael's Grove, in a three-bedroomed house, alone.

Mr. Denham was still anxious to sell No. 58, St. Michael's Grove, but never contemplated going to reside there himself after he had deserted his wife. He wanted to sell the house and use the proceeds for other purposes, and late in 1951, following a decision of mine in *Thompson* v. *Earthy* (3) ([1951] 2 All E.R. 235), the plaintiff Churcher, in his capacity as solicitor for Mr. Denham, and, as I hold, in no other capacity, thought out a scheme. What the scheme was is very clearly set out in a case which the firm of Churcher & Churcher submitted to counsel. I do not think that the case is dated, but the opinion of counsel, to which I will refer after I have read from the case put to him, is dated Oct. 29, 1951. The case for opinion reads as follows:

> "Re: 58, St. Michael's Grove, Fareham. Instructions to counsel to advise Mr. P. C. Denham. Instructing solicitors act for Mr. Peter Charles Denham a bus driver, the owner (subject to a mortgage) of a dwelling-house—58, St. Michael's Grove, Fareham, Hants. Mr. Denham is living apart from his wife and for the purposes of these instructions may be regarded as being in desertion. His wife continues to reside at 58, St. Michael's Grove, the matrimonial home. It may be taken that a reconciliation is out of the question. In December, 1950, Mr. Denham offered his wife alternative accommodation and on her accepting the house offered he contracted to purchase it. At the eleventh hour the wife performed a volte face leaving Mr. Denham with a

house on his hands which he did not require, incurring further mortgage commitments and all the additional expenses. A sale of this house may have resulted in a loss and Mr. Denham and a Mrs. Street at present reside there as man and wife. The continued possession of 58, St. Michael's Grove (subject to a mortgage) is a financial embarrassment to Mr. Denham and the property is unsaleable while Mrs. Denham is in occupation unless a purchaser is willing to take action as in *Thompson* v. *Earthy* (3) ([1951] 2 All E.R. 235). Having regard to this decision Mr. Denham proposes to convey the house to Mrs. Street, at a price equivalent to the present market value with vacant possession, the balance of purchase money over and above the amount of the first mortgage being left on second mortgage to Mr. Denham. Mrs. Street would then seek possession of the house resorting to proceedings if necessary. If successful the house will then be sold and Mr. Denham would benefit as second mortgagee. Counsel will advise whether in his opinion Mr. P. C. Denham's proposal is sound in law and likely to bring about the desired result and whether the county court proceedings which it may be necessary for Mrs. Street to bring would be regarded as an abuse of process."

Counsel's advice was as follows:

"My opinion, based both on the reasoning which I put forward in other cases prior to *Thompson* v. *Earthy* (3) and on that case, is that proceedings for possession brought by Mrs. Street after sale of the lease by her [that is a slip by counsel; it was not a lease] and demand of possession made must succeed unless Mr. Denham has made Mrs. Denham his tenant by taking rent from her. I assume that not to be the case. There are . . . judges who would use the circumstances of this case which are irrelevant to the cause of action as an excuse for [some judicial observations not relevant to the case]. I do not however see how any defence in law to the proposed action can be founded on those circumstances, and certainly proceedings for possession of the house a person has bought could not be said to be an abuse of the process of the court. Of course to find another purchaser who would buy, with an indemnity as to costs, would avoid such unpleasantness."

It is to be regretted that another purchaser was not found, but the very mild way in which counsel puts it is to be noted—the worst that he thinks had to be avoided was "unpleasantness". It was decided to sell to Mrs. Street. While I may say that that was undoubtedly a scheme which would be calculated to arouse in any deserted wife's mind the greatest possible antagonism and perhaps the parties were too certain that the law was in their favour when they took that risk, it is quite a different thing to dub that transaction with all the epithets which could be thought of, especially having regard to the fact that the wife was really being very unreasonable in persisting to live in the house, containing three bedrooms, alone, having regard to the poverty of both of them. The sale to Mrs. Street was completed by a conveyance dated Jan. 14, 1952, and made between Mr. Denham, of the one part, and Mrs. Street, of the other part, the price being £1,500. Of the purchase money £950 was raised by Mrs. Street by an advance from the same trustees as held the existing legal charge of Dec. 22, 1950. This sum was then used by Mr. Denham to discharge that charge and a statutory receipt dated Jan. 12, 1952, was indorsed thereon. The advance of £950 to Mrs. Street was secured by a legal charge dated Jan. 14, 1952, and made between Mrs. Street, of the first part, Mr. Denham, of the second part, and the two Churcher trustees, of the third part, whereby Mrs. Street charged No. 58, St. Michael's Grove by way of legal mortgage with the payment of the principal sum of £950 with interest thereon at four per cent. per annum, and Mr. Denham joined as surety and charged No. 39, Henrietta Street as collateral security. This is the legal charge under which possession of No. 58, St. Michael's Grove is now sought. The whole of the said advance of £950 was made by the lenders

out of trust moneys subject to the trusts of the will of William Emanuel Churcher. £550, the balance of the purchase money for No. 58, St. Michael's Grove, was raised by a loan from Mr. Denham secured by a legal charge dated Jan. 15, 1952, and made between Mrs. Street, of the one part, and Mr. Denham, of the other part, whereby Mrs. Street charged the property by way of legal mortgage (subject to the legal charge of Jan. 14, 1952) with the payment to Mr. Denham of the said sum of £550 with interest thereon at four per cent. per annum.

The concurrence of the will trustees was not essential to the scheme; the scheme could perfectly well have been operated by a sale to Mrs. Street subject to the existing mortgage. The trustees of the will did in fact become participants in this scheme, because, instead of holding on to the charge which they already had, which had been granted by Mr. Denham, they took a new charge for the same amount from Mrs. Street as soon as she had acquired the legal estate. The only advantage they got from that was one which I should imagine, in the circumstances, was treated as of no importance, viz., the covenant of Mrs. Street, which they had not got before. No money passed between anybody, and the trustees did in effect substitute the new charge for the charge which they already possessed. The only thing that changed was that they got the additional security, if it is so to be described, of Mrs. Street's covenant. I am quite certain there was nothing sinister in this transaction so far as the trustees were concerned; but it was Churcher & Churcher's misfortune that they were acting for clients whose interests were not identical. There was no conflict of interest, but the trustees, as far as I can see, had nothing to gain by departing from their existing position, and they concurred in it, as I find, to oblige one of their clients, Mr. Denham, in the honest belief that it did not make a halfpenny-worth of difference, one way or the other, to their clients the trustees of the will.

One of the trustees of the will, Mr. G. L. G. Churcher, who was not a partner of the plaintiff, died on Apr. 10, 1952. On Apr. 1, 1952, Mrs. Street commenced proceedings against Mrs. Denham in the Queen's Bench Division, claiming possession of No. 58, St. Michael's Grove. The action was defended; it was tried by LYNSKEY, J., and he dismissed it ([1954] 1 All E.R. 532).

In or about March, 1954, Mr. Denham received an offer of £500 for No. 39, Henrietta Street, which he was anxious to accept, in the first place, because he wanted to live nearer his place of work at Fareham; secondly, because the offer, if accepted, meant a profit of £30 over the price he paid for the property in October, 1950, and, thirdly, because the property was adversely affected by the town planning proposals of the Portsmouth City Council. At that time Mr. Denham had an opportunity of purchasing for £700 a cottage, No. 9, Church Street, Titchfield, near Fareham, which was near his place of work. A relation of his offered to make a contribution towards the purchase price, leaving Mr. Denham to find the balance of the purchase price, costs and stamp duty. Mr. Denham proposed to pay this out of the proceeds of sale of No. 39, Henrietta Street, leaving a sum of about £200 available for reduction of the mortgage debt secured by the legal charge of Jan. 14, 1952. I have stated that for two reasons: one is because it shows how and why the principal sum of £950 was reduced to £750, which is its present figure, and, secondly, because an argument has been addressed to me that the trustees ought not to have agreed to release No. 39, Henrietta Street for a repayment of not more than £200 of principal; and a great point is made of the fact, which is a fact, that once there was no mortgage on the premises in which Mr. Denham and Mrs. Street lived, they suddenly became industrious to forget to pay their mortgage interest on the mortgage on No. 58, St. Michael's Grove.

Mr. Churcher admitted that this transaction in the event appeared to have been unwise, and nobody can say otherwise, but he refused to admit, and has my sympathy in refusing to admit, that it was necessarily unwise at the time when it was undertaken. It is impossible to say without a great deal of information about the relative values, and a good deal of other things, whether it was

A worthwhile to release No. 39, Henrietta Street in order to get a capital repayment of £200, and there is certainly no evidence which would enable me to say anything more in this case about that episode than that on which counsel has in fact laid a great deal of stress. There were reasons in fact, which I need not state, why it was not possible to ask Mr. Denham to substitute the cottage which he bought for No. 39, Henrietta Street. By a transfer dated Apr. 23, 1956, a representative B of the last surviving trustee transferred the mortgage to the plaintiffs in this action, they having by this time become the trustees of the aforesaid will.

On Dec. 25, 1956, the state of the mortgage account was as follows, and it is, I think, very important in connexion with the far-roving inquiry which I am conducting: balance of principal sum, £750; fire insurance premium due Dec. 25, 1954, but paid by plaintiffs on Mar. 30, 1955, in default of payment by C mortgagor or surety, £1 6s. 3d.; interest on £950 from Mar. 26, 1954, to June 24, 1954, plus interest on £750 from June 25, 1954, to Mar. 25, 1955, less tax, £17 12s.; interest on £751 6s. 3d. from Mar. 26, 1955, to Dec. 25, 1956, less tax, £30 4s. 10d., making a total sum of £799 3s. 1d., of which £751 6s. 3d. is principal and the balance arrears of interest. Interest has accumulated since then, and there has been no further repayment of capital. The plaintiffs say that they D have demanded payment of arrears of interest both from Mrs. Street and from Mr. Denham without result. Mrs. Street may well have been fully occupied with her illegitimate family, because she had no less than four children, and, as Mr. Denham is a bus driver and consequently of small means, I am not greatly surprised to hear that.

The house in question is falling into disrepair through lack of painting and E repairs, and in view of the fact, as the plaintiffs say, that their beneficiaries are being kept out of the income which they ought to derive from the property, and as the security has deteriorated from lack of repairs, they feel it their duty, they say, to realise their security, and for that purpose they seek to obtain vacant possession. They say that they have endeavoured to negotiate a sale of the property to Mrs. Denham on certain terms, which are not material; but it is F material that her solicitors have stated that she is quite unable to make any suggestion as to purchasing the property as she has no financial resources whatever. In those circumstances, they ask the court to exercise its discretion and in so doing to order delivery of possession of the property to the plaintiffs.

Mrs. Denham filed an affidavit in answer which does not really put in issue any of the facts which I have stated. There is one thing which I want to read G from her affidavit. She says: "I have an income of £2 12s. 6d. including the £2 per week maintenance payable by my husband". So her income, apart from her husband's payment, is 12s. 6d. a week. She says:

> "I have nowhere else to go, and out of this income I pay the rates of 58, St. Michael's Grove which amount to approximately 10s. per week, and what I can manage for repairs. In the past two years I have spent £11 on H repairs, including £5 10s. on the roof. I admit the property does need painting, but in other respects it is not in a state of lack of repair and I paper and distemper the interior myself."

When the desertion took place, which was in 1942, sixteen years ago, Mrs. Denham was a young woman, and there is no evidence that she has ever suffered I from any physical or mental disability. What has she been doing for the last sixteen years? It is eight years since the house emptied itself by the departure of the grandmother, following the previous departure of the adult children. What has she been doing that she is in this penurious position? Except for some curious by-product of new legal doctrines, how could any woman whose financial standing, and whose husband's financial standing, was of the sort with which I am dealing in this case expect to be able to live in a three-bedroomed house earning nothing at all? She says, as every deserted woman is entitled to say, that she has got a very great moral grievance against her husband, but even in this sort of matter

it does, after a lapse of years, I think, become incumbent on injured wives to try to mitigate the practical damage even if they cannot solace emotional distress. I have gone into this because my view in this case is that unless she is put under some pressure she will expect to live, and perhaps succeed in living, in this house rent free for the rest of her life, not being there by way of punishment of the husband who has deserted her, but by way of punishment of the beneficiaries under the Churcher will who have nothing whatever to do with her matrimonial relations. On the other hand, it may be that if the spur is put on her she will find herself able to work, even to the extent of taking lodgers, and then I am not at all certain that something could not be evolved which would be reasonable to the plaintiffs and reasonable to her. But if she is a waster—and I am not saying she is; I have no information in regard to it—it is plain to me that the situation is hopeless, and that is something which is going to lead up to what I am ultimately going to do in this case.

My task has been much facilitated by concessions which have been made by counsel on both sides. Counsel for the plaintiffs conceded that in this court, and in this court only, the deserted wife has in respect of the matrimonial home an equity which is valid against a purchaser for value of the matrimonial home who has notice, or knowledge—I think " knowledge " is the right word here—that she is a deserted wife, and he concedes that the second defendant, Mrs. Denham, is such a person and that his clients had that knowledge. He argues, and I think counsel for Mrs. Denham agrees, or, at any rate, does not dispute, that that being so, the question whether or not the plaintiffs obtain possession depends on an exercise by me of a judicial discretion, and the only matter of law which I have to deal with is whether there are any ambits of that judicial discretion, and, if so, what they are.

The last word on that subject so far has been said in *Jess B. Woodcock & Son, Ltd.* v. *Hobbs* (4) ([1955] 1 All E.R. 445), and so important and new is this field that I intend to make fuller citations from it than I normally do from authorities. First of all, I will state the facts as appearing in the headnote:

" Before 1940 the defendant and her husband H. resided in premises of which he was tenant, paying the standard rent of £1 per week. He carried on a transport business there. In 1940 H. deserted the defendant who remained in the house, H. continuing to pay the rent. In 1948 H. bought the premises. He permitted the defendant to continue to live in them, paying her £2 per week maintenance. In 1950 the British Transport Commission compulsorily acquired the transport business, including the premises, and in June of that year they wrote to the defendant offering her a tenancy of the premises at 21s. 2d. per week, which represented the standard rent together with a permitted increase. H. replied to that letter stating that the defendant was in occupation as a caretaker and that the rent which he had paid prior to his purchase of the premises represented part of the allowance which he made to her. The commission made no further inquiry. On Apr. 12, 1954, the plaintiff company purchased the whole undertaking from the commission, whose form of tender for the sale stated that the defendant lived there rent free, under an arrangement alleged to have been made in 1943 between H. and herself, on condition that she acted as caretaker in the absence of H. and his staff; the tender further provided that the purchase was subject to the defendant's occupation. The plaintiff company made no further inquiry as to the position of the defendant. On May 17, 1954, the plaintiff company served the defendant with notice to quit. At no time had the defendant paid or offered to pay any rent nor had she ever accepted the offer of a tenancy made to her in June, 1950.

" *Held:* (i) (by DENNING and BIRKETT, L.JJ.) the plaintiff company was a bona fide purchaser of the premises for value but with notice that the defendant was in occupation and, in the circumstances, with constructive

notice of her equity to remain in occupation, and accordingly the plaintiff company's purchase was subject to the defendant's equity to remain in occupation as a deserted wife, but (ii) (by the court) the defendant's equity was a right to continue in occupation for so long only as the court in its discretion thought to be reasonable and, in the circumstances, she would be ordered to give up possession at the expiration of three months."

It is to be observed that in *Jess B. Woodcock & Son, Ltd.* v. *Hobbs* (4), the plaintiffs had constructive notice only and not knowledge. It is fair to say that that was itself one of the circumstances which was taken into consideration, but I do not understand it to be suggested that because the plaintiffs here had knowledge and not merely constructive notice they are not entitled to invoke the theory that it is for the court to exercise its discretion. But I do not deny that it was one of the factors which was taken into consideration in that case. Having considered the facts, DENNING, L.J., says (ibid., at p. 449):

> "The deserted wife has no right to stay indefinitely in the house. Her right is only to stay until such time as the court in its discretion orders her to leave. That is the only right she has against her husband, and it is the only right she has against his successors. The court always has a discretion in the matter . . . When the purchaser, as here, brings an action for possession and the wife sets up a claim to stay as a deserted wife, the court can, if it thinks fit, make an order for her to go. The exercise of this discretion is no doubt an anxious task, but a similar discretion is exercised in the case of statutory tenants under the Rent Acts, and in applications under the Bankruptcy Act, 1914 (*Bendall* v. *McWhirter* (2)), and under the Law of Property Act, 1925 (*Bull* v. *Bull* (5), [1955] 1 All E.R. 253)."

The learned lord justice then gives some illustrations, but I do not read those as being definitions of any test which is to be applied, but merely as illustrations of what the court might be expected to do if the circumstances corresponded with the illustrations given, and the circumstances in this case do not, in my view, correspond with any of the illustrations given. But I notice some of the things which the learned lord justice took into consideration, and I will read them ([1955] 1 All E.R. at pp. 449, 450):

> "The purchasers bought in good faith at a fair value and they did not know she was a deserted wife. They were told she was a caretaker. She had been many years in the house paying no rent. When she was offered a tenancy at 21s. 2d. a week, she did not accept it. If she had only accepted it, she could have been a statutory tenant with a status of irremovability, but she did not accept it. She has not at any time offered to pay any rent. She sought in these proceedings to set up the Limitation Act, 1939, and to claim a squatter's title. True it is that she left everything to her husband. She thought it was his duty to provide a roof over her head. It was he who set up the story of a caretaker so as to save himself paying rent. Innocent as she is, however, she cannot be left there much longer without paying rent. I think that we should make an order for her to give up possession in three months. That will give her time to apply to the courts for further maintenance from her husband to make up for the loss of her home."

I draw attention to those words. BIRKETT, L.J., said that he was of the same opinion. He said ([1955] 1 All E.R. at p. 451):

> "I agree with what my Lord has said, that it is open to this court to deal with, and it does in fact deal with, this matter of discretion today. I do not suppose that all the facts of this case will ever be fully ascertained, but I think that sufficient of the facts are known for this court to exercise its discretion. It is perfectly plain that the deserted wife cannot claim to have a perennial tenancy whereby she can stay there and never be removed in any circumstances."

PARKER, L.J., took a somewhat different view. He said ([1955] 1 All E.R. at p. 451). A

"I agree with the proposed order. I would only add this. At one time it looked as if we should have to decide, there being no decision of this court as yet on the matter, whether the protection afforded to a deserted wife in *Bendall* v. *McWhirter* (2) could be extended to a case where the property in which the wife continued to reside had been purchased by a purchaser for value with constructive notice of the wife's possession. Speaking for myself, I should on that matter have required considerable further argument, since, as at present advised, I see great difficulty in extending the wife's protection so as to give her any rights against a bona fide purchaser, whether with or without notice." B C

I want to deal with the part played by the plaintiffs, not, indeed, by the plaintiffs themselves in their capacity as trustees, but by their predecessors in title, the trustees of the will, in 1952, because that has been the subject of acute attack by counsel for Mrs. Denham and not without some support from authority, and I must deal with it fully and carefully.

I must confess that if, when I decided *Thompson* v. *Earthy* (3), I had thought of the possibility of some such transaction as was carried out in this case as between the husband and the deserted wife, I should have given further reflection to the case, and I can well understand that if the courts had not intervened to prevent those kinds of transactions, Parliament would have intervened. It would have been an advantage, in my view, if Parliament, rather than a higher court, had intervened, because, in order to prevent certain cases of injustice to deserted wives, a position has been brought about which may produce considerable injustices to other people unless each case is brought before the courts, which is, after all, a course involving considerable expenditure. That is very relevant, because, in explaining why he took the view that a wife's equity, as it is now commonly called, to the matrimonial home affected a purchaser for value, DENNING, L.J., said this in *Bendall* v. *McWhirter* (2) ([1952] 1 All E.R. at p. 1315): D E F

"It has been suggested that the husband's right to apply under s. 17 of the Act of 1882 for possession is personal to the husband and does not extend to his successor. Hence it is said that the successor must be able to sue at law for possession because it is inconceivable that he should have no means of getting her out. That was the argument which prevailed with ROXBURGH, J., in *Thompson* v. *Earthy* (3), and with the county court judge in the present case. It seems to me, however, that one answer to it may be this: Although an application under s. 17 has to be made in the husband's name, nevertheless, a successor in title can compel the husband to allow his name to be used for the purpose. If the husband sells the house there is an implied assignment by the husband of his right to obtain possession, and equity has always compelled an assignor to allow an action to be brought in his name. So, if the husband becomes bankrupt, the trustee can compel the husband to allow his name to be used for an application under s. 17: see s. 22 (3) and s. 38 (b) of the Bankruptcy Act, 1914. Alternatively, the trustee in bankruptcy can make an application under s. 105 (1) for an order that the wife do give up possession. In either case the court which deals with the application is enabled under the relevant section to do whatever is just. I must say, however, that, even if a successor cannot compel the husband to apply under s. 17, but the successor has himself to bring an action at law, nevertheless, I should have thought the court would have a discretion whether to order possession, for that is the only way in which effect can be given to the wife's right as now established." G H I

That is a critical sentence. It is obvious that the discretion under s. 17 of the Married Women's Property Act, 1882, is not one of which, for example, the

A plaintiffs in the present case could have availed themselves. The discretion conferred by that Act is a statutory discretion. This discretion that I am now exercising appears to have had its birth in that sentence:

> " . . . I should have thought the court would have a discretion whether to order possession, for that is the only way in which effect can be given to the
B wife's right as now established."

Then the passage continues: " Any other view would lead to great injustice ". So that I think it is a discretion which the court, or at least DENNING, L.J., found to spring ex necessitate rei, and in justification for it he added these very material words:

C
> " Any other view would lead to great injustice. It would mean that a guilty husband could transfer the house into the name of his new mistress and then get her to evict his innocent lawful wife from the matrimonial home. No civilised community could tolerate such a cynical disregard of the marriage state. Equity demands that the successor in title should be in no better position than the husband."

D " Well ", says counsel for Mrs. Denham with great force, " what about this case: is not this just such a case as the one of which DENNING, L.J., has said, ' No civilised community could tolerate ' ? " Now, " such a cynical disregard of the marriage state " is what he is talking about, and we are not really in this case concerned with the marriage state at all, but with the question whether or not somebody has lent some money and whether he should or should not recover it
E by pre-existing rules of law. That is the first thing. Secondly, in this case, unlike the illustration which DENNING, L.J., gave, the husband behaved very reasonably in regard to his wife's accommodation before this transaction took place, and that is, I think, a factor of considerable importance. Thirdly, whatever may be thought about the transaction when regarded as one between the husband and his deserted wife—and I must confess that I think that in that regard the
F most offensive part of it was the selling to Mrs. Street, the mistress, rather than to any other person—what was the part played by the plaintiffs, who had lent money which, incidentally, was not theirs, because they were trustees in regard to that transaction? They only gave it their support to the extent of permitting what they thought was a good mortgage to be changed into what they thought was an equally good mortgage, neither better nor worse, for I disregard Mrs.
G Street's covenant. They did it with the knowledge that the transaction had been submitted to counsel with a question as to its propriety, and counsel had expressed himself in language which I have read. They stood in no circumstances to gain anything out of it except, to my mind, the unimportant benefit of the additional security of Mrs. Street's covenant. Could any court on those materials find the trustees guilty of a breach of trust ?

H The trustees acted in part on the advice of the trust solicitors, but more important, as that was the firm of which one of the trustees was a member, they acted here on the approbation of counsel. I cannot visualise, as I have said, that the trustees would be held to have committed a breach of trust in those circumstances. Who then is going to suffer from this transaction ?—not the solicitors who devised the scheme subject to counsel's approval, but the
I beneficiaries of this trust, who had nothing whatever to do with either the matrimonial dispute or this transaction except their concurrence in what their trustees did in the manner which I have indicated. Moreover, I wish to stress that DENNING, L.J., spoke rather more strongly, as I think, than he intended in that passage in *Bendall* v. *McWhirter* (2), because, while I do not for one moment suggest that the underlying reasoning is unsound (viz., that Parliament would almost certainly have intervened if the courts had not done so, which, I think, is almost certainly true to prevent such a transaction as the lord justice was visualising), yet I have always thought that it was not unprofessional to take

such advantage of loopholes in the law as existed from time to time. For my own part I find it very difficult to condemn any solicitor who, thinking that he sees a way out of an unjust situation, viz., that the wife was sticking in this house and refusing to accept alternative accommodation and paying nothing for it, took this way out of it. It does not seem to me that it was an improper thing for him to advise his client to try to get out of it in that way. We know the attempt failed, but the whole state of the law on this subject is not clear yet, and it was very obscure then, and the fairer approach, as I think, to this transaction is to be found in a passage in the judgment of DENNING, L.J., in *Jess B. Woodcock & Son, Ltd.* v. *Hobbs* (4), which I omitted before in order to return to it after citing, amongst others, *Bendall* v. *McWhirter* (2). DENNING, L.J., said ([1955] 1 All E.R. at p. 448):

> " Counsel for the plaintiff company said that those three cases were to be explained as cases of collusion; but they were not put on that ground and I do not think it is the correct explanation. The conveyances were real enough. They were not shams. They were intended, it is true, as a means of getting round the law; but that is not in itself a ground for denying their validity. I may instance the transaction by which hire-purchase finance companies do business. All those transactions are a means of getting round the law concerning bills of sale; but so long as there is a real purchase by the finance company and a real hiring back, the transactions are good. The true explanation of the three cases is, I think, the ground taken by the judges, namely, that the mistress and the purchasers respectively took with full knowledge of the facts. They were, therefore, in no better position than the husband and took subject to the wife's right to stay in the house. The husband, it is true, had an ulterior motive. He wanted the wife turned out of the house, but that does not affect the legal position. It would be the same if the husband had given the house to his mistress or to his brother-in-law [and I stress that, because I think the brother-in-law is so much less offensive than the mistress] by a deed of gift. If they took with full knowledge of the facts, they ought not to be able to turn out the wife any more than the husband could. This means, no doubt, that the wife's right is an equity."

That is language much less severe and much less flavoured with a moral reproach than is the language of the passage on which counsel for Mrs. Denham relies, and, if I may say so, I am much more inclined to the later statement of DENNING, L.J. After all, he cannot complain, so long as I choose one of the statements, which one I choose; and I think the judgment of PARKER, L.J., on that point should not be overlooked. Having said what I have already read, PARKER, L.J., continued (ibid., at p. 451):

> " I do not, however, in any way suggest that *Street* v. *Denham* (1) and *Ferris* v. *Weaven* (6) ([1952] 2 All E.R. 233), to which my Lord has referred, were wrongly decided, since they could in any event be justified on their special facts. In both those cases the purchases were not made by purchasers treating at arm's length, but they were purchases made at the instigation of the husband so as to enable him to have a benefit therefrom; in other words, the transaction in each case was a device to get the wife out for the husband's benefit."

In my view, therefore, too much weight should not be attached in this case to the circumstances that the then trustees concurred in a transaction which might have been done with less offence at the time and which now, in the light of later developments, would not be attempted at all. But I have taken that into consideration and it has affected, and will affect, to some degree, the way in which I propose to exercise my discretion.

I do not think that there are any limitations on this recently judge-made discretion, except the limitation which applies to all exercises of judicial discretion, i.e., that it must be exercised judicially, or in the light of judicial common

A sense. I cannot find any; I see no ground why there should be any. If the discretion exists at all, it seems to me that all the relevant circumstances should be taken into consideration.

Now I come to deal with the other side of the picture. First of all, whatever may be said about these various rights, whether they are equities or irremovabilities, or whatever else they might be, two facts in this case stand out. The B first is that the trustees were in no way involved in the matrimonial dispute, and the law of marriage of this country has suffered no cynical disregard by them, or any disregard. That, I think, is the first and most important fact. To my mind, the second very important fact is that as a mere matter of business, without any arrière-pensée at all, they lent £950 entirely as a matter of business, i.e., as an investment as trustees, and they had no purpose of facilitating either C the wife's fortunes or the husband's fortunes; they just wanted an investment for their money. The husband had the money. Mrs. Street never had it. If they have done anything amiss, it is merely that they gave up the better security for one not quite so good, because it would have been much better to have had the husband's security without Mrs. Street's covenant than to have had Mrs. Street's security plus Mrs. Street's covenant. So that is a very strong fact.

D Why, I ask myself, because Mr. Denham deserted his wife sixteen years ago, should the deserted wife be living in this house, not at the expense of Mr. Denham, but at the expense of the Churcher trustees' beneficiaries ? In that connexion I stressed a passage in the judgment of DENNING, L.J.: perhaps it would be fairer to see whether the husband's conduct could not be compensated for more E equitably by an increase in maintenance, if indeed a bus driver is capable of paying any more, than by depriving the beneficiaries in the Churcher estate of the income on the money which they have lent. That is not, in my view, an equity. If I did not grant any relief in this case, it seems to me as certain as anything could be that this wife who, for all I know, has earned nothing in the last sixteen years, does not appear to be working, and is extremely poor, would F be able to live rent and interest free in this house for the rest of her days at the expense of the beneficiaries in the Churcher estate. That cannot be right on any view of this case. It is all very well to say: " Why do not the trustees sue Mrs. Street ? Why do not they sue Mr. Denham ? " Mrs. Street got legal aid once before, and perhaps she would get it again, but I do not think that it would be a very profitable transaction for the trustees even if they got a judgment against G her, because it would probably never be satisfied. That is not living in the realm of reality. These trustees would never have advanced a penny-piece if they had not thought that they had a security in this property; they never lent this money on the security of Mr. Denham or Mrs. Street; they lent it on the security of the property, and something very strong would be needed to produce such an inequitable result as to deprive their beneficiaries of income because of this H dispute between Mr. and Mrs. Denham, however right Mrs. Denham may be in the matrimonial dispute. Surely, at any rate, where people who have lent £950 are concerned, a deserted wife has sooner or later to try to mitigate the damage which she has suffered in the practical, if not in the emotional, sphere. It follows that I could not refuse them relief.

On the other hand, I appreciate the great difficulties in which Mrs. Denham I may be. Housing accommodation is extremely difficult to get, and I cannot imagine that any local authority would look with much favour on a lady who was living in a house with three bedrooms and who was not doing anything in the way of taking in lodgers, and it seems to me quite possible that, if she put her back into it, she might bring about a position in which she might continue to live in this house and the beneficiaries might have their four per cent. interest and their security preserved. That would, of course, postpone their chances of realisation, but I am not sure that that would matter much so long as the security was kept up. So far as I can see, house values are still rising. It would also mean

they could not get a greater rate of interest than four per cent., which no doubt they could if they called it in, but that disadvantage is the price that the plaintiffs would pay, and I think on the whole the price that they ought to pay, for having burned their fingers in this transaction. A

I propose to make an order for possession on this day six months hence. If Mrs. Denham wants to stay in this house after that date, she must make satisfactory proposals to the plaintiffs. It may be that the parties can agree on the proposals, but if not, although I do not want it to be thought that this is establishing a practice in the Chancery Division, in this particular case, and I wish to stress those words, I am prepared to decide, if there is a dispute, whether the proposals are or are not satisfactory, in the exercise of my discretion, as a term of allowing the lady to stay any longer. I must, therefore, try to give an outline of what I should be likely to regard as satisfactory. B C

First of all, though strictly speaking, Mrs. Denham cannot charge the premises because she has no title that is capable of being charged, she should execute a document which bears a close family resemblance to a mortgage. On no ground can she stay, except by consent, after re-marriage nor can she have any right which will subsist after her death. It would not be fair to require her to covenant to repay the principal; but it would be fair, in my judgment, to make her covenant to pay the interest and to keep the property in the same state of repair as is required by the subsisting mortgage deed, whatever that may be. If that clause is not sufficiently stringent, a somewhat more stringent clause might be warranted having regard to the fact that the mortgage cannot be called in for merely not repaying the capital, but that is a matter for investigation. I also think that she must pay the arrears of interest. They are not a very large sum, though they would be large to her, but, on the other hand, I feel that, if she really puts her best foot forward, it is not going to be an impossible burden on her, and the beneficiaries under this will are at least entitled to have the income both current and past which has not been paid. I cannot think of any reason why this lady should have been able to stay in this house for sixteen years paying nothing, and, therefore, I see no reason at all why she should not pay the arrears which have accrued due. D E F

Order accordingly.

Solicitors: *Sinclair, Roche & Temperley*, agents for *Churcher & Churcher*, Gosport (for the plaintiffs); *Gibson & Weldon*, agents for *Hobson Thomas, Sherwell & Wells*, Portsmouth (for the second defendant).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

A

HUNT *v.* ALLIED BAKERIES, LTD. (No. 2).

[COURT OF APPEAL (Jenkins and Romer, L.JJ., and Roxburgh, J.), November 27 1958.]

Execution—Discovery in aid of execution—Order for examination of judgment debtor as to means before an examiner—Validity—Regularity of appointment—Form of order—Committal for failure to keep appointment—R.S.C., Ord. 42, r. 32; Ord. 61, r. 33; R.S.C., App. K, form No. 38.

B

On Dec. 3, 1957, a master made an order under R.S.C., Ord. 42, r. 32*, that the judgment debtor should attend before an examiner of the court at such time and place as the examiner should appoint. An appointment was made for July 17, 1958, by indorsing the order of Dec. 3, 1957—" Restored to the list for Thursday, July 17, 1958, at 11.30 o'clock in the forenoon in room 106 ". The indorsement was not signed by the examiner, but it was authenticated by the seal of the Central Office of the Supreme Court. The judgment debtor failed to appear and was committed to prison for contempt of court. He appealed against the committal order contending that he was not in contempt of court on the grounds (i) that the order of Dec. 3, 1957, was bad on its face, as under R.S.C., Ord. 42, r. 32, the examination must be " before . . . an officer of the court " and an examiner of the court was not an officer of the court, and (ii) that the delegation of the making of the appointment of the examiner was ultra vires and, if it were not, that the appointment for July 17, 1958, was irregular as not having been made by the examiner and not appointing a time and the place for the examination.

C

D

E

Held: the committal order would stand because—

(i) the practice of referring the examination of a judgment debtor to an examiner was of long standing, the order of Dec. 3, 1957, had been made in accordance with the form introduced under R.S.C., Ord. 61, r. 33 (substantially in a form recognised in *Re Evans*, [1893] 1 Ch. 252), and the court was not satisfied that the long-standing practice was ultra vires or that the order of Dec. 3, 1957, was bad (see p. 40, letter D, to p. 41, letter C, post), and

F

(ii) the direction in the order of Dec. 3, 1957, that the debtor should attend at such time and place as the examiner should appoint involved a delegation to the examiner of an act that was ministerial, not judicial, and the delegation was valid; and

(iii) the time and place of the appointment were sufficiently indorsed on the order of Dec. 3, 1957, and were sufficiently authenticated by the seal of the Central Office.

G

Re Evans ([1893] 1 Ch. 252) and *Townend* v. *Townend* ((1905), 93 L.T. 680) considered.

Appeal dismissed.

H

[As to the examination of a judgment debtor as to means, see 16 HALSBURY'S LAWS (3rd Edn.) 28, para. 40.

As to contempt by disobedience of orders other than orders for the payment of money, see 8 HALSBURY'S LAWS (3rd Edn.) 25, para. 46.

As to examiners of the court, see 9 HALSBURY'S LAWS (3rd Edn.) 424, para. 977.]

I

Cases referred to:

(1) *Re Evans, Evans* v. *Noton*, [1893] 1 Ch. 252; 62 L.J.Ch. 413; 68 L.T. 271; 16 Digest 9, *21.*

(2) *Townend* v. *Townend*, (1905), 93 L.T. 680; *subsequent proceedings*, 22 T.L.R. 128; 16 Digest 50, *533.*

Appeal.

This was an appeal by Kenneth Douglas Hunt, the plaintiff in the action, from

* The terms of R.S.C., Ord. 42, r. 32, are printed at p. 39, letter H, post.

an order of WYNN-PARRY, J., made on Nov. 4, 1958, committing him to prison for contempt of court for failing to keep an appointment before an examiner of the court.

The plaintiff appeared in person.
William Denny for the defendants.

JENKINS, L.J.: This is an appeal by the plaintiff in the action from an order of WYNN-PARRY, J., dated Nov. 4, 1958, for the committal of the plaintiff to prison for disobedience of an order of Dec. 3, 1957, that disobedience taking the form of failing to attend an appointment before an examiner fixed for a particular day, namely, July 17, 1958. As the basis of the proceeding was the order of Dec. 3, I had better read the operative part of it. It is in these terms:

> "It is ordered that the plaintiff do attend before an examiner of the court to be orally examined as to his means of satisfying the directions for the payment of costs respectively contained in the orders dated respectively Mar. 2, 1956, Mar. 12, 1956, Apr. 25, 1956, July 27, 1956, July 5, 1957, and July 22, 1957."

The course of events after the order had been made was somewhat remarkable. The plaintiff pursued a course of what may be described as masterly inaction. Numerous successive appointments were made and he did not attend any of them, his guiding principle being, as I understand it, that he need not comply with any order unless he was satisfied that the order was valid. There were appointments for Feb. 6 and Feb. 27, 1958, which he did not attend, and later there was an appointment for June 5, notice of which apparently is alleged not to have been served on him. Then there was an appointment for July 5, in respect of which the defendants claim to have served the plaintiff, and, finally, there was the appointment for July 17, 1958, the plaintiff's failure to attend which formed the ground for the committal order under appeal. In respect of the plaintiff's failure to attend the appointments of Feb. 6 and Feb. 27 or one of them, an order was made by VAISEY, J., on May 9, 1958, giving liberty to issue a writ of attachment against him for his failure to attend, but the learned judge directed that the writ should lie in the office for a period, I gather because there was a possibility of appeal. The plaintiff did, in fact, appeal and he succeeded in procuring a reversal of VAISEY, J.'s order, inasmuch as the documents in the case were in one way or another defective.

The plaintiff has impressed on us, and we have been perfectly well aware for many years, that, in proceedings for contempt, the proper documents must be properly served, and that, owing to the penal character of the jurisdiction, defects, which would be overlooked for the purposes of ordinary litigation, may afford sufficient ground for refusing attachment or committal where the question is one of contempt, which, if brought home, may involve deprivation of liberty. The plaintiff has addressed us at very great length, but I am not blaming him for that because the matter is, no doubt, in his view of great importance. He began by telling us that he did not challenge the service of the various documents, so that, so far as what one might call the machinery of service was concerned, he had no complaint to make, but he says that, although there was service, this was not what he called "due service" so as to satisfy the rules. He told us over and over again that, if any technical point was wrong, he was entitled to take advantage of it. As he does not dispute the matter of service, it is unnecessary for me to refer to the affidavits dealing with that aspect of the case.

His first complaint, as I understand it, is that the indorsement fixing the appointment of July 17, 1958, did not comply with the order of Dec. 3 because it was not an appointment by the examiner "at such time and place as the said examiner may appoint" within the meaning of the order of Dec. 3. In fact, the indorsement was in this form:

A "Restored to the list for Thursday, July 17, 1958, at 11.30 o'clock in the forenoon in room 106."

That indorsement on the order was not signed by the examiner, but it was authenticated by the Central Office seal of the Supreme Court of Judicature which was impressed so as to overlap the last two lines of the indorsement. I cannot agree with the plaintiff that there is any valid ground for complaint on B the strength of the precise form of words used in that indorsement. "Restored to the list" could not mean anything else but that the case was going to be heard and that it was intended to appoint as the day on which it was going to be heard, Thursday, July 17, and the indorsement goes on to say perfectly plainly the time "11.30 o'clock in the forenoon in room 106". The plaintiff argued, though I think somewhat faintly, that the description "room 106" was in- C sufficient because it did not go on to state that the room was in the Royal Courts of Justice. I cannot accept that. Even in contempt proceedings there must be a modicum of common sense, and I regard that indorsement as sufficient for the purposes of the order of Dec. 3, 1957.

The second matter was that there were two letters written by the defendants' solicitors to the plaintiff informing him of the appointment for July 17. Those D were only referred to by the plaintiff for the purpose of contending that they were wholly irrelevant, and that it was only permissible to look at the documents actually served. I am not satisfied that that submission is entirely correct. I agree that, so far as service of the proceedings is concerned, these letters are irrelevant, but they certainly do show that the plaintiff cannot have been under any misapprehension at any time about this appointment, and, indeed, I did E not understand him really in the end to suggest that he was.

Thirdly, the plaintiff complained of a two months' delay on the part of the defendants in moving their motion for attachment or committal. In the circumstances of the case I cannot regard that degree of delay as material.

The plaintiff's fourth point arises under R.S.C., Ord. 41, r. 5, and this is the well-known rule saying:

F "Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment, or order, within which the act is to be done . . ."

The plaintiff says that rule was not complied with; there was no indorsement of the day, place and time. That, as I understand it, was really another way of relying on his first point as to the form of the indorsement. G

The plaintiff's fifth point was that the order of Dec. 3, 1957, was in the wrong form and, therefore, has at all times been bad and, what is more, bad on its face so that it cannot be made the subject of proceedings in contempt. In order to appreciate that point, one has first of all to look at R.S.C., Ord. 42, r. 32, which says:

H "*Examination of judgment debtor as to debts owing to him.* When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the court or a judge for an order that the debtor liable under such judgment or order, or, in the case of a corporation, that any officer thereof, be orally examined, as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order, before a judge or I officer of the court as the court or judge shall appoint; and the court or judge may make an order for the attendance and the examination of such debtor, or of any other person, and for the production of any books or documents."

One should look next at the form of order in such a case which is contained in R.S.C., App. K, form No. 38, and is headed: "In the High Court of Justice, (blank) Division. Master (blank)". In the top right hand corner there are the figures "19" (blank) and the letter and number are to be inserted; these would be the letter and number of the action concerned. Then the form reads—

"Between (blank) judgment creditor and (blank) judgment debtor". It continues:

> "It is ordered that the above-named judgment debtor . . . attend . . . before one of the masters of the Supreme Court of Judicature or one of the examiners of the court, at such time and place as he may appoint . . ."

The body of that order appears to me to be substantially the same as the operative part of the order of Dec. 3, 1957, which I have read, with the exception that, whereas form No. 38 assumes that the document is going to be entitled between a judgment creditor and a judgment debtor, in the present case the title of the action appears to have been retained, so that the order is headed: "Kenneth Douglas Hunt, plaintiff, and Allied Bakeries, Ltd., defendants". The plaintiff invited us to hold that that was a fatal defect in the order. I cannot accept that view. There is, I think, good ground for supposing that the practice of retaining the heading of the action is sometimes followed. I notice that the form given in DANIELL'S CHANCERY FORMS at p. 354, appears to be in that form, the application being described as "an application on the part of the plaintiff that the above-named defendant shall be ordered", and so on. That point appears to me to be entirely without substance.

The point which has occasioned me more difficulty arises in this way. Turning to R.S.C., Ord. 42, r. 32, one finds

> ". . . whether the debtor has any and what other property or means of satisfying the judgment or order, before a judge or officer of the court as the court or judge shall appoint; and the court or judge may make an order for the attendance and the examination of such debtor . . ."

It is to be observed that the examination is to be held, according to that, "before a judge or officer of the court". Now, says the plaintiff, in this case the examination was to be held before one of the examiners of the court; an examiner of the court is not an officer of the court, and, accordingly, the order of Dec. 3, 1957, is an order not warranted by the rules, and, therefore, for this reason also it is invalid on its face. The plaintiff's argument that examiners are not officers of the court depends, I think, on a note at p. 1034 of the ANNUAL PRACTICE (1959 Edn.): "Before a judge or officer of the court". Under that heading, this note appears:

> "In 1929, it became and has since been the practice to refer the examination of a judgment debtor to an examiner of the court . . . What sanction there was for this procedure it is difficult to say, because it is an open question whether an 'examiner' is an officer of the court. He is (ex hypothesi) a barrister, whose position and powers are defined in Ord. 37, r. 5, rr. 39-53, and all the examiners are practising barristers. Yet no officer of the court can practise as a barrister."

Then there is a reference to the Supreme Court of Judicature (Consolidation) Act, 1925, s. 120. I am not satisfied that, for the purposes of this rule, examiners of the court are not officers of the court. Moreover, as appears from the note, the practice adverted to was introduced as long ago as 1929, and I am not prepared on any submission which has been made to us in the course of this case to hold that this long-standing practice is ultra vires. One should also, I think, refer to R.S.C., Ord. 61, r. 33:

> "The masters may from time to time prescribe the use in or for the purpose of the Central Office, and subject to the approval of the Lord Chancellor in and for the purposes of the district registries, of such modified or additional forms as may be deemed expedient. Such modified or additional forms shall when approved by the Lord Chancellor be forthwith transmitted to each district registrar and shall be the forms to be used in and for the purposes of the district registry."

According to Appendix K in the ANNUAL PRACTICE, form No. 38, that is to say the form of order, was introduced under R.S.C., Ord. 61, r. 33.

There is one other point on this aspect of the matter. In *Re Evans, Evans* v. *Noton* (1) ([1893] 1 Ch. 252), which contains Mr. Registrar LAVIE's celebrated note on attachment and committal, the order in question appears to have been substantially in the form of the order of Dec. 3 in the present case. That was as long ago as 1892. I will read the relevant passages in the statement of facts (ibid., at p. 253):

> " On Mar. 4, an order was made in chambers that Noton should attend before the examiner in rotation at such place and time as he should appoint, and be examined on the part of the plaintiff for the purpose of the inquiry directed by the order of Feb. 1, 1892."

I need not, I think, read further, but that passage shows recognition of this type of order as long ago as 1892, and reference is made to it also in *Townend* v. *Townend* (2) ((1905), 93 L.T. 680).

Over and above his point that the examiners are not officers of the court, the plaintiff raised the point that a form of order providing that the appointment should be before one of the examiners of the court at such time and place as the examiner may appoint was ultra vires, in that it involved a delegation by the court or a judge of the judicial powers conferred on them. I return to R.S.C., Ord. 42, r. 32. The form of words is:

> " before a judge or officer of the court as the court or judge shall appoint; and the court or judge may make an order for the attendance and the examination of such debtor . . ."

It is said that the words in the present order " that the plaintiff do attend before one of the examiners of the court at such time and place as the examiner may appoint " delegate to the examiner the duty properly reposed in the judge or officer of the court of fixing the time at which an examination is to be held. That, it seems to me, is a pure ministerial act, and I doubt very much whether there would be anything obnoxious in any such delegation. This practice, according to the ANNUAL PRACTICE, has been followed since 1929, and one may add to that that, on this point also, one appears to find recognition of this type of order in *Re Evans* (1).

Then the plaintiff said that the indorsement was not part of the order. He cited *Townend* v. *Townend* (2), which I have already mentioned, but I think it appears from that case, and also from *Re Evans* (1), that this type of order is free from objection, provided the indorsement specifying the time and place, and so on, is adequately recorded and authenticated on the order. The actual form of order in *Townend* v. *Townend* (2) was an order that

> " the respondent do attend before one of the registrars for the purpose of being examined as to the security he can give to carry out the provisions of the order . . ."

He was to attend before one of the registrars, but it appears to have been accepted in that case that, while an informal appointment with the time of hearing before the registrar would not do, an order on the lines of that in *Re Evans* (1) would be free from objection. In the present case, one has the order contemplating, on the face of it, that the examiner is to fix the time and place of the appointment. Accordingly, I think that the time and place of the appointment is sufficiently indorsed on the order for the purpose of proceedings in contempt if there is put on the order the day, time and place of the appointment, and the indorsement is authenticated by the seal of the Central Office, as was done here.

The plaintiff complained that the examiner did not sign the indorsement. There is, in fact, nothing in the order, as far as I can see, which requires him to sign it. *Townend* v. *Townend* (2) shows that the indorsement fixing the time must be properly authenticated, but, provided that is done, I see no reason why

it should not be sufficient. The plaintiff then said that the fixing of dates over and over again under this order was objectionable, and he suggested that the power of doing so expired, according to his argument in its original form, after one appointment had been made. I do not think that he adhered to that, but he did point out that there is an indorsement of Feb. 27, 1958, which adjourned the matter for a date to be fixed within three months, and he said no date was ever in fact fixed within three months, and that, once the three months had expired without an appointment being fixed, the order must be considered as exhausted. I can see no sufficient ground for so holding. It appears to me that this form of order is a very convenient form, and it would involve a great deal more trouble and expense if a fresh order had to be obtained for every proposed appointment.

I have now referred to a number of the plaintiff's points, and I hope I have done justice to them. There may be one or two which I have omitted to mention specifically, for he did, as I have said, raise a very large number of points indeed, but, giving the whole matter the best consideration I can, I see no sufficient reason for differing from the learned judge, and in my judgment, this appeal fails and should be dismissed. I have only to add, in view of various observations which fell from the plaintiff, that, in my view, he really has himself to thank in this case. He could long since have been cleared of this trouble if he had chosen to assent to an appointment being fixed and had attended such appointment; at all events, if he had made a genuine offer to do that he would probably by this time have been cleared of his contempt. As it is, all I can say is, as I have said before, that in my view this appeal fails and should be dismissed.

ROMER, L.J.: I agree. There is only one point that I had, perhaps, better mention. At one time the plaintiff was inclined to say that, if any order should be made against him at all, it should take the form of attachment and not committal. I do not think he pursued that because, having regard to the terms of R.S.C., Ord. 42, r. 7, it is quite clear that an order for committal was justified in this case, as the rule says:

> " A judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal."

On every other point I agree wholly with what my Lord has said and have nothing to add myself.

ROXBURGH, J.: I agree.

JENKINS, L.J.: I should like to express my agreement with what has fallen from ROMER, L.J., as to the propriety of proceedings by way of committal as distinct from attachment in the present case.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *A. Kramer & Co.* (for the defendants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

BIRTLEY DISTRICT CO-OPERATIVE SOCIETY, LTD. *v.* WINDY NOOK & DISTRICT INDUSTRIAL CO-OPERATIVE SOCIETY, LTD.

[QUEEN'S BENCH DIVISION (Streatfeild, J.), November 3, 4, 1958.]

Arbitration—Setting aside award—Counterclaim in action on award—Whether counterclaim to have award set aside for misconduct can be raised by way, in effect, of defence.

In an action to enforce an arbitration award, the defendants sought to amend their defence by adding by way of counterclaim a claim to have the award of the arbitrators set aside on the ground of alleged misconduct.

Held: in an action on an arbitration award misconduct of the arbitrators could not be raised by way of counterclaim to set aside the award, and leave to amend the defence would be refused.

Scrimaglio v. *Thornett & Fehr* ((1924), 131 L.T. 174) applied.

[As to the power of the court to set aside an award and as to the procedure, see 2 HALSBURY'S LAWS (3rd Edn.) 55, paras. 119, 120; and for cases on the subject, see 2 DIGEST (Repl.) 698, *2103-2114.*

As to enforcement of an award by action, see 2 HALSBURY'S LAWS (3rd Edn.) 51, para. 113; and for cases on defences available, see 2 DIGEST (Repl.) 707, 708, *2199-2209.*]

Cases referred to:

(1) *Scrimaglio* v. *Thornett & Fehr*, (1924), 131 L.T. 174; 2 Digest (Repl.) 441, *149.*

(2) *Pedler* v. *Hardy*, (1902), 18 T.L.R. 591; 2 Digest (Repl.) 698, *2103.*

Action.

The plaintiffs, Birtley District Co-operative Society, Ltd., claimed by writ issued on May 5, 1957, against the defendants, Windy Nook & District Industrial Co-operative Society, Ltd., a declaration, among other relief, that the award made on Nov. 5, 1955, as re-considered and amended by the arbitrators on Sept. 18, 1956, in an arbitration between the plaintiffs and defendants, was binding on the defendants. At the trial of the action the defendants sought to amend their defence by adding by way of counterclaim a claim to have the award of the arbitrators set aside on the ground of their alleged misconduct. The report is confined to this preliminary point.

Sir Frank Soskice, Q.C., and *R. A. MacCrindle* for the plaintiffs.

Gerald Gardiner, Q.C., and *C. F. Dehn* for the defendants.

STREATFEILD, J.: I have no doubt in my own mind what my ruling on this question should be. It is that I refuse leave for this counterclaim to be proceeded with. As it has been indicated to me, and is obvious, that whatever may be my decision in this case a higher court will certainly have to re-consider it, I had better state my reasons.

By the counterclaim, so called, although in my view it is virtually a defence to this action, the defendants seek to set aside the award of arbitrators on the ground of alleged misconduct, the particulars of which are to be found only in the correspondence which has been disclosed in this action. An arbitration is governed by its own particular procedure laid down by the Arbitration Act, 1950, and the procedure for setting aside an award under that Act is by motion to the High Court. In practice that means before a single judge, the case being entered in the Special Paper and the application and motion being made within six weeks of the award. There is, of course, power to extend time for good cause. That is the procedure for setting aside an award as well as for remitting it to the arbitrators on the ground of misconduct. That has not been done in this case. Instead, an action to enforce the award has been brought, and it is now

sought, as I have indicated really by way of defence, although in name by counterclaim, to set aside that award by reason of misconduct. It is quite clear from a decision of the Court of Appeal which is binding on me in *Scrimaglio* v. *Thornett & Fehr* (1) ((1924), 131 L.T. 174) that misconduct of the arbitrator cannot be pleaded as a defence to an action to enforce the award.

It has also been said in *Pedler* v. *Hardy* (2) ((1902), 18 T.L.R. 591) that it is very doubtful whether it can be pleaded by way of counterclaim. For myself I would put it even higher; I would have thought that it was a fortiori, because there is no such thing as an action commenced by writ to set aside an award for misconduct of the arbitrator. The Act lays down the procedure that it is on motion to the High Court and not by action, and, if there cannot be a substantive claim in an action to set aside an award for misconduct, when one bears in mind that a counterclaim is a substantive claim it seems to me even stronger that there cannot be a counterclaim on that ground. Therefore, for that reason alone I would come to the conclusion that it would be wrong to grant leave to enter this counterclaim.

I judge it also by another yardstick and I put myself into the position notionally of a judge in entertaining an application for extension of time to move the court to set aside an award under R.S.C., Ord. 59, r. 39. The position then would be this. The defendants here, in fact, did move the court on July 23, 1956, to set aside the award on different grounds, and there is no doubt that it was in respect of an arbitration under the Arbitration Act, 1950, because their notice is headed "In the matter of the Arbitration Act, 1950". PEARSON, J., refused to set it aside on those grounds and accordingly in September, 1956, the award, having been remitted to the arbitrators, was amended by them in accordance with the motion to remit the award taken out by the plaintiffs.

In December, 1957—I am going to take that date as being in favour of the defendants—discovery in this action was completed, so that all of the ammunition available for the defendants to set aside the award on the ground of misconduct of the arbitrators was then in the possession of the defendants or their solicitors. Of course, they had not got it at the time when they first applied to set aside this award, but I have to ask myself whether, granting them a reasonable time, even a month, after December, 1957, to consider the rather voluminous correspondence, if an application had then been made for leave to extend the time to move the court to set aside the award, I should have granted that application for extension of time. If one allows a month or two months or even three months after December, 1957, I feel that beyond that time I certainly should not have granted extension of time. In fact the defendants took out a summons before the master which was adjourned into court in October, 1958; in October, 1958, having had all the information in that correspondence for some ten months, for the first time they make a suggestion of setting aside this award on the ground of misconduct. In those circumstances, if the application had come before me then in the form of leave to extend the time, I should undoubtedly have refused it.

As I have said, I do not think that the procedure is admissible in any event to allow this counterclaim, but, even if it was regarded as a practical alternative to the procedure by way of motion, it would still to my mind be well out of time, and speaking for myself I should not extend the time. For both of those reasons, therefore, I would refuse leave to enter this counterclaim.

Application to enter counterclaim refused.

Solicitors: *Herbert Reeves & Co.*, agents for *Wm. Mark Pybus & Sons*, Newcastle-upon-Tyne (for the plaintiffs); *Sharpe, Pritchard & Co.*, agents for *Watson, Burton, Booth & Robinson*, Newcastle-upon-Tyne (for the defendants).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

TSAKIROGLOU & CO., LTD. *v.* NOBLEE THORL G.m.b.H.

[QUEEN'S BENCH DIVISION (Diplock, J.), December 8, 9, 1958.]

Sale of Goods—C.i.f. contract—Frustration—Performance possible by route which was not customary—Closing of Suez Canal—Province of judge and of jury in frustration cases.

Arbitration—Case stated—Facts found in Special Case—Primary facts and inferences—Findings corresponding to special verdict of a jury.

By a contract on form 38 of the Incorporated Oil Seed Association, dated Oct. 4, 1956, the sellers agreed to ship three hundred tons of groundnuts c.i.f. Hamburg, shipment November/December, 1956. Clause 6 of the contract provided that "In case of prohibition of import or export, blockade or war, epidemic or strike, and in all cases of force majeure preventing the shipment within the time fixed, or the delivery, the period allowed for shipment or delivery shall be extended by not exceeding two months. After that, if the case of force majeure be still operating, the contract shall be cancelled." At the date of the contract the usual and customary port for shipment of groundnuts was Port Sudan and the customary route for carriage of the goods by sea was through the Suez Canal. The canal was blocked to shipping from Nov. 2, 1956, but it was possible to load at Port Sudan, where the groundnuts were in warehouses, and to ship them via the Cape of Good Hope. The sellers applied to the buyers for an extension of time under cl. 6, which the buyers refused. The sellers did not ship the groundnuts. The buyers elected to treat the contract as rescinded, and their claim for damages having been submitted to arbitration, the board of appeal found and held (finding 12 (vi) of their award which was made in the form of a Special Case) that "the performance of the contract by shipping the goods on a vessel routed via the Cape of Good Hope was not commercially or fundamentally different from its being performed by shipping the goods on a vessel routed via the Suez Canal".

Held: the buyers were entitled to damages for breach of contract for the following reasons—

(i) the board of appeal's finding 12 (vi) was a finding of fact which the court had no ground for setting aside, and its consequence was that the contract was not frustrated by the closing of the Suez Canal.

Carapanayoti & Co., Ltd. v. *E. T. Green, Ltd.* ([1958] 3 All E.R. 115) distinguished.

(ii) the sellers were not entitled to an extension of time under cl. 6 of the contract, since the word "shipment" therein meant placing the goods on board the vessel (see p. 52, letter D, post).

Dictum of BAILHACHE, J., in *Re Comptoir Commercial Anversois and Power, Son & Co.'s Arbitration* ([1920] 1 K.B. at p. 878) applied.

(iii) a term that the goods were to be shipped via the Suez Canal would not be implied in the contract.

Carapanayoti & Co., Ltd. v. *E. T. Green, Ltd.* ([1958] 3 All E.R. 115) followed on this point.

[As to shipment of goods under a c.i.f. contract, see 29 HALSBURY'S LAWS (2nd Edn.) 214, para. 286.

As to the frustration of a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 185, para. 320; and for cases on the subject, see 12 DIGEST (Repl.) 459, 460, *3425-3429*.]

Cases referred to:

(1) *Carapanayoti & Co., Ltd.* v. *E. T. Green, Ltd.*, [1958] 3 All E.R. 115.

(2) *Upjohn* v. *Hitchens, Upjohn* v. *Ford*, [1918] 1 K.B. 171; *affd.* C.A., [1918] 2 K.B. 48; 87 L.J.K.B. 1205; 119 L.T. 180; 31 Digest (Repl.) 401, *5304*.

(3) *British Launderers' Research Assocn.* v. *Hendon Borough Rating Authority*, [1949] 1 All E.R. 21; [1949] 1 K.B. 462; [1949] L.J.R. 646; 113 J.P. 72; 2nd Digest Supp.

(4) *Jackson* v. *Union Marine Insurance Co., Ltd.*, (1874), L.R. 10 C.P. 125; 44 L.J.C.P. 27; 31 L.T. 789; *affg.* (1873), L.R. 8 C.P. 572; 12 Digest (Repl.) 438, *3339*.

(5) *Bank Line, Ltd.* v. *Capel (A.) & Co.*, [1919] A.C. 435; 88 L.J.K.B. 211; 120 L.T. 129; 12 Digest (Repl.) 443, *3365*.

(6) *Re Comptoir Commercial Anversois and Power, Son & Co.'s Arbitration*, [1920] 1 K.B. 868; 89 L.J.K.B. 849; 122 L.T. 567; 12 Digest (Repl.) 449, *3389*.

Special Case.

This was an award in the form of a Special Case stated pursuant to s. 21 (1) (b) of the Arbitration Act, 1950, by the Board of Appeal of the Incorporated Oil Seed Association (hereafter called the I.O.S.A.) on an appeal to the board from the award of an umpire dated Feb. 20, 1957. By a c.i.f. contract dated Oct. 4, 1956, on I.O.S.A. contract form No. 38, the sellers (Tsakiroglou & Co., Ltd.) agreed to ship three hundred tons of groundnuts to Hamburg November/December 1956 shipment to the buyers (Noblee Thorl G.m.b.H.). At that time the usual route for such shipments was via the Suez Canal. On Nov. 2, 1956, when the Suez Canal was closed to shipping, the groundnuts were in warehouse in Port Sudan. The sellers did not ship the goods and claimed that they were protected by the exceptions clause in the contract, or alternatively that the contract was frustrated on Nov. 2, 1956. The buyers claimed damages for breach of contract. The dispute was referred to arbitration. The umpire made an award holding that the sellers were in default. The sellers appealed to the Board of Appeal of the I.O.S.A., who upheld the umpire's award and, at the request of the sellers, stated their award in the form of a Special Case on the following question of law: whether on the true construction of the contract and the facts found the sellers were in default. The facts appear in the judgment.

Eustace Roskill, Q.C., and *R. A. MacCrindle* for the appellants.

John Megaw, Q.C., and *J. F. Donaldson* for the respondents.

DIPLOCK, J.: This is a Case Stated by the Board of Appeal of the Incorporated Oil Seed Association (which I shall call, as usual, the I.O.S.A.); and it is yet another of the Suez cases. On Oct. 4, 1956, the sellers, the appellants here, who are a company incorporated and resident in Khartoum, agreed to sell to the buyers, who are a company incorporated in Western Germany and resident in Hamburg, three hundred tons of Sudanese groundnuts in the shell at £50 per one thousand kilos c.i.f. Hamburg; shipment November/December, 1956, cash against documents modified in a respect material for the purposes of this case. The contract terms were those of the I.O.S.A. contract No. 38 at which I must look. I.O.S.A. No. 38 is headed: " Contract for West African groundnuts in the shell ". The printed terms relate to shipment from a West African port and a particular kind of charterparty. The clauses to which I shall have to refer are the following:

" 3. War risks insurance. Sellers shall insure goods against war risks on usual Lloyd's conditions but sellers' obligation in this respect shall be limited to the terms and conditions in force and generally obtainable in London at time of shipment . . .

" 5. Declaration and cancellation. Name of steamer (or steamers) to be declared not later than date of sailing, but not sooner than fifteen days prior to the first day of the stipulated period of shipment and if the steamer named, before loading, is lost or suffers damage causing the cancelment [sic] of the charterparty the seller shall have an extension of two months from the official advice of the loss or cancelment to carry out the contract by another vessel . . .

A "6. Strikes, etc. In case of prohibition of import or export, blockade or war, epidemic or strike, and in all cases of force majeure preventing the shipment within the time fixed, or the delivery, the period allowed for shipment or delivery shall be extended by not exceeding two months. After that, if the case of force majeure be still operating, the contract shall be cancelled.

B "10. Default. In default of fulfilment of contract by either party the other party at his discretion shall, after giving notice in writing, have the right to sell or purchase, as the case may be, against the defaulter who shall make good the loss, if any, on such sale or purchase on demand . . ."

That contract having been entered into on Oct. 4, 1956, on Oct. 7 the sellers C booked space for three hundred tons of groundnuts to be shipped to Hamburg in one of four vessels scheduled to call at Port Sudan in November and December, 1956. On Oct. 25, 1956, the sellers got an export permit for the necessary quantity of groundnuts and on Nov. 1, 1956, three hundred tons of groundnuts in warehouse at Port Sudan were held to their order.

The next relevant dates are the well-known Suez Canal dates. The Suez D Canal was nationalised on July 26, 1956, long before this contract was entered into. The Israeli forces began military operations against Egypt on Oct. 29, 1956. The British and French forces began military operations against Egypt on Nov. 1, 1956. Port Said was captured on Nov. 5, 1956, and there was a cease fire on Nov. 6, 1956. The Suez Canal was blocked on Nov. 2, 1956, and, as a matter of history, remained closed to shipping until Apr. 9, 1957.

E On Dec. 7, 1956, after the canal was blocked, but before the shipping period had expired, the sellers claimed an extension under cl. 6. On Dec. 18 the buyers refused the extension. On Jan. 7, 1957, the buyers claimed arbitration, and on Jan. 9, 1957, the buyers gave notice of intention to buy in against the sellers under the default clause, that is to say, they elected to treat the contract as rescinded by the sellers' wrongful repudiation by breach of condition in not shipping within the contract period, November/December, 1956.

F The appeal board of the I.O.S.A., upholding the umpire, who awarded the buyers £5,625 damages, held that the buyers were entitled to do so. There are a number of relevant findings of fact which I must read.

"Sudanese groundnuts are harvested at the end of October or beginning of November and the customary port for shipment of such groundnuts is G Port Sudan. All groundnuts exported from Sudan to Europe are shipped from Port Sudan which is the only suitable port."

No port of shipment was mentioned in the contract, but it is conceded by both sides that by necessary implication on that finding of fact Port Sudan was the contemplated port and contractual port of shipment. The findings of fact are:

H "2. At the date when the contract was entered into the usual and normal route for the shipment of Sudanese groundnuts from Port Sudan to Hamburg was via the Suez Canal. It would be unusual and rare for any substantial parcel of Sudanese groundnuts from Port Sudan to Europe to be shipped via the Cape at all times when the Suez Canal was open.

"6. The closure of the Suez Canal prevented transport of the contract I goods from Port Sudan to Hamburg via the Suez Canal and the impossibility of transportation by that route continued until April, 1957. The sellers could have transported the goods from Port Sudan to Hamburg via the Cape during November or December, 1956.

"7. The distance from Port Sudan to Hamburg via the Suez Canal is approximately 4,386 miles and the distance from Port Sudan to Hamburg via the Cape of Good Hope is approximately 11,137 miles. The distance from Port Sudan to Suez is 694 miles.

"8. The freight ruling at the time of the contract for the shipment of

groundnuts from Port Sudan to Hamburg via the Suez Canal was about £7 10s. per ton. After the closure of the Canal the Port Sudan-U.K. Conference imposed the following surcharges for goods shipped on vessels proceeding via the Cape of Good Hope, viz., as from Nov. 10, 1956, twenty-five per cent., and as from Dec. 13, 1956, one hundred per cent.

" 10. At the date when the contract was made both parties contemplated that shipment would be made via the Suez Canal."

In addition to these findings of fact there are mixed findings of law and fact and those that I need read at the moment are in the following terms:

" 12. (iv) It was not an implied term of the contract that shipment or transportation should be made via the Suez Canal. (v) The contract was not frustrated by the closure of the Suez Canal. (vi) The performance of the contract by shipping the goods on a vessel routed via the Cape of Good Hope was not commercially or fundamentally different from its being performed by shipping the goods on a vessel routed via the Suez Canal."

It is conceded that, although slightly different in wording, these findings of fact and of mixed law and fact are substantially the same as those that were in the Case Stated, which was the subject of the decision in *Carapanayoti & Co., Ltd.* v. *E. T. Green, Ltd.* (1) ([1958] 3 All E.R. 115), which I shall hereafter call *Green's* case and which was decided as recently as July 18 of this year. There is, however, one important difference; the finding 12 (vi), supra, was not present in *Green's* case (1). In *Green's* case (1) McNAIR, J., held that a contract not differing in any material respect from the present, except for the clause corresponding to cl. 6*, was frustrated by the blocking of the Suez Canal. The crucial question in this case, in my view (though there are others to deal with), is whether finding 12 (vi) makes this case distinguishable from *Green's* case (1), although if it does not the buyers invite me to follow McNAIR, J.'s decision.

One point, since it goes to the argument on frustration as well as to the argument on cl. 6, I can deal with first and shortly. This is a contention of the sellers that in a c.i.f. contract it is an implied term that shipment shall be via a route which is at the date of the sale contract a usual and customary route, and, if there is at that date only one usual and customary route, by that route. Here there is a finding of fact that the usual and normal route was via Suez and that was the only usual and normal route. The contract, therefore, the sellers argue, must be read as if the words " via Suez " were inserted after the word " shipment " and before the words " November/December, 1956 ". There is no direct authority for this proposition. So far from its being a necessary implication, it seems to be one which any business man would reject. I am prepared to echo the following passages in McNAIR, J.'s judgment in *Green's* case (1) where he says (ibid., at p. 119):

" In principle, it seems to me that where a contract expressly, or by necessary implication, provides that performance, or a particular part of the performance, is to be carried out in a customary manner, the performance must be carried out in a manner which is customary at the time when the performance is called for. This is particularly so in the case of forward contracts like many c.i.f. contracts which call for performance at some future date, when one bears in mind that in mercantile matters custom and usage are subject to rapid change . . . For example, in times of strained international relations the customary form of bills of lading may change by the universal acceptance of a particular form of war-risk protection. Can it be said that the seller is bound to tender the form of bill of lading which was customary at the date of the contract when, by the time when performance has arrived, that form has been supplanted by another customary form ? I think not . . . In my opinion, as a matter of principle,

* That is, the clause headed " Strikes etc.", see p. 47, letter A, ante.

A the sellers' obligation under a contract such as this is not confined to shipping by a route which was a usual and customary route at the date of the sale contract, but is to ship by a route usual and customary at the time of performance."

In the following sentence McNAIR, J., who had not had the advantage of a closer B examination into *Upjohn* v. *Hitchens*, *Upjohn* v. *Ford* (2) ([1918] 1 K.B. 171) which I have had, fortifies his opinion by the observations of ROCHE, J., in *Upjohn* v. *Hitchens* (2). I do not rely on that as fortifying my conclusion. I am satisfied that the fortification of McNAIR, J.'s view on this topic agrees with mine.

I now turn to frustration, remembering that frustration is not to be lightly C held to have occurred, as it puts an end to a contract independently of the volition of the parties at the time of the frustrating event, and, it may be, without either party being conscious that what has happened has snapped their contractual bonds. The case books are full of reports of cases where lay arbitrators have found contracts to be frustrated and the court has held that they were wrong. Lawyers have ever been more prone than merchants to cling to the D letter of the contract; see, for example, "Shylock *v.* Antonio"*, a case which might have been decided on grounds of public policy but in fact turned on a pure question of construction! *Green's* case (1) is one of the very few, if not unique, cases where trade arbitrators have found a contract not to be frustrated and the court has found that it was. I should be very reluctant, particularly in the commercial court, to come to a different conclusion of law from that reached by E McNAIR, J., in the same court as recently as last July, if I thought that the facts with which I am confronted were indistinguishable from those with which he was confronted in *Green's* case (1). The appeal board's finding in para. 12 (vi) seems to me to be a vital difference. That finding I repeat:

> "The performance of the contract by shipping the goods on a vessel routed via the Cape of Good Hope was not commercially or fundamentally F different from its being performed by shipping the goods on a vessel routed via the Suez Canal."

It makes a vital difference only if it is, or at any rate includes, a finding of fact and is not a mere finding of law.

This brings one really to the question: What are the respective provinces of G the judge and the jury in a frustration case? In other words, how should this case be summed up to a jury? What is the question on which they should be invited to bring in a special verdict? There are certain findings of fact which are common to this case and to *Green's* case (1) and which are undisputedly pure questions of fact and which in the illuminating analysis of DENNING, L.J., in *British Launderers' Research Assocn.* v. *Hendon Borough Rating Authority* (3) H ([1949] 1 All E.R. 21 at p. 25) would be called "primary facts"†. The most important of them are: (1) At the time of the contract buyers and sellers would assume that the goods would be shipped via Suez. (2) The voyage round the Cape was about two and a half times the length of the voyage via Suez, which in a ten to eleven knot steamer would take nearly seven weeks instead of somewhat under three weeks or correspondingly shorter periods in faster vessels. It I would involve two crossings of the equator and a passage through the southern hemisphere in summer; the freight rate in *Green's* case (1) was £6 10s. out of the total c.i.f. price of £28 15s., and in the present case £7 10s. out of the c.i.f. price of £50; the rate would have been twenty-five per cent. higher from Nov. 10 and one hundred per cent. higher from Dec. 13. On those facts undoubtedly a

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* Merchant of Venice, Act 4, Scene 1.

† This subject, the binding effect of primary facts and inferences or conclusions drawn from them, was considered also recently in *Edwards* v. *Bairstow* ([1955] 3 All E.R. at pp. 53, 57) in the House of Lords.

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jury could come to the conclusion, I think, as McNair, J., did, that the contract was frustrated by the blocking of the Suez Canal. A

What I have to decide is whether on those facts a jury should be directed as a matter of law to find frustration, or whether there is a further conclusion to be drawn from those facts which can as well be drawn by a layman properly instructed on the law as by a lawyer, and which is, therefore, a conclusion of fact for the tribunal of fact: see *British Launderers' Research Assocn.* v. *Hendon Borough Rating Authority* (3). I think that clearly there was and that, despite all the water that has flowed under the bridge since *Jackson* v. *Union Marine Insurance Co., Ltd.* (4) ((1873), L.R. 8 C.P. 572) was decided, it can today be phrased as simply as the question that was left to the jury by Brett, J., in that case and approved in 1874 by the strong Court of Exchequer Chamber*, most of whose members had long experience of the pre-Judicature Act procedure under which special verdicts were obtained from juries at nisi prius and argument as to the consequences of such special verdicts was subsequently conducted before the common law court in banc. The question in that case was left to the jury in these terms: Whether the time necessary to get the ship off and repair her so as to be a cargo-carrying ship was so long as to put an end in a commercial sense to the commercial speculation entered into by the shipowner and the charterers ? With the greatest respect to everything that has been said since, including some criticism by Lord Sumner in *Bank Line, Ltd.* v. *A. Capel & Co.* (5) ([1919] A.C. 435 at p. 460) I do not think that in a case of this kind that question or one analogous to it can be improved on as a question to be put to the jury, and I would note in passing that Lord Sumner's criticism, to which I have referred, was that it made it too easy for a jury to find frustration, not too difficult. That question, I think, is a question of fact and, where it is answered, the answer is a conclusion of fact found by the jury. It is a finding of fact of the utmost relevance in answering the ultimate question of law: Was the contract frustrated in whichever of the anthology of phrases you care to select as the best way of posing that ultimate question of law ? As McNair, J., said in *Green's* case (1) ([1958] 3 All E.R. at p. 120): B C D E F

> " It is the function of the court to determine, as a matter of law, whether frustration arises on the court's appreciation of the facts found and of the legitimate inference to be drawn from such facts."

The legitimate inferences to be drawn from the facts found include any conclusions of fact and, in the absence of any finding by the arbitrators in *Green's* case (1), that G

> " The performance of the contract by shipping the goods on a vessel routed via the Cape of Good Hope was not commercially or fundamentally different from its being performed by shipping the goods on a vessel routed via the Suez Canal ",

it was a conclusion of fact which it was open to the learned judge to draw from the facts that were found in *Green's* case (1) that performance by shipping via the Cape was commercially and fundamentally different from a performance by shipping via Suez. McNair, J., did, I think, apply his mind to precisely that question of fact and drew the inference which he expressed (ibid., at p. 121), the inference that the circumstances of the longer and different route of transport would involve or might involve the seller in quite different obligations as to the condition of the goods on shipment from that involved in a shipment via the canal. H I

I do not think that it is necessary for my purpose to express any view on the argument addressed to me by counsel for the respondents whether that was a conclusion of fact which could legitimately be drawn without some further findings of fact by the arbitrators as to the qualities and character of the goods

* L.R. 10 C.P. 125.

A and the effect of a longer shipment on them. But I am faced with quite a different problem from that with which MCNAIR, J., was faced. I have a finding of fact, or, to use the jury analogy, a special verdict, that "The performance of the contract by shipping the goods on a vessel routed via the Cape of Good Hope was not commercially or fundamentally different from its being performed by shipping the goods on a vessel routed via the Suez Canal". If that finding were B unassailable, then, in my view, it follows that the contract was not frustrated. To each of the three questions in *Green's* case (1) ([1958] 3 All E.R. at p. 120):

> "(1) Must the parties have made their bargain on the basis that, if the canal was no longer available when the sellers elected to perform, the contract would be off ? . . . (2) Was the closure of the Suez Canal a circumstance C fundamental enough to transmute the sellers' obligation into an obligation of a different kind, which the contract did not contemplate, and to which it could not apply ? . . . (3) Would the answer to the 'officious bystander' have been: 'Of course, if the canal is closed after Nov. 2, the contract is off' ? . . . ",

D if that finding of fact is unassailable, the answer must be "No".

The question with which I am confronted is: Can that finding by the appeal board stand ? In the case of a jury a special verdict of this kind could be assailed on two grounds. First, that there was no evidence that could reasonably support it, and secondly, that they had been misdirected as to the meaning of the question on which they had brought in a special verdict. In the case of a trade arbitration E such as this where the appeal board consists of persons familiar with the trade, the first ground does not arise. The appeal board are entitled to use their personal knowledge or expertise in arriving at conclusions of fact. They are not limited to the evidence of witnesses called before them. As regards the second ground, in an arbitration this really amounts to showing that the appeal board have misdirected themselves as to the meaning of their finding. Their finding is ex- F pressed in very simple language which any judge might do well to emulate, and which he would have to do if we went back to juries for frustration cases. The only words as to the meaning of which the appeal board could possibly have directed themselves are those in the phrase "commercially or fundamentally different", and I should have thought that the adverb "commercially", at any rate, is one that commercial men like this appeal board could readily understand. G They had directed their minds to the right contract, a contract for the sale of goods of which shipment and carriage from Port Sudan to Hamburg was but an essential incident. And unless I am to assume that they have misunderstood the simple words "commercially or fundamentally different", they have found that in the particular trade—that is the trade in Sudanese groundnuts—the sellers' obligations as to the condition of the goods on shipment are not materially H different if a shipment is via the Cape instead of via Suez, and that the delay in arrival in Hamburg involved in the longer shipping route, at any rate, under a contract which gives a two-month shipping period, does not make it a different kind of contract from that contemplated when it was entered into.

I see no ground on which I can set aside or ignore this finding, which I regard as a conclusion of fact. I think that its presence in the Case Stated constitutes I a crucial difference between the facts of this case and those of *Green's* case (1). I therefore hold that the appeal board was right in law in deciding that the contract was not frustrated by the closing of the Suez Canal.

I can deal shortly with the remaining point in the case, which is: Did cl. 6 of the contract* entitle the sellers to an extension of time for shipment ? The findings, whether they be of fact or law, which are relevant to this issue are findings sub-paras. (i), (ii) and (iii) of para. 12. They were as follows:

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* See p. 47, letter A, ante.

" (i) There were hostilities but not war in Egypt at the material time. (ii) Neither war nor force majeure prevented shipment of the contract goods during the contract period if the word ' shipment ' means placing the goods on board a vessel destined for the Port of Hamburg. (iii) If the word ' shipment ' includes not only the placing of the contract goods on board a vessel but also their transportation to the contract destination then shipment via the Suez Canal was prevented during the contract period of shipment by reason of force majeure but shipment via the Cape was not so prevented."

The only question of law is: Does " the shipment " in cl. 6 mean either (a) shipment via Suez, or (b) not merely placing the goods on board a vessel but includes their carriage to the port or destination, or (c) shipment to Hamburg by whatever route ? Does it mean placing the goods on board a vessel destined for the Port of Hamburg by whatever route ? I have already held that as a matter of construction the words " shipment via Suez " cannot be read into the contract. " Shipment " in cl. 6 means any shipment which satisfies the terms of a contract and thus includes, after the blocking of the Suez Canal, shipment via the Cape. The word " shipment " I hold as a matter of construction means, and means only, placing the goods on board: see *Re Comptoir Commercial Anversois and Power, Son & Co.'s Arbitration* (6) ([1920] 1 K.B. 868 at p. 878), where BAILHACHE, J., in a passage which was approved, I think, by all the members of the Court of Appeal, said this:

" Now, if I give to the word ' shipment ' the widest meaning of which it is capable, it cannot mean more than bringing the goods to the shipping port and then loading them on board a ship prepared to carry them to their contractual destination."

Counsel for the appellants has, however, one further string to his bow. He contends in the alternative that " the shipment " means " the intended shipment ", and there is a finding of fact that space had been reserved on vessels to sail in the contract period via Suez. The clause appears to me to be perfectly intelligible and perfectly sensible without reading into it a word that is not there, and I for one decline to do so.

The question put was: Whether on the true construction of the contract and the facts found the sellers were in default ? To that question I answer " Yes ", with the consequence that the appeal fails.

Umpire's award upheld.

Solicitors: *Richards, Butler & Co.* (for the appellants); *Bernard Samuel Berrick & Co.* (for the respondents).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* WOOD BROS. (BIRKENHEAD), LTD. (In Liquidation).

[House of Lords (Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Keith of Avonholm and Lord Somervell of Harrow), November 3, 4, 5, December 18, 1958.]

Surtax—Undistributed income—Direction and apportionment—"Actual income from all sources"—Computation of income—Whether sum liable to balancing charge included—Income Tax Act, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2 *c.* 10), *s.* 245, *s.* 248 (1), *s.* 255 (3).

A resolution to wind-up a company voluntarily was passed on Apr. 16, 1952, and subsequently a balancing charge was made on the company on £18,675 under the Income Tax Act, 1952, s. 292 (3)* and s. 323 (4)*, being a sum equal to the excess of the proceeds of the sale of plant and machinery over their written-down value for income tax purposes. The Special Commissioners of Income Tax thereafter made a direction under s. 245† and s. 248 (1), requiring an apportionment among the members of the company of its actual income from all sources from Apr. 29, 1950, to Apr. 16, 1952, the period from the end of the last year for which accounts of the company had been made up to the commencement of the winding-up. The amount on which the balancing charge was made was included in the computation of the actual income of the company for that purpose.

Held (Viscount Simonds and Lord Keith of Avonholm dissenting): the amount on which the balancing charge was made was not "actual income" of the company within the description "actual income from all sources" in s. 245 of the Income Tax Act, 1952, having regard particularly to the terms of s. 255 (3)†, concerning the computation of such actual income; further (per Lord Morton of Henryton, p. 55 letter G, post, Lord Somervell of Harrow concurring) the amount on which the balancing charge was made was not income or (per Lord Reid, p. 59, letter H, post) was not income in any normal sense.

Decision of the Court of Appeal ([1957] 3 All E.R. 314) affirmed.

[As to balancing charges, see 20 Halsbury's Laws (3rd Edn.) 503, para. 966; and as to apportionment of actual income of companies for surtax purposes, see ibid., 558, para. 1085, and, in liquidation, ibid., 562, 563, para. 1095.

For the Income Tax Act, 1952, s. 245, s. 248, s. 255, s. 292, and s. 323, see 31 Halsbury's Statutes (2nd Edn.) 232, 235, 243, 283, 312.]

Cases referred to:

(1) *Kirkness* v. *Hudson* (*John*) *& Co., Ltd.*, [1955] 2 All E.R. 345; [1955] A.C. 696; 36 Tax Cas. 28, 57; 3rd Digest Supp.

(2) *Thomas Fattorini* (*Lancashire*), *Ltd.* v. *Inland Revenue Comrs.*, [1942] 1 All E.R. 619; [1942] A.C. 643; 111 L.J.K.B. 546; 167 L.T. 45; 24 Tax Cas. 328; 2nd Digest Supp.

(3) *Howard de Walden* (*Lord*) v. *Inland Revenue Comrs.*, [1948] 2 All E.R. 825; 30 Tax Cas. 345; 2nd Digest Supp.

(4) *London County Council* v. *A.-G.*, [1901] A.C. 26; 70 L.J.Q.B. 77; 83 L.T. 605; 65 J.P. 227; 4 Tax Cas. 265; 28 Digest 73, *392*.

Appeal.

Appeal by the Crown from an order of the Court of Appeal (Jenkins, Parker and Pearce, L.JJ.), dated Oct. 4, 1957, and reported [1957] 3 All E.R. 314, affirming an order of Harman, J., dated July 16, 1957, and reported [1957] 3 All E.R. 147, on an appeal by the taxpayer against a direction and apportionment made by the Special Commissioners of Income Tax on Mar. 11, 1955,

* The terms of these sub-sections are printed at p. 57, letter I, and p. 58, letter D, post.

† The terms of s. 245 and s. 255 (3) are printed at p. 58, letters E to H, post.

under the Income Tax Act, 1952, s. 245 and s. 248. The facts appear in the speech of LORD REID, p. 56, post. A

Sir John Senter, Q.C., E. Blanshard Stamp and *A. S. Orr* for the Crown.

Heyworth Talbot, Q.C., P. Shelbourne and *M. P. Nolan* for the taxpayer company.

Their Lordships took time for consideration. B

Dec. 18. The following opinions were read.

VISCOUNT SIMONDS: My Lords, I am so fully in agreement with the opinion of my noble and learned friend, LORD KEITH OF AVONHOLM, that I can be very brief in stating my own views. Nor shall I occupy your Lordships' time in stating the many sections of the Income Tax Act, 1952, to which reference was made in the course of the argument. The Act contains over five hundred sections and twenty-five Schedules. A considerable number of them were relied on by one side or the other. The question is, in fact, a very short one. It is whether the amount in respect of which a so-called balancing charge was properly made on the respondent company under s. 292 (1) and s. 323 (4) of the Act was part of its actual income from all sources for the relevant period within the meaning of s. 245 of the Act. If so, that amount was apportionable among the members of the respondent company and the apportionment made by the Special Commissioners was properly made. But it has been held by HARMAN, J., on a Case Stated by the commissioners and, for different reasons, by the Court of Appeal that the amount in question ought not to be regarded as part of its actual income for the period in question. C D E

The argument was twofold: first, as was held by the Court of Appeal, that no statutory enactment provided that the amount on which the balancing charge was assessed should be deemed to be income of the company for income tax purposes; and, secondly, that, in any case, it was not part of the actual income of the company from all sources. If the first argument prevailed, the second argument was unnecessary; it was not suggested that the amount in question could be actual income of the company if it was not income at all. F

My Lords, it appears to me that the construction placed by the Court of Appeal on the relevant sections of the Act is too narrow. The purpose of the balancing charge is not in doubt. I respectfully adopt the language of my noble and learned friend, LORD MORTON OF HENRYTON, in the recent case of *Kirkness* v. *John Hudson & Co., Ltd.* (1) ([1955] 2 All E.R. 345 at p. 353): G

> " Conversely, if the moneys received on the sale were in excess of the written-down value of the asset, a ' balancing charge ' was imposed, in order to restore to the public revenue the amount by which the past allowances were shown to have been excessive."

The allowances were made in respect of the computation of profits or gains for purposes of income tax, the part of the public revenue affected was that which was derived from income tax and the balancing charge is made in order to restore to that tax an amount by which it has been mistakenly reduced. Call it notional or artificial or what you will. It is an amount which, for the purpose of income tax, is as truly part of the subject's income as is, for instance, the notional or artificial amount which is under Sch. A* regarded as his income. My noble and learned friend, LORD KEITH OF AVONHOLM, will exhaustively examine the relevant sections. I hope, therefore, I may not be thought to be wanting in respect to those who take a different view, if I say that, in my opinion, the solution of the problem lies in remembering that, in the Act, the word " income " has a special meaning, namely, a sum which is by the Act charged to income tax and measured in accordance with its provisions and that, specifically, where Case I of Sch. D is in question " profits and gains " is an expression H I

*Income Tax Act, 1952, s. 82, Sch. A.

A synonymous with "income". It is because the amount, on which the balancing charge is assessed, falls within that Case that it is brought into charge as income. I do not wish to elaborate what my noble and learned friend will say, but I cannot refrain from observing on the incongruity of the conclusion to which, in the case of a company, the Court of Appeal has come with the result in the case of an individual trader. His surtax liability appears to be concluded B by s. 524 (4) of the Act. I agree, too, that no little weight should be attached to the language of s. 270 (6) (c). In that sub-section quite naturally, and, in my opinion, rightly, that "which is the subject of a balancing charge under this Chapter" is called "income". So, in my opinion, it is for all the purposes of the Act. But it remains to determine whether it is "actual" income within s. 245. This expression is defined in s. 255 (3). I do not think it necessary to C look beyond its terms. It clearly has a purely temporal significance; it means income as defined, computed, and measured by the Act but by reference to a particular period. That is in accordance with what LORD ATKIN said in *Thomas Fattorini (Lancashire), Ltd.* v. *Inland Revenue Comrs.* (2) ([1942] 1 All E.R. 619), and it is, perhaps, permissible to add that, if it means anything else, there is no guide to what it does mean.

D I would only add that I agree with the observations of my noble and learned friend, LORD MORTON OF HENRYTON, on what LORD UTHWATT said in *Lord Howard de Walden* v. *Inland Revenue Comrs.* (3) ([1948] 2 All E.R. 825).

I would, therefore, allow this appeal but, as I understand that the majority of your Lordships think otherwise, it must be dismissed.

E **LORD MORTON OF HENRYTON:** My Lords, the parties in this case agree—(i) that a "balancing charge" was properly made on the respondent company under s. 292 and s. 323 (4) of the Income Tax Act, 1952; (ii) that "the amount on which the balancing charge is made" was correctly computed, under the same provisions of that Act, at the sum of £18,675; (iii) that, on the true construction of the Act, once the amount on which the balancing charge is made has been ascertained, the balancing charge is income tax on that amount F at the appropriate rate. The one question which remains for decision is whether the sum of £18,675 already mentioned is, or is not, part of the "actual income from all sources" of the respondent company for the relevant period, within the meaning of s. 245 of the Act. If this question is answered in the affirmative, it follows that a direction and apportionment has been properly made under s. 245, with the result that the members of the company are liable to pay any G appropriate amount of surtax on the sums apportioned to them respectively.

Counsel for the company submitted, first, that the £18,675 was not "income" of the company within the meaning of s. 245, and, secondly, that, if this sum could properly be described as income, it was not *actual* income within the meaning of the section.

My Lords, I would accept counsel's first submission.

H I have had the pleasure of reading the speech which is about to be delivered by my noble and learned friend, LORD REID. I entirely agree with his reasoning and conclusion, and I shall only add some observations on certain passages in speeches delivered in this House which were much discussed in the course of the argument. In *Thomas Fattorini (Lancashire), Ltd.* v. *Inland Revenue Comrs.* (2) ([1942] 1 All E.R. 619 at p. 626), LORD ATKIN said:

I

> "Actual income does not mean the specific receipts that come in from time to time, but the 'income-tax income' as calculated at the end of the year of assessment. To hold otherwise would make nonsense of the section when applied to commercial companies, who use their receipts as soon as they come in, and hardly ever have left for distribution the actual incomings as sought to be defined in the argument."

In *Lord Howard de Walden* v. *Inland Revenue Comrs.* (3) ([1948] 2 All E.R. 825 at p. 831), LORD UTHWATT said:

" My Lords, for myself I am content to take the view that in light of the context the words ' actual income ' can mean only income which is in some real sense capable of distribution. Apart from that context, indeed, the phrase ' actual income ' is hardly apt to include fictional income, and non-existent income composed of amounts deemed to be income is fictional income."

In each case these observations were directed to the words " actual income " in s. 21 of the Finance Act, 1922, but the wording of that section does not differ in any material particular from the wording of s. 245 in the Income Tax Act, 1952, and para. 6 of Sch. 1 to the Finance Act, 1922, is reproduced in s. 255 (3) of the Act of 1952.

My Lords, when LORD ATKIN, in *Fattorini's* case (2), used the words which I have just quoted, he was dealing with an argument which had been pressed on the House by counsel for the appellant, and he was concerned only to reject the contention that " actual income " meant the specific receipts of the company. It would not be right to construe his words as an expression of opinion that every sum on which income tax is payable is necessarily " actual income " within the meaning of the section, and, unless his words can be so construed, they do not assist the argument of counsel for the Crown in the present case. In the *Howard de Walden* case (3), LORD UTHWATT was dealing with a contention that where actual income from all sources of company No. 1 is attributed to company No. 2 as the result of an apportionment, that attributed income is part of the actual income from all sources of company No. 2, so that it could be further apportioned, under s. 21 of the Finance Act, 1922, to the shareholders of company No. 2. In rejecting that contention he pointed out, as did ASQUITH, L.J., in the Court of Appeal, that, if the contention were right, s. 32 of the Finance Act, 1927, which provides for such sub-apportionment, would have been unnecessary. I do not think it would be right to treat the words of LORD UTHWATT which I have quoted, as amounting to a decision on any question wider in its scope than the question with which he was dealing, and it is noteworthy that he did not refer in his speech to the provisions as to computing the " actual income " which were then contained in para. 6 of Sch. 1 to the Finance Act, 1922, and are now in s. 255 (3) of the Income Tax Act, 1952.

I would dismiss the appeal.

LORD REID: My Lords, the respondent company carried on business as wholesale grocers until Apr. 28, 1951. On that date it sold its business and ceased to trade. Then, on Apr. 16, 1952, it went into voluntary liquidation. On Mar. 11, 1955, the Special Commissioners of Income Tax, in pursuance of s. 245 of the Income Tax Act, 1952, directed that, for the purposes of assessment to surtax, the actual income of the company from all sources for the period Apr. 30, 1950, to Apr. 16, 1952, should be deemed to be the income of the members of the company. It is admitted that the commissioners were entitled to give that direction for that period. On the same day, Mar. 11, 1955, the commissioners, in pursuance of s. 248 (1) of the Act, apportioned the actual income of the company for that period among the members. They determined the amount of the actual income to be apportioned as £76,264. No objection is taken to the method of apportionment. The sole question in this appeal is whether the commissioners were entitled to take that sum as the actual income of the company for that period. That sum includes a sum of £18,675 and the company contends that this sum was not part of the actual income of the company within the meaning of s. 245 of the Act, and that the commissioners were, therefore, only entitled to apportion among the members the sum of £57,589. The company's contention was upheld by the Commissioners for the Special Purposes of the Income Tax Acts, who, accordingly, on Apr. 23, 1957, reduced the amounts apportioned to a total of £57,589. An appeal by the Crown was dismissed by HARMAN, J., and a further appeal was dismissed by the Court of Appeal on Oct. 4, 1957.

The sum of £18,675 is the amount on which a balancing charge was made on the company under s. 292 and s. 323 of the Act in respect of its sales of plant and machinery on its ceasing to carry on business. It is admitted that this sum was correctly calculated and that the company was properly assessed in respect of it. The question whether a sum on which a balancing charge is made is, or is not, part of " actual income " depends on the proper interpretation of the sections of the Act which deal with those matters; but it will, I hope, make my subsequent observations rather more intelligible if I first try to indicate in outline the apparent purpose of the Act in providing for balancing charges.

Before 1945, there was statutory provision for allowances for depreciation of wear and tear of plant and machinery under r. 6 of the Rules applicable to Cases I and II of Sch. D. If one assumes values in money remaining stable, the amount of the allowances on any item ought to be such that, when the trader comes to sell it, the price which he receives is equal to the price which he paid for it less the aggregate amount of the allowances which he has received in respect of it. If, on selling the item, he receives more than that amount then, neglecting the effect of inflation, it could be said that the allowances made to him had been too large, and, as these allowances had been deducted year by year before assessment of his trading profits, he had, therefore, paid too little in income tax. Before 1945, there was no provision in the Income Tax Acts which enabled the Revenue to recover anything from the trader when the price which he received on the sale of an item showed that the trader had benefited in the past at the expense of the Revenue by having been granted too large allowances. And, in the converse case, where the price received on sale showed that past allowances had been too small, there was no provision to enable the trader to receive a further allowance. To put this right was clearly one of the objects of the elaborate code enacted in the Finance Act, 1945, and now set out in Part 10 of the Act of 1952. " Balancing charges " were introduced to meet the case where the trader had received too large allowances in the past, and " balancing allowances " were introduced to meet the converse case. The provisions of the Act of 1952 are so elaborate that the scheme may appear more clearly if I only quote those parts of the sections which appear to me to be directly relevant in the present case. Balancing charges and allowances are first dealt with in s. 292, which provides:

> " (1) Subject to the provisions of this section, where any of the following events occurs in the case of any machinery or plant in respect of which an initial allowance or an annual allowance has been made for any year of assessment to a person carrying on a trade, that is to say, either—(a) the machinery or plant is sold, whether while still in use or not . . . and the event in question occurs before the trade is permanently discontinued, an allowance or charge (in this Chapter referred to as ' a balancing allowance ' or ' a balancing charge ') shall, in the circumstances mentioned in this section, be made to, or, as the case may be, on, that person for the year of assessment in his basis period for which that event occurs . . .
>
> " (2) Where there are no sale, insurance, salvage or compensation moneys or where the amount of the capital expenditure of the person in question on the provision of the machinery or plant still unallowed as at the time of the event exceeds those moneys, a balancing allowance shall be made, and the amount thereof shall be the amount of the expenditure still unallowed as aforesaid, or, as the case may be, of the excess thereof over the said moneys.
>
> " (3) If the sale, insurance, salvage or compensation moneys exceed the amount, if any, of the said expenditure still unallowed as at the time of the event, a balancing charge shall be made, and the amount on which it is made shall be an amount equal to the excess or, where the said amount still unallowed is nil, to the said moneys . . ."

Sub-section (4) then provides that in no case shall the amount on which a balancing charge is made exceed the aggregate of the allowances previously made to him in respect of the machinery or plant sold.

That section determines the amount on which a balancing charge is to be made. The way in which a balancing charge or a balancing allowance is made is provided by s. 301 (1) and s. 323, of which the relevant parts are as follows:

" 301.—(1) Any allowance or charge made to or on any person under the preceding provisions of this Chapter shall . . . be made to or on that person in charging the profits or gains of his trade.

" 323.—(1) Any claim by a person for an allowance falling to be made to him under any of the provisions of this Part of this Act in charging the profits or gains of his trade shall be included in the annual statement required to be delivered under this Act of the profits or gains thereof, and the allowance shall be made as a deduction in charging those profits or gains.

" (4) Any charge falling to be made under any of the provisions of this Part of this Act on a person for any year of assessment in charging the profits or gains of his trade shall be made by means of an assessment on the profits or gains of that trade for that year of assessment in addition to any other assessment falling to be made thereon for that year."

I must now set out s. 245 of the Act under which the commissioners gave their direction, and s. 255 (3) which deals with the manner of computation of the actual income of the company—the question at issue in the present case. Those sections are as follows:

" 245. With a view to preventing the avoidance of the payment of surtax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted that where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period for which accounts have been made up, distributed to its members, in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of surtax, a reasonable part of its actual income from all sources for the said year or other period, the commissioners may, by notice in writing to the company, direct that, for purposes of assessment to surtax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members, and the amount thereof shall be apportioned among the members.

" 255.—(3) In computing, for the purposes of this Chapter, the actual income from all sources of a company for any year or period, the income from any source shall be estimated in accordance with the provisions of this Act relating to the computation of income from that source, except that the income shall be computed by reference to the income for such year or period as aforesaid and not by reference to any other year or period."

With regard to the meaning of the phrase " actual income from all sources " counsel referred to *Thomas Fattorini (Lancashire), Ltd.* v. *Inland Revenue Comrs.* (2) ([1942] 1 All E.R. 619), and *Lord Howard de Walden* v. *Inland Revenue Comrs.* (3) ([1948] 2 All E.R. 825). But the circumstances in those cases were quite different from those in the present case and I can get little assistance from what was said by LORD ATKIN in the former case and by LORD UTHWATT in the latter case. It appears to me that, in the present case, I must take s. 255 (3) and determine whether, in making a computation of the actual income of the company from all sources in the manner there directed, the sum subject to the balancing charge does, or does not, fall to be included. If it does, then the Crown succeed, but if it does not, then this appeal must be dismissed.

Nothing turns in this case on the last part of this sub-section, but this part of the sub-section may afford an explanation of the choice of the word " actual " in the phrase " actual income " in this sub-section and in s. 245. This sub-section was originally para. 6 of Sch. 1 to the Finance Act, 1922, which, by s. 21, first enacted the provisions which now form s. 245 of the Act of 1952. In 1922, trading profits were still computed on a three years average, and the last part of para. 6 then read:

> " except that the income shall be computed by reference to the income for such year or period as aforesaid and not according to an average of more than one year or by reference to any year or period other than such year or period as aforesaid."

So it is possible that the phrase " actual income " was there used to emphasise the fact that the income to be considered under s. 21 was the income for a particular year and not income computed on a three years average. But, whether that be so or not, s. 255 (3) in effect provides a definition of what is meant by " actual income "; it directs how actual income is to be computed and, in my opinion, nothing can be included in actual income unless it can be brought within the words

> " income from any source . . . estimated in accordance with the provisions of this Act relating to the computation of income from that source . . ."

It was argued for the Crown that the sum made subject to the balancing charge was income and that its source was the trade carried on by the company. Even if that were so, the question would still arise—Was this sum income estimated in accordance with the provisions of this Act relating to the computation of income from the company's trade? The ordinary provisions relating to the computation of trading income are those which relate to Sch. D, Case I, and they have nothing to do with balancing charges. So it appears to me that the question then is this—Can the provisions of s. 292, s. 301 and s. 323 properly be regarded as provisions of the Act relating to the computation of income from trade? I do not wish to overstress what has so often been said in this House to the effect that no tax can be imposed on a subject without words in an Act clearly showing an intention to lay a burden on him. If it appears by clear implication that the provisions of these sections should be so regarded, that would, I think, be sufficient and I shall, therefore, turn back to these sections to consider whether their terms afford sufficient ground for any such implication.

Section 292 deals with the computation of the sum on which a balancing charge is to be made. Three things are to be taken into account in the case of a sale of plant or machinery—the price originally paid for it, the price received for it on sale, and the aggregate of past allowances made in respect of it. The original cost less the past allowances is the " expenditure still unallowed ". The sum made subject to the balancing charge is not in any normal sense income. The machinery or plant with reference to which it is calculated was a capital asset, and the cost of aquiring it was capital expenditure. So far as I can see, the only way in which the sum made subject to the balancing charge is related to income in the ordinary sense is that it represents a part, or it may be the whole, of the allowances made in past years, and that, in those years, those allowances were brought in as deductions after profits had been computed so as to reduce the trader's taxable income. So it has a relation to the trader's taxable income in past years but no relation to his " actual income " for the year in question. This section does not provide expressly or by clear implication that the sum on which a balancing charge is made is to be deemed to be, or to be treated as, a trading receipt, nor does it provide that it is to be part of, or to be aggregated with, the trading income for the year in question. So far as this section is concerned, this sum is left to stand by itself. This is in striking contrast with the provisions of s. 337, which deals with a comparable matter, the sale of an asset representing

scientific research expenditure of a capital nature. There it is provided, by sub-s. (2) (b), that, if the proceeds of sale plus the allowances exceed the original cost, the excess or the amount of the allowances, whichever is the less, " shall be treated as a trading receipt of the trade accruing at the time of the sale ". That provision was first enacted by the Finance Act, 1944, s. 29, and it was, therefore, before the eyes of the draftsman and of Parliament when balancing charges were first introduced.

The other two sections on which the argument for the Crown was chiefly founded are s. 301 and s. 323. They must, I think, be taken together. They deal not with computation but with the method of assessment of the balancing charge. The former provides that the charge is to be made in charging the profits or gains of the trade and this is expanded by s. 323 (4), which provides that it is to be made by means of an assessment on the profits and gains and that this assessment is to be in addition to any other assessment thereon for the year. To my mind, the question is whether these sections clearly designate the sum made subject to the balancing charge as part of the trading income for the year in question, or whether they merely provide, as a matter of machinery, that the balancing charge shall be charged and assessed as if it was a charge on that trading income. It is, I think, of some importance that the assessment, by means of which the charge is made, is to be separate from the assessment in respect of trading profits. If it was intended that the sum made subject to the balancing charge should be treated for all purposes as part of the trading income for the year in question, counsel were unable to suggest any reason why there should be this double assessment and no reason occurs to me. Indeed, it would rather seem that the draftsman has deliberately avoided anything that could suggest that sums made subject to balancing charges are part of trading income for the year in question.

Then an argument was founded on s. 1 of the Act. This section links the annual Finance Acts with the Income Tax Act by providing that tax at the rates there enacted shall be charged for each year in respect of all property profits or gains described or comprised in the Schedules. It was argued that, unless the sum made subject to a balancing charge could be said to be described or comprised in Sch. D—it could not be in any other Schedule—then no tax on it could be recovered. So it was said that the intention must have been to make this sum a part of the trading income for the year in question—the only way in which it could become comprised in Sch. D. I am not at all satisfied that that is so. I think that a sufficient link between a balancing charge and the annual Finance Acts could be found in the provisions of s. 323 (4) that the charge shall be made by means of an assessment on the profits or gains of the trade for that year. An assessment for a particular year can only be at the rates enacted in the current Finance Act. And if the intention was, not to enact that the sum made subject to a balancing charge is to be deemed to be income for all purposes, but merely to enact that, for the particular purpose of this assessment, it should be treated as if it were trading income of the year in question, then I think that those provisions were appropriate for that purpose.

Then it was argued that anything made subject to income tax must necessarily be income for all purposes of the Act. Reference was made to the familiar passage in LORD MACNAGHTEN'S speech in *London County Council* v. *A.-G.* (4) ([1901] A.C. 26 at p. 35) beginning:

> " Income tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else."

No doubt that was so in 1901. Apart from Sch. A, everything that was taxed at that date was income in the ordinary sense, and if a landowner, instead of drawing income from rent, occupied his own property, he was enjoying money's worth of an income character. But now income tax is sometimes meant to be a tax on something which is not income. For example, s. 318 charges income tax in

A certain circumstances on capital sums received for the sale of patent rights, and it does so by making such sums chargeable under Case VI of Sch. D.

I do not think that much can be inferred from any general statement equating sums charged to income tax with income. For some purposes it may be convenient and not incorrect to do this. Counsel for the Crown attached importance to the fact that s. 270 (6) (c) refers to " income which is the subject of a balancing B charge under this Chapter ". The context there is that certain allowances are to be available primarily against " the following income ", and then there are specified incomes taxed under Sch. A, and certain income taxed under Sch. D, Case VI. This appears to be the only place in the Act where the word " income " is used in connexion with sums made subject to balancing charges. The word appears to me to be used here as mere description, and to signify no more than C that the sums in question are chargeable to income tax. But, even if the use of the word " income " in this rather unimportant sub-section had some general significance, it would not go to the real point in this case. The question in this case is not whether a sum made subject to a balancing charge is income in some general sense but whether it is actual income within the meaning of s. 245 and s. 255 (3). After a close examination of all the sections relied on, in light of the D argument submitted for the Crown, I can find nothing sufficient to bring sums made subject to a balancing charge within the scope of the term " actual income " in s. 245.

My Lords, I fear that I have taken up much time with technical argument. I have done so because income tax is a highly technical subject. But, if I took a broader view of the case, I should reach the same result. Under s. 245, it is the E commissioners' duty to determine whether the company has within a reasonable time distributed to its members a reasonable part of the income to which the section applies. One would, therefore, expect the section to apply to income which is, in fact, capable of distribution, and this expectation would be confirmed by the fact that the section purports to deal with " actual income ". It is true that, when one comes to s. 255 (3), one finds that, by its terms, actual income can F include some items which, although they are income in the sense in which LORD MACNAGHTEN used the word, are not money in the hands of the company capable of immediate distribution. But it is a long step from that to find that the section also includes in actual income a new kind of subject which was not chargeable to income tax when the section was first enacted, and which is not income in any ordinary sense of the word. Of course, if Parliament has made it clear that the G section is to apply, then the section must be applied, though it is not easy to see how the commissioners, acting reasonably as they must, could take such a sum into account in carrying out their duty under the section to consider whether a reasonable part has been distributed. This novel kind of " income " has been made chargeable to income tax, no doubt for good reasons. But I would not think that that fact raises any presumption that s. 245 also applies to it. Regard- H ing the whole matter in this way, far from finding any clear indication of an intention to bring these sums within the scope of s. 245, I would not find it possible to reach that result without devious and dubious argument. I am, therefore, of opinion that this appeal should be dismissed.

LORD KEITH OF AVONHOLM: My Lords, we are concerned here with I a direction and apportionment made by the Special Commissioners under s. 245 and s. 248 of the Income Tax Act, 1952, with reference to undistributed income of the respondent company, which went into voluntary liquidation on Apr. 16, 1952. Much discussion has centred on the meaning of " actual income " in these sections. In my opinion, " actual " here has a temporal significance and relates to income from all sources for the year or period to which the direction relates and not to income computed by reference to any other year or period. This, I think, is clear from the language of s. 255 (3) of the Act. The accounts of the company since Apr. 29, 1950, had not been certified by the company's auditors prior to the

liquidation, and it is common ground that the relevant period under consideration is Apr. 29, 1950, to Apr. 16, 1952, by reason of the terms of s. 253 of the Act. Under that section, the income of the company for that period is, for the purposes of s. 245, deemed to be income available for distribution to the members of the company.

The short question in the case is whether money received by the company from the sales of certain plant and machinery in excess of the written-down value from allowances previously given for purposes of tax is income of the company for the relevant period within the meaning of s. 245 and s. 253 of the Act. The company sold its business and ceased trading on Apr. 28, 1951. The plant and machinery was sold on the cessation of its business. It is common ground that, in respect of this sale, a balancing charge falls to be made on the sum of £18,675 under the provisions of s. 292, s. 301 and s. 323 of the Act of 1952. The year of assessment for the balancing charge is fixed by reference to the company's " basis period " for which the event occurred, in this case Apr. 6 to Apr. 28, 1951.

My Lords, it would seem that the income of the company from all sources means income of the company from any source brought into charge for income tax under the Act of 1952. The only source suggested in the present case is the trade of the company, the profits or gains of which are brought into charge under Sch. D. The Revenue say the subject-matter of the balancing charge, viz., £18,675, is such a profit or gain. The company say it is not. This sum represents excess allowances that have been given to the company in previous years under the provisions of the Act of 1952, or previous Acts, including the Income Tax Act, 1918, making to traders allowances in respect of the capital cost of machinery and plant and which were given as deductions from profits and gains brought into charge for tax. Under the Act of 1918, no provision was made for recoupment to the Revenue if it should ultimately be found, on sale of an asset or otherwise, that an excessive allowance had been made, whereas under the present Act provision is made for such a case, in the shape of a balancing charge, and also, where it is found that too small an allowance has been given to the trader in past years, for giving him further relief in the shape of a balancing allowance. Section 292 of the Act is the section that provides the measure for computing the amount of the balancing allowance or the amount on which a balancing charge falls to be made. This section has been previously considered in this House and elsewhere, and I find it unnecessary to examine its provisions in further detail. It is agreed that the sum subject to the balancing charge, viz., £18,675, has been correctly computed. I would refer, however, to what have been called the relevant charging provisions of the Act, though they might more appropriately be called the relieving and charging provisions. Section 301 (1) says:

> " Any allowance or charge made to or on any person under the preceding provisions of this Chapter shall . . . be made to or on that person in charging the profits or gains of his trade."

Section 323 (1) provides:

> " Any claim by a person for an allowance falling to be made to him under any of the provisions of this Part of this Act in charging the profits or gains of his trade shall be included in the annual statement required to be delivered under this Act of the profits or gains thereof, and the allowance shall be made as a deduction in charging those profits or gains."

Sub-section (2) provides for carrying forward the allowance or part thereof to succeeding years where the profits or gains of a year are insufficient to permit full effect being given to the deduction. Sub-section (4) reads:

> " Any charge falling to be made under any of the provisions of this Part of this Act on a person for any year of assessment in charging the profits or gains of his trade shall be made by means of an assessment on the profits or

A gains of that trade for that year of assessment in addition to any other assessment falling to be made thereon for that year."

I pause at this point to ask what is there that fixes the rate at which the balancing charge falls to be made on the profits or gains of the trade? There is nothing in the Act that fixes the rate expressly. It is, however, common ground that the B rate is the standard rate of income tax for the basis period. I see no way of bringing in that rate except through s. 1 of the Act which applies the rate of income tax fixed by any Act for any year to all property, profits or gains of that year comprised in the Schedules to the Act of 1952. It is hardly necessary to refer to repeated observations in this House and elsewhere that income tax is a tax on income. If a balancing charge is to be regarded as a tax on income, it is a C short step to take, to regard the amount on which it is levied as income arising, in the present case, from a transaction in the course of trade. If it is not income within one or other of the Schedules to the Act, I can see no authority for levying any rate of income tax on the amount computed as subject to a balancing charge. It is said that a change has taken place in the outlook of income tax legislation and that all receipts which are subject to tax are not necessarily income receipts. D It is true that a somewhat exceptional course seems to have taken place under s. 318 of the Act in the case of the sale of patent rights for a capital sum. But a particular exception in the case of so special a matter as the sale of patent rights does not, in my opinion, detract from the general principle to which I have referred.

The scheme generally of the relevant statutory provisions seems to me to be to E allow to be charged against the revenue side of a trading account depreciation in respect of wear and tear of capital assets, and on the sale or otherwise of these assets either to restore to revenue what has been found to have been unnecessarily charged for depreciation or to allow a further charge against revenue if it is found that insufficient depreciation has been allowed. I should not have thought that this would be contrary to sound commercial and accountancy principles, but, F whatever may be commercial or accountancy practice, I think the object of the Act was to secure that the subject-matter of the balancing charge should be treated as an income profit subject to tax and not as a capital profit free from tax. If this be so, then the sum of £18,675 should properly be regarded as a receipt credited to revenue, though arising out of a capital transaction, and, as it would go to increase the profits and gains of the trade and arise out of the trade, it G should form part of the income of the company for the purposes of s. 245.

The weight of the argument for saying that this sum is not such income seems to rest on the language of s. 323 (4), which levies the balancing charge by an assessment on profits and gains additional to any other assessment on the profits and gains. Any other assessment would include income tax under Sch. D. Therefore, so the argument would seem to run, this sum cannot be income from any H source recognised as giving rise to a liability to income tax under the Act. This I find difficult. The more natural meaning, in my opinion, is that this is a supplementary assessment of the same nature and origin as the tax levied under Sch. D and imposed because the subject-matter of the charge is regarded as an addition to the profits or gains of the trade. Thus we find a reason, difficult otherwise to explain, for fixing the rate of charge at the appropriate income tax rate for the I basis period. Moreover, the balancing charge cannot be considered without reference to its correlative the balancing allowance. The balancing allowance has the effect of reducing the amount of profits and gains brought into charge for tax. Is it to be said that the income of a company for the purposes of s. 245 are the profits and gains before deduction of the balancing allowance? I think not. But the balancing allowance proceeds from the same kind of transaction as may give rise to a balancing charge. The considerations, in my opinion, are the same in each case. The balancing allowance results in a reduced assessment. In the

case of a balancing charge, an extra assessment is made, and the result is the same as if a single assessment was made on the sum of the profits and gains plus the amount brought in as subject to a balancing charge. What has been allowed unnecessarily as a deduction from profits and gains for the purposes of tax is to be subject to the same kind of tax when brought back into account. In my opinion, the sum here in question is just an additional profit or gain of the company subject to tax under Sch. D to the Act. A B

I derive little assistance from various other sections of the Act which were referred to in the course of the hearing, and find in them nothing to militate against the view I have expressed. Some reliance was placed by the company on s. 337 of the Act, inasmuch as it expressly provides that certain proceeds from the sale of an asset representing scientific research expenditure of a capital nature shall be treated as a trading receipt of the trade. This argument I find somewhat double edged. In any event, the section finds place in a separate part of the Act, Part 11, devoted to " Relief for Expenditure on Scientific Research ", and I should hesitate to draw any inference from Part 11 in considering the effect of Part 10 of the Act. Of greater significance, in my opinion, is the reference in s. 270 (6) (c) to " income which is the subject of a balancing charge under this Chapter ", which appears in the same Part of the Act as that covering allowances in respect of machinery and plant. Section 270 appears in Chapter 1 of Part 10 of the Act but Chapters 1, 2 and 3 of Part 10 are all modelled on the same pattern, and bring in balancing allowances and balancing charges which, in principle, differ in no material respect in any one of these chapters. The separation into Chapters is due to the different nature of the assets dealt with and leads to the same results in each case. C D E

Lastly, it may be noted that, where an individual trader has been assessed to tax at the standard rate for any year of assessment, the assessment will be final and conclusive, under s. 524 (4) of the Act, in estimating his total income. This would seem to be conclusive as to his surtax liability. It would be at least strange that, where an individual's surtax liability emerged through his interest as a shareholder in a trading company under the surtax provisions of Part 9 of the Act, a different result should be reached. F

On all considerations, I am of opinion that the determination of the commissioners is wrong and that the appeal should be allowed.

LORD SOMERVELL OF HARROW: My Lords, I agree with the opinions of my noble and learned friends, LORD MORTON OF HENRYTON and LORD REID. I would dismiss the appeal. G

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue* (for the Crown); *Simmons & Simmons*, agents for *March, Pearson & Green*, Manchester (for the taxpayer company).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

BARCLAYS BANK, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[Chancery Division (Danckwerts, J.), December 5, 9, 17, 1958.]

Estate Duty—Company—Shares—Valuation—Control of company—Shares held by deceased in fiduciary capacity—Whether permissible to look beyond company's articles and register—Finance Act, 1940 (3 & 4 *Geo.* 6 *c.* 29), *s.* 55 (1) (*a*), (3) (*a*).

The issued share capital of a company consisted of 8,350 ordinary shares of £1 each. The estate of the deceased, who died on Dec. 15, 1955, included 1,100 shares of the company, and 3,650 shares were the subject of a settlement made by the deceased in 1936. The deceased took no beneficial interest under the settlement, but he had been a trustee thereof since 1936 until his death. The shares were registered in the company's register of members in the names of the deceased and the other three trustees, and the deceased's name appeared first of the four registered holders. By the company's articles of association, on a poll every member had one vote for each share of which he was the holder, and, in the case of joint holders, the vote of the senior who tendered a vote was to be accepted to the exclusion of the votes of the other joint holders, seniority for this purpose being determined by the order in which the names stood in the register of members. On a summons by the executors to determine whether the principal value of the 1,100 shares comprised in the deceased's estate should be estimated, for the purposes of estate duty, in the manner prescribed by the Finance Act, 1894, s. 7 (5), or in the manner prescribed by the Finance Act, 1940, s. 55*, which would apply if the deceased had control of the company at any time during the five years ending with his death,

Held: the method of valuation prescribed by s. 55 of the Finance Act, 1940, did not apply for the following reasons—

(i) the present case being concerned with death duties on the deceased's estate, not with taxation of a company's profits, it was permissible for the purpose of ascertaining whether the deceased had control of the company to look beyond the company's register of members, particularly as provisions of the Act of 1940 (viz., s. 55 (5) and s. 58 (5)) contemplated an examination of the position of a shareholder beyond what the register might show, and

(ii) looking, therefore, beyond the register of members, and having regard to the fact that the deceased, as a joint shareholder, was one of four trustees and was not absolute owner of the shares jointly held by the trustees, the deceased had not had the "control of the company" within s. 55 (1) (a) of the Act of 1940.

British American Tobacco Co., Ltd. v. *Inland Revenue Comrs.* ([1943] 1 All E.R. 13) and *Inland Revenue Comrs.* v. *Bibby & Sons, Ltd.* ([1945] 1 All E.R. 667) distinguished.

S. Berendsen, Ltd. v. *Inland Revenue Comrs.* ([1957] 2 All E.R. 612) considered.

[As to the valuation of shares, for purposes of estate duty, by reference to assets of company where deceased had control of company at any time during the five years ending with his death, see 15 Halsbury's Laws (3rd Edn.) 75, para. 154.

For the Finance Act, 1940, s. 55, see 9 Halsbury's Statutes (2nd Edn.) 483.]

Cases referred to:

(1) *B. W. Noble, Ltd.* v. *Inland Revenue Comrs.*, (1926), 12 Tax Cas. 911.

* The relevant provisions of s. 55 are printed at p. 67, letter D, post.

(2) *British American Tobacco Co., Ltd.* v. *Inland Revenue Comrs.*, [1943] 1 All E.R. 13; [1943] A.C. 335; 112 L.J.K.B. 81; 169 L.T. 98; 29 Tax Cas. 49; 2nd Digest Supp.

(3) *J. Bibby & Sons, Ltd.* v. *Inland Revenue Comrs.*, [1944] 1 All E.R. 548; 170 L.T. 370; *affd.*, H.L., sub nom. *Inland Revenue Comrs.* v. *Bibby & Sons, Ltd.*, [1945] 1 All E.R. 667; 114 L.J.K.B. 353; 173 L.T. 17; 29 Tax Cas. 167; 2nd Digest Supp.

(4) *Pulbrook* v. *Richmond Consolidated Mining Co.*, (1878), 9 Ch.D. 610; 48 L.J.Ch. 65; 9 Digest (Repl.) 465, *3038*.

(5) *Puddephatt* v. *Leith*, [1916] 1 Ch. 200; 85 L.J.Ch. 185; 114 L.T. 454; 9 Digest (Repl.) 431, *2800*.

(6) *John Sheilds & Co. (Perth), Ltd.* v. *Inland Revenue*, 1950 S.C. 441; 29 Tax Cas. 475; 2nd Digest Supp.

(7) *Inland Revenue Comrs.* v. *Silverts, Ltd.*, [1951] 1 All E.R. 703; [1951] Ch. 521; 2nd Digest Supp.

(8) *S. Berendsen, Ltd.* v. *Inland Revenue Comrs.*, [1957] 1 All E.R. 727; [1958] Ch. 1; *revsd.*, C.A., [1957] 2 All E.R. 612; [1958] Ch. 1; 3rd Digest Supp.

(9) *St. Aubyn* v. *A.-G.*, [1951] 2 All E.R. 473; [1952] A.C. 15; 3rd Digest Supp.

(10) *Liversidge* v. *Anderson*, [1941] 3 All E.R. 338; [1942] A.C. 206; 110 L.J.K.B. 724; 116 L.T. 1; 2nd Digest Supp.

Adjourned Summons.

By their originating summons dated Oct. 7, 1958, the plaintiffs, the executors of the will of Tom Shipside, deceased, asked for the determination under s. 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, of the following question: Whether on the true construction of the Finance Act, 1894, and amending Acts and, in particular, of the Finance Act, 1940, s. 55, the principal value of the 1,100 fully paid ordinary shares of £1 each in T. Shipside, Ltd. comprised in the estate of the deceased should be estimated for the purpose of payment of estate duty on his estate in respect of his death on Dec. 15, 1955, (a) in accordance with the provisions of s. 55 of the Finance Act, 1940, or (b) in accordance with the provisions of s. 7 of the Finance Act, 1894, or (c) in some other and, if so, what way.

B. L. Bathurst, Q.C., and *Denys B. Buckley* for the plaintiffs.

John Pennycuick, Q.C., and *E. Blanshard Stamp* for the Crown.

Cur. adv. vult.

Dec. 17. **DANCKWERTS, J.**, read the following judgment: Mr. Tom Shipside died on Dec. 15, 1955, and the plaintiffs are the executors of his will. The application is concerned with the method of valuation for the purposes of estate duty of 1,100 shares of £1 each in the capital of T. Shipside, Ltd., comprised in Mr. Shipside's estate. The question is whether these shares should be valued in accordance with s. 7 (5) of the Finance Act, 1894, or in accordance with the provisions of s. 55 of the Finance Act, 1940. If the latter method, which requires the value of the shares to be estimated by reference to the net value of the company's assets, is adopted, the burden of the estate duty will be increased. Put quite generally, the point is whether the deceased had at any time within the five years preceding his death control of the company within the meaning of s. 55 of the Act of 1940.

The company, which was incorporated under the Companies Acts, 1908 to 1917, at all material times had an issued capital of 8,350 ordinary shares. Plainly, the 1,100 shares above mentioned would not have given Mr. Shipside control of the company. But on Dec. 1, 1936, Mr. Shipside made a settlement by which he settled 3,650 fully paid ordinary shares in the company, and if these shares are to be added to the 1,100 shares, there would be a total of 4,750 shares, amounting to more than one-half of the issued share capital of the company. The trusts

of the settlement were for the benefit of Mr. Shipside's wife and children, and he took no beneficial interest under the settlement. Mr. Shipside and two other persons were the original trustees, and, as a result of an appointment made on Nov. 30, 1948 (when one of the original trustees retired), from that date until Mr. Shipside's death Mr. Shipside and three other persons were the trustees. The 3,650 shares were registered in the company's register of members in the names of the four trustees, and Mr. Shipside's name appeared first of the four registered holders of the shares. By art. 60* of Table A of 1908 (which was incorporated in the company's articles of association), on a poll every member has one vote for each share of which he is the holder, and under art. 61* of the same Table A:

> " In the case of joint holders the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders; and for this purpose seniority shall be determined by the order in which the names stand in the register of members."

It is necessary now to refer to the Finance Act, 1940. By s. 55 (1):

> " Where for the purposes of estate duty there pass, on the death of a person dying after the commencement of this Act, shares in or debentures of a company to which this section applies, then if—(a) the deceased had the control of the company at any time during the three [amended in 1946† to five] years ending with his death . . . the principal value of the shares or debentures, in lieu of being estimated in accordance with the provisions of s. 7 (5) of the Finance Act, 1894, shall be estimated by reference to the net value of the assets of the company in accordance with the provisions of the next succeeding sub-section."

Sub-section (2) provides for the estimation of the net value of the assets of the company in a certain manner. Sub-section (3) provides as follows:

> " For the purposes of this section a person shall be deemed to have had control of a company at any time if he then had—(a) the control of powers of voting on all questions, or on any particular question, affecting the company as a whole which if exercised would have yielded a majority of the votes capable of being exercised thereon . . . or if he could have obtained such control . . . by an exercise at that time of a power exercisable by him or with his consent."

Sub-section (5) provides:

> " Control of a company which a person had in a fiduciary capacity shall be disregarded for the purposes of this section."

Section 58 (5) provides:

> " References in this Part of this Act to a person having any power or control or doing any act in a fiduciary capacity shall be construed as references to his having that power or control or doing that act in a fiduciary capacity imposed on him otherwise than by a disposition made by him and in such a capacity only."

It was pointed out on behalf of the executors that trustees of a private trust can only exercise powers of a discretionary character on the unanimous decision of all the trustees, and if they cannot reach agreement they cannot exercise the power at all. Consequently it was argued that the deceased could not have exercised lawfully the right to vote in respect of the settled shares except under the authority of the decision of all four trustees, and he would be restrainable

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* Article 60 of Table A of the Companies Act, 1908, corresponds to art. 62 of Table A of the Companies Act, 1948, and art. 61 of the 1908 Table A corresponds to art. 63 of the 1948 Table A.

† By the Finance Act, 1946, s. 47, and Sch. 11, the words " five years " were substituted for " three years ", as respects persons dying after Apr. 9, 1946.

by injunction if he sought to disregard the wishes of his co-trustees. Therefore, in actual fact he had not control of the powers of voting in respect of the settled shares, and he had not control of the company. On behalf of the Commissioners of Inland Revenue, the principal contention was that it was not permissible in applying the Act to go behind the articles of association and the company's register, and, therefore, the deceased, by virtue of his registration as the first of the joint holders, and the provisions of art. 61 of Table A, had control of the company, and any obligations that he might owe to his co-trustees could be disregarded.

I was referred to a number of authorities, none of which was a decision in respect of s. 55 of the Finance Act, 1940. In *B. W. Noble, Ltd.* v. *Inland Revenue Comrs.* (1) ((1926), 12 Tax Cas. 911), the question arose on s. 53 (2) (c) of the Finance Act, 1920, relating to corporation profits tax, whether a director had " a controlling interest in the company ". The chairman of the directors held half the ordinary shares of the company, and was entitled, on equal division of opinion among the shareholders, to a casting vote. It was held that he had a controlling interest in the company. ROWLATT, J., said (12 Tax Cas. at p. 926) that " controlling interest " was a phrase which had a certain well-known meaning; it meant the man whose shareholding in the company was such that he was the shareholder who was more powerful than all the other shareholders put together in general meeting.

That case was approved by the House of Lords in *British American Tobacco Co., Ltd.* v. *Inland Revenue Comrs.* (2) ([1943] 1 All E.R. 13), which was a case concerned with the levying of national defence contribution under the Finance Act, 1937, on a body corporate. The relevant statutory provision* required inclusion in the body corporate's profits for this purpose of

> " all income received by way of dividend or distribution of profits from any other body corporate in which the first-mentioned body has a controlling interest and which is not liable to be assessed to the national defence contribution."

The conclusions of the House of Lords appear to have been (i) that the words " controlling interest " included not only direct control of the company which it was sought to tax, but also an indirect controlling interest, such as the holding of a controlling interest in another company which itself held a controlling interest in the company liable to be assessed to the national defence contribution; and (ii) that the holding of a bare majority of voting power in a company was, in general, sufficient to constitute " a controlling interest ", and it was not necessary to hold such a proportion of the shares as would secure the passing of a resolution for which a special majority was required.

The case on which the commissioners principally relied was *J. Bibby & Sons, Ltd.* v. *Inland Revenue Comrs.* (3) ([1944] 1 All E.R. 548, in the Court of Appeal, and [1945] 1 All E.R. 667, in the House of Lords). This was a case relating to excess profits tax under s. 13 (9) of the Finance (No. 2) Act, 1939, whereby the material question was whether the directors of the company had " a controlling interest therein ", that is, in the company. The directors held in their own right shares of the company which amounted to less than fifty per cent. of the ordinary share capital of the company. But three of the directors, who were brothers and the trustees of a marriage settlement of a sister, were the registered joint holders of 57,500 ordinary shares. The three brothers had a contingent beneficial interest under the settlement in the event of the death of their sister without issue. If these shares were added to the 209,332 shares held by the directors in their own right, they would amount to more than fifty per cent. of the company's five hundred thousand ordinary shares. The Court of Appeal held that, apart from the special case of a bare trustee, shares of the company owned by the

* The Finance Act, 1937, Sch. 4, para. 7 (b).

directors as trustees should be taken into account in ascertaining whether the directors had a controlling interest therein; and the House of Lords, without expressing an opinion on the case of a bare trustee, unanimously affirmed the order of the Court of Appeal.

Apart from the consideration that the decision of the House of Lords was dealing with a different statute, a distinguishing feature of that case is plainly the fact that the three directors were the only trustees of the settlement which comprised the shares, and so the decision lay with them as to the way in which the votes in respect of the settled shares should be cast. But reliance was placed on behalf of the Commissioners of Inland Revenue on the observations which their Lordships made in the course of their speeches. LORD RUSSELL OF KILLOWEN, after referring to the opinion of the Court of Appeal that, apart from the special case of a bare trustee, there was no half-way house between an interpretation which limited the expression to the case of beneficial ownership and one which included ownership by trustees, irrespective of the fact whether or not they also had some beneficial interest in the shares which gave control, said ([1945] 1 All E.R. at p. 669):

> " My Lords, I agree with the view of the Court of Appeal. When the section speaks of directors having a controlling interest in a company, what it is immediately concerned with in using the words ' controlling interest ' is not the extent to which the individuals are beneficially interested in the profits of the company as a going concern or in the surplus assets in a winding-up, but the extent to which they have vested in them the power of controlling by votes the decisions which will bind the company in the shape of resolutions passed by the shareholders in general meeting. In other words, the test which is to exclude a company's business from sub-s. (9) (a) and include it in (9) (b), is the voting power of its directors, not their beneficial interest in the company.
>
> " For the purpose of such a test the fact that a vote-carrying share is vested in a director as trustee seems immaterial. The power is there, and though it be exercised in breach of trust or even in breach of an injunction, the vote would be validly cast vis-à-vis the company, and the resolution until rescinded would be binding on it. The contention that upon the wording of s. 13 the interest must be confined to beneficial interests appears to me to be but a repetition of the argument which was rejected by this House in the case of *British American Tobacco Co., Ltd.* v. *Inland Revenue Comrs.* (2) in relation to National Defence Contribution and the Finance Act, 1937."

LORD MACMILLAN said (ibid., at p. 670):

> " The question whether the directors of the respondent company have the control of it by their voting power as shareholders must in my view be determined by the memorandum and articles of the company and by the register of shareholders. By the constitution of the company, as I have already mentioned, the voting power is vested in the ordinary shareholders and the register shows that the directors hold a majority of these shares. As was said by JESSEL, M.R., in *Pulbrook* v. *Richmond Consolidated Mining Co.* (4) ((1878), 9 Ch.D. 610 at p. 615), ' The company cannot look behind the register as to the beneficial interest but must take the register as conclusive and cannot inquire . . . into the trusts affecting the shares.' So far as the company is concerned the relation between such of its shareholders as happen to be trustees and their beneficiaries is res inter alios. It may be that a trustee shareholder may, as between himself and his cestuis que trust, be under a duty to exercise his vote in a particular manner, or a shareholder may be bound under contract to vote in a particular way (cf. *Puddephatt* v. *Leith* (5), [1916] 1 Ch. 200). But with such restrictions the company has

nothing to do. It must accept and act upon the shareholder's vote notwithstanding that it may be given contrary to some duty which he owes to outsiders. The remedy for such breach lies elsewhere."

LORD SIMONDS said ([1945] 1 All E.R. at p. 672):

"What, my Lords, constitutes a controlling interest in a company? It is the power by the exercise of voting rights to carry a resolution at a general meeting of the company. Can the directors of the respondent company by the exercise of their voting rights carry such a resolution? Yes: for they are the registered holders of more than half the ordinary shares of the company. Therefore they have a controlling interest in the company . . . My Lords, in my opinion the Crown's contention cannot be sustained. Those who by their votes can control the company do not the less control it because they may themselves be amenable to some external control. Theirs is the control, though in the exercise of it they may be guilty of some breach of obligation whether of conscience or of law. It is impossible (an impossibility long recognised in company law) to enter into an investigation whether the registered holder of a share is to any and what extent the beneficial owner. A clean cut there must be."

John Sheilds & Co. (Perth), Ltd. v. *Inland Revenue* (6) (1950 S.C. 441) was also an excess profits tax case depending on the meaning of "a controlling interest" in s. 13 (9) of the Finance (No. 2) Act, 1939. At all material times more than half the share capital of the appellant company was held by the trustees of the will of the former governing director. The voting rights in respect of these shares resided, under the company's articles of association, in the trustee first named on the company's register, unless all the trustees nominated one of their number for this purpose. No such nomination was made, and the voting rights were held by the first-named trustee, who was not a director of the company. In accordance with their powers under the articles of association, the trustees appointed as governing director of the company one of their number, who was thus in a position to arrange for his own name to appear first on the company's register in respect of the trust shareholding, or to require any member of the company to retire from his membership and to transfer his shares to another member at a valuation. In fact, the governing director so appointed did not exercise these powers. It was held by the Scottish Court of Session that the directors did not have a controlling interest in the company within the meaning of s. 13 (9) of the Act. The ground of the decision was that whatever the potentialities of the governing director's powers, by not using them he left the controlling interest in the hands of the trustee who was not a director of the company.

The next case is *Inland Revenue Comrs.* v. *Silverts, Ltd.* (7) ([1951] 1 All E.R. 703). At all material times four persons were directors of the company. All the "B" shares, which carried half the voting rights, were vested in one of the directors. The "A" shares, which carried the other half of the voting rights, were the subject of a settlement, and were vested in a bank as the custodian trustee of the settlement within the meaning of s. 4 of the Public Trustee Act, 1906. Two of the directors were the managing trustees of the settlement. It was held by the Court of Appeal that the bank as a registered holder of all the "A" shares was not merely a nominee or bare trustee; that, therefore, the controlling interest in the shares must be treated as being in the bank, and it was not possible to investigate the character in which the bank exercised its voting rights as shareholder by reference to the terms of the settlement or of s. 4 of the Public Trustee Act, 1906, or otherwise; and that the directors, accordingly, had not a controlling interest in the company. This was a profits tax case under the Finance Act, 1937. There is a passage in the judgment of the court delivered by SIR RAYMOND EVERSHED, M.R., which is of interest, as it seems to me. He said ([1951] 1 All E.R. at p. 708):

A "In our judgment, the ratio decidendi in *Bibby's* case (3) is that, in accordance with well-established principles relating to limited companies, a question of the rights of members vis-à-vis the corporation (such as that of voting control under its regulations) is to be determined by reference, and by reference only, to the share register beyond which it is not (save, possibly, in the case of mere 'nominee' shareholders) permissible to look, and not that, B in the case of a trust, the powers and discretions of exercising votes in regard to shares must be treated as reposing in the trustees without regard to the terms of the trust or the right of beneficiaries to direct such exercise. Thus, if (because the shares were registered in the names of 'nominees' or 'bare trustees' or otherwise) it were in any circumstances permissible to look beyond the share register, we do not think the speeches in the *Bibby* case (3) C would prevent inquiry being made whether those individuals to whom the nominee shareholders were answerable were themselves obliged by contract or otherwise to give directions in accordance with instructions received from some third party."

And with reference to the *British American Tobacco* case (2) and the *Bibby* D case (3), it was pointed out (ibid., at p. 709) that in neither case was the question the general one: "Who controls the company?"

The last case is *S. Berendsen, Ltd.* v. *Inland Revenue Comrs.* (8) ([1957] 2 All E.R. 612). A company had an issued share capital of one thousand shares, each of which carried one vote at meetings of the company. The directors of the company between them held 401 of the shares, carrying less than fifty per E cent. of the votes at meetings, and a Danish company held 590 shares, carrying over fifty per cent. of the votes. The shareholding of one of the company's directors in the Danish company gave him control of the voting powers of the Danish company. On an assessment to profits tax, it was contended by the Crown that the shares of the Danish company should be added to the shares held by the directors for the purpose of ascertaining whether a controlling F interest in the company was held by the directors within the meaning of para. 11 of Sch. 4 to the Finance Act, 1937, as amended by s. 34 of the Finance Act, 1952. WYNN-PARRY, J. (not surprisingly, in view of the cases to which I have referred) held ([1957] 1 All E.R. 727) that the share register of the company was the sole test in deciding the ownership of shares, and that it was not permissible to go beyond the register to ascertain whether the directors in fact owned any further G shares. But the Court of Appeal reversed this decision, and held that, where a registered shareholder was a body corporate, it was necessary to look beyond the share register to ascertain who by their votes controlled that body corporate; and that, since the Danish company (which was the majority shareholder in the English company) was itself controlled by one of the directors of the English company, the directors of the English company had "a controlling H interest therein" for the purpose of the relevant statutory provision.

It seems to me that in the last case the court, in the search for "the controlling interest", went beyond the articles of the company which was the subject of the inquiry. But on behalf of the commissioners it was sought to distinguish and account for this feature of the case by confining the decision to a case in which it is found that the shareholder on the company's register is a corporation I which is incapable of exercising volition and must act through the agency of some human person. If, therefore, it is said, such a person is identified as being the person who by his votes controls the member corporation and he is a director of the original company, then he comes within the description of a director who has "a controlling interest therein". None the less, it appears to me that this result has been reached by examining the position of the shareholder in regard to circumstances which are outside the provisions of the company's articles. However that may be, it was contended on behalf of the commissioners that the effect of the cases which I have mentioned is that I am bound to have regard only

to the fact that by virtue of the company's articles Mr. Shipside, as the first on the register of the joint shareholders, alone could vote in respect of the settled shares, and that I am not entitled to have any regard to the fact that Mr. Shipside was merely one of a body of trustees who were, in fact, in law, and on the register, the owners of the shares in question.

Those cases were, however, all cases decided on statutes which were different from the statute on which the present case depends. The phrase used was "a controlling interest in" and not "the control of the company"; and, as has been pointed out on behalf of the executors, those statutes were concerned with the taxation of the company's profits, and the present case is concerned with the duties payable in respect of an individual's estate. Moreover, in the relevant sections of the Finance Act, 1940, there are provisions which definitely require investigation beyond and outside the mere position on the company's register, and no such provisions are to be found in the statutes dealing with excess profits tax and the other taxing provisions which were the subject of the decisions to which I have been referred. Under s. 55 (5) of the Act of 1940, it is necessary to investigate the true position of the registered shareholder to see whether he is, in fact, a trustee or occupies some other fiduciary capacity in respect of some other person or persons. Then it is necessary to investigate further for the purposes of s. 58 (5), to discover whether the position of the shareholder is or is not due to some disposition made by him. If, therefore, it is permissible to examine the position and duties of the registered shareholder in regard to persons off the register, why is it not right to have regard to the fact that the person having the right to vote is not the absolute owner of the shares but merely one of four trustees, particularly when all four are on the register as joint owners? If the investigation is carried this far, it is then apparent that the shareholder in question was not free to cast the votes attached to the shares as a free and unfettered voter but was bound to act only on the unanimous decision of the four registered shareholders. There is no question in the present case about the beneficial interest in the shares. In such circumstances, in my view, Mr. Shipside had not control of the company.

An argument was also addressed to me on behalf of the commissioners in regard to the effect of s. 55 (3), having regard to the words "shall be deemed to have had control", and I was referred to LORD RADCLIFFE'S examination of the uses of such a phrase in *St. Aubyn* v. *A.-G.* (9) ([1951] 2 All E.R. 473). He said (ibid., at p. 498):

> "The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."

This seems to me to resemble the methods of Humpty Dumpty mentioned by LORD ATKIN in *Liversidge* v. *Anderson* (10) ([1941] 3 All E.R. 338 at p. 361).

It was contended in the present case that the intention of s. 55 (3) of the Act of 1940 was to give the phrase "the control of the company"* an artificial construction, and it was also contended that the present case fell within sub-s. (1) of s. 55 without any recourse to sub-s. (3) at all. I find it unnecessary, however, to make a choice, because it appears to me that, whatever be the intention of sub-s. (3), there still remains to be decided what the meaning is of the phrases "the control of the company" and "the control of powers of voting on all questions . . ."† In my opinion, for the reasons which I have already given,

* In s. 55 (1) (a) of the Act of 1940.

† In s. 55 (3) (a) of the Act of 1940.

in the circumstances of this case the deceased had neither the control of the company nor the control of powers of voting on all questions, or on any particular question, affecting the company as a whole which, if exercised, would have yielded a majority of the votes capable of being exercised thereon.

Declaration accordingly.

Solicitors: *Gibson & Weldon*, agents for *J. & A. Bright*, Nottingham (for the plaintiffs); *Solicitor of Inland Revenue.*

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re HUNT.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Cassels and McNair, JJ.), December 16, 1958.]

Arrest—Privilege from arrest—Persons attending court—Litigant in person arrested in court on order of court committing him to prison for contempt—Whether entitled to claim privilege from arrest.

The so-called privilege from arrest to which persons who are attending court, including parties to a cause, witnesses and solicitors, are entitled while going to, attending at and returning from court, is an inherent power conferred on the court itself which enables it to see that justice is done and that persons properly in court are not interfered with and are not prevented from assisting the court and from carrying on their business there by their being arrested; accordingly, where a litigant in person is committed to prison for contempt of court on the order of the court before which he is appearing and is arrested in court, he cannot claim privilege from his arrest.

Cameron v. *Lightfoot* ((1778), 2 Wm. Bl. 1190) followed.

[As to privilege from arrest for contempt, see 8 HALSBURY'S LAWS (3rd Edn.) 45, 46, paras. 81, 82; and for cases on privilege from arrest, see 16 DIGEST 79, 80, *976-987.*]

Cases referred to:

(1) *Cameron* v. *Lightfoot*, (1778), 2 Wm. Bl. 1190; 96 E.R. 701; 21 Digest 467, *486.*

(2) *Re Evans, Evans* v. *Noton*, [1893] 1 Ch. 252; 62 L.J.Ch. 413; 68 L.T. 271; 16 Digest 9, *21.*

Application for habeas corpus.

This was an application by Kenneth Douglas Hunt, the applicant, for a writ of habeas corpus ad subjiciendum directed to the Governor of Brixton Prison and Allied Bakeries, Ltd., the respondents, the applicant being detained in Brixton Prison for contempt of court. The main ground of the application was that the applicant was wrongfully arrested for contempt. On Nov. 4, 1958, the respondent Allied Bakeries, Ltd., moved before WYNN-PARRY, J., for an order to commit the applicant to Brixton Prison for contempt of court in failing to comply with an order dated Dec. 3, 1957, pursuant to which the applicant was ordered to attend an examination, on July 17, 1958, as to his means of paying the costs arising out of an action between the applicant and Allied Bakeries. Ltd., which the applicant failed to attend; in that action the applicant was the plaintiff and was appearing in person. WYNN-PARRY, J., being satisfied that the applicant had no intention of attending any examination of his means which might be fixed, thereupon ordered him to be committed to Brixton Prison and the tipstaff who had arrived

in court arrested the applicant and took him to the prison. The applicant now contended that he was wrongfully arrested since he was a litigant in person and was committed for ordinary, as opposed to special, contempt and that for those reasons he was privileged from arrest within the precincts of the Law Courts.

The applicant appeared in person.

Rodger Winn for the Governor of Brixton Prison.

B. B. Gillis, Q.C., and *W. E. Denny* for Allied Bakeries, Ltd.

LORD PARKER, C.J.: The applicant in this case was committed on Nov. 4, 1958, to Brixton Prison for contempt in disobeying an order of the court. He now applies to this court in person for a writ of habeas corpus. He has raised every conceivable point, but there is no doubt that the one which has been developed at greatest length and the one with which this court is really concerned, goes to whether he was properly arrested. [His Lordship stated the facts and continued:] In these circumstances the applicant says that he was wrongfully arrested. He claims that he had some privilege from arrest while he was in the court. That is the first point which he takes. He takes some four or five other points*, all of which admittedly have been raised by him on an appeal to the Court of Appeal from Wynn-Parry, J.'s judgment†. He says that some of the points were not dealt with by the Court of Appeal. That no doubt is so. If one reads the judgment it appears that point after point was taken before the Court of Appeal, as indeed have been taken before this court. The fact that the Court of Appeal did not deal with all of them expressly does not mean to say they had any doubt on the matter because the appeal was dismissed, and therefore every point which he took before the Court of Appeal was decided whether expressly or impliedly against him. It may be that that decision of the Court of Appeal is res judicata in these proceedings, but I find it quite unnecessary to decide that and, for my part, approaching the matter de novo and having heard all the arguments raised by the applicant, I see no reason, even if I am at liberty to do so, to come to any other view than that taken by the Court of Appeal. Accordingly, so far as all his points other than that concerning privilege from arrest are concerned, in my judgment the applicant completely fails.

The question regarding the privilege from arrest is quite an interesting one, on which one would expect to find clear and definite authority in the text-books. The applicant contends that in a case of ordinary contempt, such as merely disobeying an order of the court, a litigant before the court has complete immunity from arrest while in the precincts of the court. In the case of special contempt, which he would class as contempt in the face of the court and criminal contempt, he would agree there is no privilege against arrest within the precincts of the courts. Accordingly he complains that he was wrongfully arrested in Wynn-Parry, J.'s court and he is wrongfully detained in Brixton Prison.

I find it unnecessary to go through all the history of the matter. It is a misconception to talk about a litigant or a solicitor or a witness having immunity from arrest while within the precincts of the court. The truth is that the privilege, if privilege there be, is a privilege of the court to be sure that justice is done in court, and for that purpose to prevent anybody properly before the court from being arrested. That seems perfectly clear if one looks at one or two of the authorities. If one goes back to 1778, it will be seen in *Cameron* v. *Lightfoot* (1) ((1778), 2 Wm. Bl. 1190), that this matter was fully dealt with, and De Grey, C.J., in that case said this (ibid., at p. 1192):

* The other points taken by the applicant were, inter alia, that the subject-matter of the contempt of court alleged against him was res judicata; that the court had no power to commit him to prison for an indefinite period, and that the appointment for the applicant's examination on July 17, 1958, made under the order dated Dec. 3, 1957, was ultra vires.

† See ante, p. 37.

A "The question therefore is, whether the privilege of the King's Court, extended to suitors redeundo, so vitiates an arrest, or suspends the operation of the writ, that the taking a man thereon becomes an act of trespass to the party taken. The ancient way of availing oneself of the privilege of the courts was by suing out a writ of privilege for suitors, jurors, and witnesses. But this privilege is not considered as the privilege of the person attending B the court, but of the court which he attends."

There the matter is being dealt with, as I have said, not as a privilege of the litigant but as something which the court has power to do in order that there should be a proper administration of justice. Again, in the Consolidated Orders in Chancery of 1860 it was provided by Ord. 42, r. 1:

C "Officers and attendants upon the court, suitors and witnesses, are to have privilege eundo, redeundo, et morando, for their necessary attendance, but not otherwise; and where any of them are arrested at such times of necessary attendance, it is a contempt of court."

True, those Orders in Chancery were repealed in 1883, but it has always been D assumed that whether by reason of R.S.C., Ord. 72, r. 2, or indeed at common law the rights that existed before 1883 remain*.

It is also to be observed that in Chitty's Archbold's Practice of the Queen's Bench Division (1885 Edn.), Vol. 2, at p. 1484, the matter is put perfectly clearly. It says this:

E "Every person connected with a cause, and attending in the course of it, whether compelled to attend by process or not, such as parties, witnesses, bail, solicitors, etc., are privileged from arrest whilst going to, attending, and returning from court, or the judges' chambers."

Then it goes on to provide that barristers have the same immunity. Then a little later on (ibid., at p. 1485) it says: F

"It is not considered as the privilege of the person attending the court, but of the court which he attends."

At p. 1487 it is laid down that where an arrest has been made in court and complaint is made of that arrest, the complaint is made to the judge in question. It G is perfectly clear from that that it is a privilege of the court and in Daniell's Chancery Practice (8th Edn.), Vol. 1, it is stated at pp. 776 and 777 in much the same terms:

"Officers and attendants upon the court, suitors, and witnesses are to have privilege eundo redeundo et morando for their necessary attendance, but not otherwise, and when any of them are arrested at such times of neces- H sary attendance it is a contempt of court. A solicitor who is proceeding to the court to attend to his professional business there pending is privileged from arrest; and the question in such cases is, whether, at the time of his arrest, he was bona fide proceeding in a direct line to or from the court. The solicitor is also privileged if he is on his way to attend an appointment at the offices of the court. If the first arrest is bad, all the detainers lodged under it I

* The Consolidated Orders in Chancery of 1860 were repealed by the Rules of the Supreme Court, 1883, appendix O; see the Annual Practice (1959 Edn.) at p. 1 and the Annual Practice (1925 Edn.) (the last edition in which appendix O to R.S.C., 1883, is set out).

R.S.C., Ord. 72, r. 2 provides: "Present Practice. Where no other provision is made by the Act [i.e., the Supreme Court of Judicature (Consolidation) Act, 1925] or these rules, the present procedure and practice [i.e., in force in 1883] remain in force". See also 8 Halsbury's Laws (3rd Edn.) 46, para. 82, as to the existence of a rule at common law similar to that contained in Ord. 42, r. 1 of the Chancery Orders of 1860.

are also bad. The application to discharge must be made to that court of which the arrest is a contempt." A

From those authorities and text-books, it seems to me to be perfectly clear, as indeed one would expect, that this so-called privilege from arrest is a power which every court has inherently to see that justice is done in the court, and for that purpose that people properly in the court are not interfered with by being arrested and prevented from assisting the court and carrying on their business in the court. In so far as it is said to be a privilege of the person attending the court, the privilege is no more than this, that they are entitled to rely on the judge of that court to see that justice is not interfered with by their being arrested. There is nothing to suggest that a person is privileged from arrest in a court if the arrest is done on the order of that court; indeed, it would be very surprising if that were not so. The truth of the matter is that certainly before 1893, as is shown by Mr. Registrar LAVIE's note in *Re Evans, Evans* v. *Noton* (2) ([1893] 1 Ch. 252 at p. 259), it has always been the practice for a person who is committed by the court to be arrested in court, not only if he has been guilty of what is called special contempt but also in the case of ordinary contempt, though he is properly before the court. Accordingly, in my judgment there is nothing in the applicant's point in regard to wrongful arrest. In these circumstances, I would refuse this application. B C D

I should perhaps add that I have deliberately avoided the debate as to how far this court sitting as a Divisional Court can inquire into matters of committal. It may be that the true view is, and I think that the cases support it, that though this court always has power to inquire into the legality of the committal, it will not inquire whether the power has been properly exercised. However, in this case I am quite satisfied that the application fails. E

CASSELS, J.: I agree.

McNAIR, J.: I also agree.

Application dismissed. F

[An order for the costs of the application was made in favour of Allied Bakeries, Ltd., and an order for costs of a nominal amount of 10s. was made in favour of the Governor of Brixton Prison.]

Solicitors: *Treasury Solicitor* (for the Governor of Brixton Prison); *A. Kramer & Co.* (for Allied Bakeries, Ltd).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

HENRY BOOT & SONS, LTD. *v.* LONDON COUNTY COUNCIL.

[COURT OF APPEAL (Lord Somervell, Morris and Pearce, L.JJ.), November 17, 18, 1958.]

Building Contract—Wages—Rise and fall clause—"Rates of wages"—Weekly sums credited to each employee each week, payable as lump sum holiday money.

A building contract provided that "23A. If during the currency of this contract (a) the rates of wages payable for any labour employed in the execution of the works shall in conformity with agreements between associations of employers and trade unions . . . be increased above or decreased below the corresponding rates in force at the date of the contractor's tender" the net cost or benefit to the contractor of any such increase or decrease should be added to or deducted from the contract price. In conformity with an agreement between associations of employers and trade unions the amount set aside each week under an agreed holiday scheme by the contractor for each of his employees (which amounts could be drawn out by the employee as a lump sum when he came to take his holidays) was increased during the currency of the contract.

Held: the sum so set aside, being a weekly sum which had to be credited to the employee each week, was within the expression "rates of wages" in cl. 23A, and so the contractor was entitled to add the net cost of the increase to the contract price.

Appeal allowed.

[Editorial Note. The phrase "rates of wages" in this case occurred in a contract entered into with the London County Council, but the phrase also is used in other common form contracts in clauses concerned with the variation of price through labour costs, e.g., the general conditions of government contracts for building and civil engineering works (CCC/Wks/1 (Edn. 8), cl. 11A).

As to the construction of phrases used in building contracts, see 3 HALSBURY'S LAWS (3rd Edn.) 428, para. 816; and for cases on the subject, see 7 DIGEST 340, 341, *38-47*.]

Cases referred to:

(1) *Bank of New Zealand* v. *Simpson*, [1900] A.C. 182; 69 L.J.P.C. 22; 82 L.T. 102; 7 Digest 334, *18*.

(2) *Charrington & Co., Ltd.* v. *Wooder*, [1914] A.C. 71; 83 L.J.K.B. 220; 110 L.T. 548; 17 Digest (Repl.) 335, *1407*.

(3) *Grant* v. *Grant*, (1870), L.R. 5 C.P. 727; 39 L.J.C.P. 272; 22 L.T. 829; 17 Digest (Repl.) 260, *640*.

Appeal.

The plaintiff building contractor appealed from the decision of PILCHER, J., dated Dec. 17, 1957, dismissing his claim against his employers under a building contract for the sum of £1,112 2s. 9d., being the amount of the increase during the currency of the contract in the amount of holiday money credited by the contractor to his employees due to an increase in the rates of such holiday money. PILCHER, J., held that the phrase "rates of wages" in the rise and fall clause of the building contract did not cover these credits of holiday money. The facts, and the relevant parts of the building contract and holiday pay agreements, are set out in full in the judgment of LORD SOMERVELL.

R. D. Stewart-Brown, Q.C., and *D. H. Gardam* for the contractor.

M. R. Hoare for the employers.

LORD SOMERVELL: This is an appeal from the decision of PILCHER, J., which raises a point of construction, and I think a difficult one; and the court is much indebted for the arguments of counsel on each side.

It arises in this way. There was a building contract between the two parties, the plaintiff contractor and the defendant employers, which contained a clause providing for a certain extra sum to be paid to the contractor in circumstances which will emerge when I read the clause. The material words of the clause are these:

> "23A. If during the currency of this contract (a) the rates of wages payable for any labour employed in the execution of the works shall in conformity with agreements between associations of employers and trade unions, or with the decisions of a competent authority, be increased above or decreased below the corresponding rates in force at the date of the contractor's tender . . . and the increase or decrease shall result in an increase or decrease of cost to the contractor in carrying out the works, then an allowance equivalent to the net increase or decrease of cost . . . as certified by the architect shall, subject to the provisions hereinafter contained, form an addition to or deduction from the amount otherwise payable under this contract."

The question is whether certain sums which arise under the scheme operated by the Building and Civil Engineering Holidays Scheme Management, Ltd., fall within the words of that clause. Broadly speaking, the idea of this holidays scheme is that a sum is put aside each week for each employee who is then able, when the time comes for him to take his holidays, to draw out the amount standing to his credit. The question, put shortly, is whether the sum credited to the employees under the provisions which I will read in a moment are within the clause which I have just read so that the contractor is entitled to demand payment if those holiday sums are increased, as they were in the present case.

There is no doubt that this scheme applies, and that it falls within the words "agreements between associations of employers and trade unions". Paragraph 2 of the annual holidays scheme says this:

> "In respect of holidays, each operative covered by the scheme shall from the calendar week beginning on the first Monday after the appointed day (as defined in cl. 15 hereof) be credited by the employer first employing him in that calendar week, and by the employer first employing him in each subsequent calendar week with the sum of 2s., except in the case of persons (male or female) under the age of eighteen years, when the sum shall be 1s. 6d."

There are various other provisions, to one or two of which I may refer later in this judgment, but that sets out the general nature of the payments in question.

Now if those weekly sums are increased, is that an increase in the "rates of wages payable for any labour employed"? The learned judge decided that it was not, for reasons to which I will refer later. He relied on another clause in the contract which, with respect, I do not think is of real assistance in solving the problem which we have to solve. It is said, on the one hand, that these are weekly sums; they are credited to workmen, and therefore prima facie are, or might be said to be, included in their "rates of wages". What the employee gets at one time is £x plus 2s. 3d., and another time £x plus 4s. 6d. Therefore, it is said that his "rate of wages" has gone up. On the other hand, it is submitted on behalf of the employers that the words are inapt to cover credits of this kind. It is said that "rates of wages" means only the ordinary wages in the ordinary sense; and counsel on behalf of the employers quite rightly drew our attention to a number of provisions in the scheme itself:—in what is called the Working Rule Agreement agreed by the London Regional Joint Committee and approved by the National Joint Council for the Building Industry, which is admittedly incorporated, and can be looked at. In all these provisions, as he said, a distinction is drawn between holiday payments, and what I would describe as "wages", at any rate in the narrower sense of rates per hour, and so on.

A I do not propose to go through the various provisions, to which counsel quite rightly drew our attention, differentiating between the holiday payments, and what I call (without begging the question) " wages " in the narrow sense, because I accept his submission that they arise under different documents, and are dealt with in different ways. The question is whether they are within the expression " rates of wages " in cl. 23A of the agreement. That clause is dealing with B increases or decreases in the rates of wages; and I have come to the conclusion that a weekly sum which has to be credited to a man each week is within the expression " rates of wages " in this clause. It is not a point which is capable of much elaboration; but if there is an increase in the amount by which each employee is credited at the beginning of each week in respect of this holiday scheme, it seems to me natural enough, for the purpose of this clause at any rate, C to say that the " rates of wages " in respect of him have been increased.

The learned judge relied on another clause in the contract, cl. 59; and it was pointed out that that was an optional clause in the sense that, although this contractor adopted it, it was a clause which might not be adopted in other contracts in this general form. I do not myself think that that is very important, but I will read the clause, and then say why I do not think it really helps. The D clause is this:

> " The contractor shall be paid in respect of all day work ordered by the architect [that, we were told, meant small variations] at the rates of wages actually and properly paid to the persons employed on such work but not exceeding the rates which at the time of the execution of the work have been E established (by machinery of negotiation or arbitration) for the trade or industry in the district where work is carried out . . . with the addition thereto of the first percentage inserted by the contractor in his tender/quotation (namely, fifteen per cent.) to cover supervision, use of plant, machinery, profit, all employers' contributions to national insurance, payment for holiday wages and all contingencies."

F The learned judge said that as "rates of wages" in that clause expressly excluded payment of holiday wages, he thought it right to put the same meaning on the words " rates of wages " where they occur in cl. 23A. Clause 59, when one considers it, is a double-edged weapon. It seems to me that a converse argument might be based on it. It might be said that, as it was thought necessary in cl. 59 to make it clear by express words that payments for holiday wages were G something not covered by " rates of wages actually . . . paid ", why was that not done in cl. 23A if it was intended that holiday payments or receipts should be excluded from " rates of wages " ? For that reason, which I need not elaborate, I feel that the clause which the learned judge relied on does not, as it were, bear the weight which he placed on it in construing cl. 23A; and that is why, in the first instance, I addressed myself to the construction of cl. 23A apart from H this clause.

A further point was submitted on behalf of the employers. There was correspondence as to this very point. The first letter is a letter dated January, 1949, some two years before the contract in connexion with which the present controversy has arisen, from the clerk to the defendant council, the employers, addressed to the London Master Builders Association of which the contractor was I a member. It is in these terms:

> " Consideration has recently been given to the need for the retention of the up-and-down clause [that is the clause in question] in the council's building and civil engineering etc. contracts, and it has been decided to continue the arrangements for another year from January, 1949. Some modification has, however, been made in the scope of the clause. Hitherto the clause has covered increases in wage rates, national insurance, holiday pay, fares, guaranteed time, prices of all materials and transport. In

future it will normally provide only for variations in wage rates and in the prices of a limited range of main materials, to be designated in each contract." A

The contractor was informed of this letter, and was also informed that the association replied to that letter to the effect that it was not possible for the association to accept the proposal contained in the said letter; and the employers wrote back maintaining their decision. On Nov. 6, 1951, with reference to another contract then subsisting between the contractor and the employers, but before the entering into of this contract, the employers again wrote and said: B

" With reference to our recent conversation on increased costs, I have to confirm that cl. 23A (a) of the contract restricts the increase or decrease to the rates of wages payable only. Increases in the cost of holiday pay stamps are, therefore, not allowable." C

It is submitted that if this court were of opinion (as I am of opinion) that, construing the clause, it covered these payments, this letter (or the effect of it) ought to be admitted in order to resolve an ambiguity if the words are thought to be capable of more than one meaning. Reliance was placed on the decisions in *Bank of New Zealand* v. *Simpson* (1) ([1900] A.C. 182) and *Charrington & Co., Ltd.* v. *Wooder* (2) ([1914] A.C. 71). Those were cases which decided that where D the words used are susceptible of more than one meaning, extrinsic evidence is admissible to show what were the facts which the negotiating parties had in their minds when they used the words the application of which is in controversy between the parties. I do not think that the employers can bring this letter within those words. The rule was stated by BLACKBURN, J., quoting himself from his work on CONTRACT OF SALE, p. 49, in *Grant* v. *Grant* (3) ((1870), L.R. 5 E C.P. 727 at p. 728):

" The general rule seems to be, that all facts are admissible which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as only tend to show that the writer intended to use words bearing a particular sense are to be rejected." F

These words fall within the latter part of that sentence. The letter is on the face of it saying: " This is what we say these words mean "; I think that the contractor was entitled to reply: " We do not agree with that; we accept your contract, and let the court decide whether you are right, or we are ".

The employers could have altered the contract by putting in express words, but they did not choose to do so; and therefore I think it falls to this court to G follow the ordinary rule, and to construe the contract as it was agreed between the parties.

For those reasons, I would allow the appeal.

MORRIS, L.J.: I agree fully with the judgment which my Lord has delivered; and although we are differing from the learned judge, I do not wish H to add to what my Lord has said.

PEARCE, L.J.: I agree.

Appeal allowed: judgment for the contractor for £1,112 2s. 9d. with costs: leave to the employers to appeal to the House of Lords granted.

Solicitors: *Masons* (for the contractor); *Solicitor, London County Council* (for the employers).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

A

SMITH *v.* AUSTIN LIFTS, LTD. AND OTHERS.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Somervell of Harrow and Lord Denning), November 11, 12, 13, December 18, 1958.]

B *Master and Servant—Duty of master—Safe means of access to place of work—Third party's premises—Accident to employee in obtaining access to place of work—Whether employee had full appreciation of risk.*

Invitee—Negligence—Duty of occupier—Protection against unusual danger—Defective doors of machine house on roof to which access had by ladder—Invitee's knowledge of defect—No warning or safeguards by occupier—Liability of occupier.

C The appellant was employed as a fitter by the first respondents, who had contracted with the second respondents to maintain a lift on premises occupied by the second respondents. The appellant had, in the course of his employment, paid many visits to the machine house in which the winding mechanism of the lift was. The machine house was on the roof and access to it was gained through a pair of doors to which a ladder led. The appellant D was aware that the left door of the machine house was in a defective condition. He, or another employee of the first respondents, had reported the defect to the first respondents, who in turn had reported it on four occasions to the second respondents. The second respondents did not repair the doors and the first respondents neither repaired them nor visited the premises to see whether the place of work and the access to it were safe. On Apr. 27, 1955, E the appellant found that the lower hinge of the left door at the entrance to the machine house was broken; he tied the doors together with wire to keep them closed. On May 14, 1955, he and two other employees went to the premises in order to replace some wire ropes, and he then found that the right door was open and that the left door was jammed inside the machine house. He tried to enter the machine house, putting his weight on the F left door to lever himself up; the door gave and he fell from the ladder and was injured.

Held: (i) (LORD REID dissenting) the first respondents (the employers) were liable in damages to the appellant because the finding of the trial judge that they were negligent in not having visited the premises to see that the place of work was safe should stand in the circumstances of this G case, the employers having on four occasions notified the occupiers of the need to repair the doors of the machine house.

(ii) the second respondents (the occupiers) were liable in damages to the appellant as invitee on the ground (a) (per VISCOUNT SIMONDS, LORD MORTON OF HENRYTON and LORD SOMERVELL) that the jamming of the left door created an unusual danger for the appellant the risk of which he did H not fully appreciate and that the proper inference in the circumstances was that the jamming of the door was created by the agents or servants of the occupiers and thus was a danger of which they knew, and (b) (per LORD REID and LORD DENNING) that the appellant had not fully appreciated the nature of the risk created by the jamming of the left door and thus was not excluded from recovering damages for the failure of the occupiers to I take reasonable care that the premises, the means of access to the machine house, were reasonably safe.

London Graving Dock Co., Ltd. v. *Horton* ([1951] 2 All E.R. 1) considered.

Appeal allowed.

[Editorial Note. The Occupiers' Liability Act, 1957, s. 2 (4) (a) (for which, see 37 HALSBURY'S STATUTES (2nd Edn.) 835), alters the law laid down in *London Graving Dock Co., Ltd.* v. *Horton* ([1951] 2 All E.R. 1), but as that Act came into force on Jan. 1, 1958, it did not affect the present case.

As to duty to invitees, see 23 HALSBURY'S LAWS (2nd Edn.) 600-605, paras. 851-853; and for cases on the subject, see 36 DIGEST (Repl.) 41, 42, *247-258*, 44, 45, *272-281*.

As to a master's duty not to expose servant to unnecessary risk, see 25 HALSBURY'S LAWS (3rd Edn.) 508, para. 976; and for cases on the subject, see 34 DIGEST 194-199, *1580-1626*.]

Cases referred to:

(1) *Horton* v. *London Graving Dock Co., Ltd.*, [1950] 1 All E.R. 180; [1950] 1 K.B. 421; *revsd.* H.L. sub nom. *London Graving Dock Co., Ltd.* v. *Horton*, [1951] 2 All E.R. 1; [1951] A.C. 737; 36 Digest (Repl.) 54, *296*.

(2) *Christmas* v. *General Cleaning Contractors, Ltd.*, [1952] 1 All E.R. 39; [1952] 1 K.B. 141; *affd.*, H.L. sub nom. *General Cleaning Contractors, Ltd.* v. *Christmas*, [1952] 2 All E.R. 1110; [1953] A.C. 180; 3rd Digest Supp.

(3) *Bates* v. *Parker*, [1953] 1 All E.R. 768; [1953] 2 Q.B. 231; 3rd Digest Supp.

(4) *Winter* v. *Cardiff Rural District Council*, [1950] 1 All E.R. 819; 114 J.P. 234; 2nd Digest Supp.

(5) *Paris* v. *Stepney Borough Council*, [1951] 1 All E.R. 42; [1951] A.C. 367; 115 J.P. 22; 2nd Digest Supp.

(6) *Wilson* v. *Tyneside Window Cleaning Co.*, [1958] 2 All E.R. 265; [1958] 2 Q.B. 110.

(7) *Smith* v. *Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 36 Digest (Repl.) 154, *812*.

(8) *Taylor* v. *Sims & Sims*, [1942] 2 All E.R. 375; 167 L.T. 414; 36 Digest (Repl.) 153, *806*.

(9) *Letang* v. *Ottawa Electric Ry. Co.*, [1926] A.C. 725; 36 Digest (Repl.) 156, *1349*.

(10) *Billings (A. C.) & Sons, Ltd.* v. *Riden*, [1957] 3 All E.R. 1; [1958] A.C. 240; 3rd Digest Supp.

Appeal.

Appeal by Harry Smith from an order of the Court of Appeal (LORD EVERSHED, M.R., MORRIS and PEARCE, L.JJ.), dated July 16, 1957, reversing an order of OLIVER, J., sitting at Newcastle-upon-Tyne Assizes without a jury, dated Feb. 14, 1957. On May 14, 1955, the appellant suffered personal injuries in an accident in the course of his employment with the first respondents, Austin Lifts, Ltd., on premises known as Baker's Buildings in Newcastle-upon-Tyne occupied by the second respondents, Annie Mary McDonald, Evelyn Louise Beere and Audrey Metcalfe Daglish, executrices of the estate of G. R. S. Baker. OLIVER, J., awarded the appellant £1,727 18s. 3d. damages and apportioned the responsibility for the accident as to twenty per cent. to the first respondents and as to eighty per cent. to the second respondents. The facts appear in the opinion of VISCOUNT SIMONDS.

Martin Jukes, Q.C., and *R. P. Smith* for the appellant.

G. S. Waller, Q.C., and *C. P. Heptonstall* for the first respondents.

H. I. Nelson, Q.C., and *H. C. Scott* for the second respondents.

Their Lordships took time for consideration.

Dec. 18. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the appellant, a fitter in the employment of the first respondents, Austin Lifts, Ltd., in the course of that employment on May 14, 1955, suffered a somewhat serious injury on certain premises in Newcastle-upon-Tyne, of which the other respondents, whom I will call "the second respondents", were the occupiers. He accordingly brought the action against them out of which this appeal arises, claiming (to put it briefly)

A that they had respectively failed to observe the duty of care that they owed to him.

The first respondents carry on the business of repairing and maintaining lifts, and were at the relevant time under contract with the second respondents to repair and maintain a lift on the premises that I have mentioned. The winding mechanism of this lift was situate in a machine house on the roof of B the premises, and access to it was gained by means of a fixed iron ladder leading to double doors at the entrance to the machine house. The base of these doors was at a height of eleven feet five inches above the roof. Before the day of the accident, the appellant had, in the course of his duty, paid many visits to the machine house, and was well aware that the left door was in a defective condition owing in particular to the lower hinge being broken, so that it was suspended C from the upper hinge. He, or another, had reported this to his employers, and they in turn had on no less than four occasions reported it to the second respondents, three times in their monthly routine reports of February, March and April, 1955, and once in a letter of Apr. 21, 1955. In each of the routine reports the same remark was made: "Machine house door broken". In the letter it was said: "The machine room doors need refixing in position". There was, I D think, nothing in these reports to suggest any danger, and I would suppose that they were a warning to the occupiers that, if the doors were not repaired, the machinery would be exposed to the weather. At any rate, the second respondents took no action on the reports, apart from a single incident which has had great importance in the case and to which I will presently refer, nor did the first respondents think it fit to pay any special visit of inspection.

E Before I come to the day of the accident, I must say something more about the doors. They were designed to be secured by bolts on the inside of the left door at top and bottom, and by a bolt on the outside of the right-hand door about midway between top and bottom. It appeared from the evidence that the top bolt on the left side was never bolted and it may be disregarded. This being so, there seem to have been two ways of getting from the ladder into the machine F house, either by undoing the outside bolt, pulling up the inside bolt on the left door, opening both doors and climbing in with the aid of such handhold as could be obtained from the machine within, or by undoing the outside bolt, opening the right door only and climbing in through the gap left by that opening with the aid of a handhold on the left door which was still closed. There was some discussion which was the "proper" or "natural" way of entry. I think G that nothing turns on this. Either way was a proper and natural way, but the latter way only so long as the left door was secure.

On Apr. 27 the appellant visited the premises for the last time before the day of the accident. As I have said, the lower hinge of the left door was then broken and he so found it. It hung suspended from the upper hinge. He could not bolt it in nor replace the door in its proper position. He did the H best he could, and that was to tie the doors together with wire to keep them closed. On May 14 he went to the premises again to replace some wire ropes. Two other employees of the first respondents, Mr. Wells and Mr. Fineram, accompanied or preceded him. On his arrival he found the right door open, and the left door jammed inside the machine house. He mounted the ladder and decided to enter by the right door. He tested the left door for a handhold. I In his own words:

> "I put my left hand on to the door and gave a tug to try to budge it, it seemed safe enough; I tried to get in; I put my right hand on the floor and the left hand on the door, and the door gave and caused me to lose balance and I fell off the ladder altogether."

Two other things should be mentioned. First, it seems clear that, when he gave the door the preliminary tug to test it, he held it near the floor, but, when he put his weight on it to lever himself up, he held it higher up, and it was this

which caused the door to give. The door remained jammed at the bottom. Secondly, Mr. Wells, who had earlier on the same day climbed the ladder and entered the machine house, found the left door jammed in and the right door open. He made a safe entry.

My Lords, the case has, I think, taken a somewhat unusual course. The learned trial judge, OLIVER, J., decided in favour of the appellant against both his employers and the occupiers, but was reversed by the Court of Appeal on the ground that his findings of fact were not justified by the evidence. There was, I think, no difference of opinion about the relevant law. The learned Master of the Rolls (LORD EVERSHED) himself, after concluding that neither respondents were liable, said that, if the findings of the learned judge which he had recited could have been justified on the evidence, the result might well have been otherwise. Such a conclusion might well involve a prolonged consideration of all the evidence, but it appears to me that there is little in dispute, and that the case must turn on the proper inference to be drawn on a very few salient points.

Let me take first the case of the second respondents, the occupiers. Their relation to the appellant was that of invitor and invitee, and the relevant law was that applicable before the recent Act*. I should, therefore, but for a single fact, have had no doubt that they were under no liability for the appellant's accident. If, on May 14, the appellant had found the condition of the doors just as he had left them, or even if the wire had been untied and the left door was swinging loose, I should have thought that the law as laid down in *London Graving Dock Co., Ltd.* v. *Horton* (1) ([1951] 2 All E.R. 1) was fatal to the appellant's claim. But a fact, which was to my mind decisive, intervened. The doors, on May 14, were not as they had been left on Apr. 27. On the contrary, the left door had by some means been lifted and wedged down so as to give the appearance of security. Yet it was not secure; apparently firm, it gave when the appellant used it to lever himself up. This was the direct cause of the accident. It must be asked then, how was the condition of the doors altered? The learned judge drew the inference that it was by the act of the occupiers or their servant. The Court of Appeal held that there was no evidence from which this inference could be drawn. Now I do not say it would be necessarily conclusive against the appellant if such an inference could not be drawn. But it is not necessary to determine that. For if it can, and should be, drawn, then it is, in my opinion, clear that an unusual danger was created for the appellant which not only was, or should have been, known to the second respondents, but was due to their own act. It may be said at once that the evidence is unclear, and that any conclusion must rest on a balance of probabilities. But some conclusion must be reached, and I think that the learned judge reached the right one. By what agency was the wire removed and the door lifted and wedged? Surely by a human agency, though a freakish wind was suggested. And if by a human agency, then whose was the hand? Not that of an eccentric trespasser but that of a servant or agent of either the first or the second respondents. Here lies the choice and, weighing the probabilities as best I can, I accept the conclusion of the learned judge. The deed was done between Apr. 27 and May 14. On the later day, Mr. Wells was the first of the employers' workmen on the scene and found the left door jammed. It was not suggested to him, nor to the appellant nor to Mr. Lickley, the managing director of the first respondents, that any visit had been paid to the machine house between the two days. The evidence of Mr. Lickley appears rather to negative it. I am left with the second respondents and, though I do not ignore the fact that they were not physically in occupation of these premises nor the evidence of Mr. Webb, their agent, I find it inherently probable that, having been repeatedly warned about the condition of the doors, they should have taken some steps, however temporary

* Occupiers' Liability Act, 1957; 37 HALSBURY'S STATUTES (2nd Edn.) 832.

A and inadequate, to remedy the situation. The premises were theirs; the duty to repair the doors was theirs, though they may have tried to shift it; the responsibility for what was done must be theirs, unless they can prove that it lay with another. That they did not prove and, in fact, made little effort to prove. In the result, therefore, I conclude that the appellant as invitee did not fully appreciate the risk which had been created for him by the second respondents. B He had, it is true, an apprehension of some risk, for he had given the door a preliminary tug, but he did not appreciate, nor could have reasonably been expected to appreciate, that, though resistant to a tug at the bottom, the door would give way if pressure was applied higher up. On this part of the case, the judgment of the Court of Appeal should be set aside and that of the learned judge restored, and I would only add that I do not intend to cast any doubt on C the authority of such cases as *Christmas* v. *General Cleaning Contractors, Ltd.* (2) ([1952] 1 All E.R. 39) and *Bates* v. *Parker* (3) ([1953] 1 All E.R. 768), which are clearly distinguishable.

I turn then to the first respondents, the employers. Here I have greater difficulty. It was their duty to see that the place at which their workmen were to work was reasonably safe. That is a generalisation which can only be D applied after a consideration of what is, in all the circumstances, reasonable and it is, I think, always important to bear in mind a principle emphasised in *Winter* v. *Cardiff Rural District Council* (4) ([1950] 1 All E.R. 819) that there is a sphere in which it is reasonable to leave to a skilled workman the decision whether the difficulty that he encounters is one in which he needs help. I deprecate any tendency to treat the relation of employer and skilled workman E as equivalent to that of a nurse and imbecile child. But, that being said, I am not prepared to differ from the majority of your Lordships that here the learned judge was justified in deciding that the employers fell short of the duty of reasonable care which they owed to the appellant. I will not elaborate this point on which your Lordships, feeling more strongly, will no doubt speak more convincingly.

F On the footing that the employers and the occupiers were both responsible in law for the accident to the appellant, I see no reason for altering the apportionment of damages made by the learned judge. It only remains to say that, on the facts as found by him, no case for finding contributory negligence by the appellant was made out.

G The judgment of the Court of Appeal must, in my opinion, be set aside and the judgment of OLIVER, J., restored with costs here and below.

LORD MORTON OF HENRYTON: My Lords, I have arrived at the conclusion, though with considerable doubt, that this appeal should be allowed, and the order of OLIVER, J., restored. I shall refer to the appellant as " the H plaintiff ", to the first respondents, Austin Lifts, Ltd., who were the employers of the plaintiff, as " Austins ", and to the other respondents, the occupiers of " Baker's Buildings ", the block of office buildings whereon the accident occurred, as " the occupiers ".

I find it convenient to consider first the case against the occupiers. The learned judge drew the inference that the left-hand door had been forced inside I the machine house by a servant or agent of the occupiers. I use the word " forced ", because the lower edge of the door overlapped the floor of the machine house by one inch and the upper edge of the door overlapped the roof of the machine house by three-quarters of an inch. It would, therefore, be necessary to lift the door inside the machine house, holding it at an angle, and then to push it inwards until it became wedged between the roof and the floor. It was, of course, possible to hold the door at an angle because the lower hinge was gone.

Was the learned judge justified in drawing the inference which I have just mentioned? It was not suggested that any employee of Austins visited the

machine house between Apr. 27 and May 14, 1955, but four possible answers were suggested to the question: A

> " How did the door become fixed in the position in which the plaintiff found it on the afternoon of May 14 ?"

They were (i) The wind blew it into that position; (ii) It was moved into that position by (a) the witness, Mr. Wells, who went into the machine house on May 14 before the plaintiff arrived there, or (b) a servant or agent of the occupiers, or (c) some other person. My Lords, I would rule out the first answer because, even if one accepts the possibility of wind blowing into that position a door which had the overlaps already mentioned, it hardly seems possible that any wind could have undone the wire with which the plaintiff had fastened the two doors together on Apr. 27. Answer (ii) (a) must also be ruled out, for Mr. Wells said that he found the left-hand door wedged in, and the right-hand door open, when he first went up the ladder, and the learned judge accepted his evidence. Answer (ii) (c) is difficult to accept. It is difficult to believe that anyone working in the office of a tenant in Baker's Buildings would get out on the roof of the building, climb some twelve feet up an almost perpendicular ladder exposed to the wind, and, finding himself confronted by two doors wired together, would undo the wire and force the left-hand door into the position in which Mr. Wells and the plaintiff found it. The only other possible answer is (ii) (b), that some servant of the occupiers or of the agents, Messrs. Storey Son & Partner, who managed this block of offices for the occupiers, had gone up to inspect the damage to the door between Apr. 27 and May 14, had undone the wire for the purposes of his inspection and had fixed the left-hand door in the position in which the plaintiff found it on May 14.

B C D E

On Apr. 20, 1955, Austins had written to Messrs. Storey Son & Partner a letter whereof the relevant parts are as follows:

> " For the attention of Mr. Sisterson.
>
> " Dear Sir, In connexion with recent correspondence and our discussion last week, we have had an examination made of the general state of the four Austin lifts in Baker's Buildings with which you are concerned . . . No. 3 Lift . . . The machine room doors need refixing in position . . . We should be glad to have the opportunity of discussing the whole question of these lifts again at your convenience."

F

The next day, Apr. 21, Austins sent a written report to Messrs. Storey Son & Partner which contained the item " Machine house door broken ". A similar report had been made on Feb. 2 and Mar. 2, after monthly inspections by employees of Austins. In view of these three reports, and the letter of Apr. 20, it seems to me quite likely that Mr. Sisterson, the addressee of the letter, or someone instructed by him, went up to inspect the doors which " needed refixing " before he attended the suggested discussion, and, for the purposes of any proper inspection it would have been necessary to undo the wire. It is true that counsel for the occupiers called as a witness Mr. Webb, who was " the manager for the estate agents who manage the property ", and he took the view that Austins were liable to repair the doors. He also said that Austins had never requested him to do any repairs to the door. The lifts maintenance contract entered into by Austins is in evidence, and I think Mr. Webb's view was clearly wrong, but, in any event, this evidence does little or nothing to make less likely a visit of inspection by Mr. Sisterson or someone instructed by him.

G H I

For these reasons, my Lords, I think that the learned judge was quite justified in drawing the inference that the occupiers, by their servants or agents, had brought about the state of affairs which confronted the plaintiff on the afternoon of May 14. If this is so, I feel no doubt that the door, in the position in which he found it, constituted a trap, and was a new and unusual danger, which the occupiers, by their servant or agent, had brought into existence and of which

A the plaintiff was ignorant. This being so, the plaintiff is entitled to damages as against the occupiers, unless it can be said that he used the door as a handhold to help him into the machine house " with full appreciation of the danger ", to quote the words of LORD PORTER in *London Graving Dock Co., Ltd.* v. *Horton* (1) ([1951] 2 All E.R. 1 at p. 6).

B My Lords, I have felt great doubt on this point. The plaintiff knew that the lower hinge of the door was broken, and his account of the accident, as given in his evidence in chief, was as follows:

> " I was holding on to the ladder; I got as near to the top of the ladder as possible; I put my left hand on to the door and gave a tug to try to budge it, it seemed safe enough; I tried to get in; I put my right hand on the floor and the left hand on the door, and the door gave and caused me
C to lose balance and I fell off the ladder altogether.
>
> " OLIVER, J.: Did the door open ? A.—No, the door did not come away altogether, it just gave."

Later he added " the door gave just a few inches and caused me to lose balance ". Now it seems to me, my Lords, that, when the plaintiff " gave the door a tug
D to try to budge it ", he must have appreciated that, if the door gave way, he was in danger of falling. To that extent and at that moment he " appreciated the danger ". Then, after giving it a tug, as he said, " it seemed safe enough ". In cross-examination he was asked: " Did you put a considerable proportion of your weight on it ? " (that is, on the door), and he said: " Yes, when I first tried it ". He was then asked: " But did you do that when you were trying to
E scramble in ? ", and answered: " Yes, I had to, to get my right hand on the wheel house floor ". So it is clear that, after giving the door a tug, he believed for a moment, wrongly, that it would not move if he used it as a handhold. I understand that the majority of your Lordships are of opinion that, in these circumstances, the plaintiff can be said not to have had " full appreciation of the danger ", within the meaning of the rule stated by LORD PORTER and accepted
F by the majority of this House in *Horton's* case (1). I have doubts on the point, but they are not strong enough to lead me to dissent.

I now turn to the case against Austins. My Lords, I would hold Austins liable because they were the plaintiff's employers, and they did not take reasonable care for his safety. I would accept, as did the Master of the Rolls (LORD EVERSHED), the language of LORD OAKSEY in *Paris* v. *Stepney Borough Council* (5)
G ([1951] 1 All E.R. 42 at p. 50):

> " The standard of care which the law demands is the care which an ordinarily prudent employer would take in all the circumstances."

OLIVER, J., held that Austins fell short of that standard and I agree with him. What were the circumstances ? From Feb. 2 onwards, Austins knew that the
H left-hand door was broken. They knew because their employees had reported the fact to them. Austins reported it four times to Messrs. Storey Son & Partner, in the three notices and the letter the terms whereof I have already set out. I can well understand that, having reported it on Feb. 2, they expected Messrs. Storey to put it right, but, when this did not happen before the inspection on Mar. 2, and their employees again reported the condition of the door, they should
I have taken steps to see that it was put right before the next inspection. True, they did not own the machine house and its doors, but they could have insisted on Messrs. Storey either repairing the door or allowing Austins to repair it. I think it is clear that the condition of the left-hand door made entry to the machine house from the top of the ladder distinctly more dangerous. OLIVER, J., held that

> " the proper way of getting in was . . . to draw the bolt, supposing it to be shut, open the right-hand door back against the building and then, having first ascertained that the bottom of the left-hand door, at any rate, was

securely bolted on to the floor, use that shut and held-fast door as a means of getting in by holding on to it when one has to take one's hands off the top of the ladder as, of course, one has, in order to get in."

He was justified in holding that this was at least *a* proper way to get in. The plaintiff normally opened both doors, but other witnesses used the method described by the learned judge, and it was rendered impossible by the absence of the lower hinge.

My Lords, Austins knew of the state of disrepair of the door throughout the period from Feb. 2 to May 14, and I agree with the learned judge's comment:

> "I should hold that the employer would be under a duty in the circumstances, after he had been communicating again and again with the occupiers and nothing had been done, to go and see if it had been done and see if the place was safe or reasonably safe for his servant. In those circumstances, on the facts of this case, it seems to me that I must say that the employer is in part liable."

For these reasons, my Lords, I think that the plaintiff ought to succeed against both respondents, and I would not disturb the learned judge's apportionment of the blame as to eighty per cent. to the occupiers and as to twenty per cent. to Austins. I see no ground for holding that the plaintiff was guilty of contributory negligence. He was confronted by a trap, and he fell into it.

I would allow the appeal and restore the order of OLIVER, J.

LORD REID: My Lords, the duties of the first and second respondents were different. The first respondents were not occupiers of the premises and they had no obligation to repair the door. But it was their duty to take such steps, if any, as a reasonable employer, careful of the safety of his servants, could and would have taken in light of the knowledge of the situation which the first respondents had or ought to have had. They knew what the situation was when the doors were in proper repair, and they had received reports from their servants after the preceding three monthly inspections made under their contract with the occupiers to maintain the lifts. We know nothing of what was reported to the employers on the first two occasions except that in routine reports to the occupiers following the inspections they added—"Remarks:—Hole in car floor. Machine house door broken". The last inspection was made by the appellant, apparently on Apr. 27, 1955; he merely says that he "reported the unsatisfactory condition of that door" to his employers. There is nothing in the evidence to suggest that, at that time, he thought this was in any way dangerous; he only said that "it was not a very easy thing to get up" and that he made no complaint. If it could have been said that he had reported that there was any danger, that would have been such a strong point in his favour that it is impossible to suppose that it would not have been brought out in the evidence. If the employers' managing director is to be believed—and there is no suggestion that he was not a reliable witness—these reports did not cause him to think that there was any danger. He knew the place, and he only thought that the condition of the doors would make it more difficult to get in to the wheel house. He was concerned that the machinery there should be protected from the weather, but he understood that, notwithstanding the condition of the doors, they were being kept shut. The appellant had, in fact, tied them together with wire because, owing to the damage, they could not be bolted. In the routine report to the occupiers which followed this inspection by the appellant, the employers repeated the same "Remarks" as before, and in a letter dealing with a number of defects in the lifts they said: "The machine room doors need refixing in position".

In fact, I do not think that there was any substantial danger for a skilled and experienced man like the appellant if the condition of the doors had remained as it was in April. Certainly there was not then the kind of danger which caused

the accident. But an argument was submitted that, by their pleadings, the first respondents have admitted that there was serious danger and that they cannot now be heard to say that there was not. In their defence, in support of a plea of volenti non fit injuria, it is said:

> " Well knowing that the said doors had been in a serious and dangerous state of disrepair on the occasion of his previous visit to the machine house, the [appellant] . . . voluntarily incurred the risk . . . "

In further and better particulars, there is some confusion between the state of affairs in April and that at the time of the accident. I hesitate to express an opinion on a matter of English pleading but I find that LORD EVERSHED, M.R., said:

> " The particular paragraph I think was intended (though, I am bound to say, it was not clearly so expressed) by way of an alternative plea—saying, in other words, that if it was in a dangerous condition then the [appellant] knew all about it and voluntarily accepted the risk."

I think, therefore, that I should disregard what is in the pleadings, particularly as this does not expressly relate to what the first respondents knew or ought to have known.

What, then, was the first respondents' duty after receiving the appellant's report in April ? It was not argued that they had failed in their duty to him before that by letting him use this route to the wheel house in April. OLIVER, J., said:

> " In this case the employer knew just as well as the occupier the condition of the thing. He was put on inquiry. I do not say that he knew that the door had not been secured, but I should hold that he would be under a duty in the circumstances, after he had been communicating again and again with the occupiers and nothing had been done, to go and see if it had been done and see if the place was reasonably safe for his servant."

Why was he put on inquiry ? I would agree that he would be if he knew or ought to have known that there was any substantial danger.

There was in April a potential danger, but that potential danger had existed from the time when the lower hinge of the door gave way sometime before February. What happened to the loose door between the April and May visits could have happened at any time during the preceding two months, and I do not see why the mere lapse of time since the hinge gave way put a heavier duty on the first respondents.

These respondents could not reasonably have done any more than they did prior to the day of the accident, May 14. They urged the second respondents to repair the doors. The second respondents did not do so because they held that this was the duty of the first respondents under their contract. In this, the second respondents were held to be wrong, and they now accept the finding that it was their obligation to make the repair. Of course, the first respondents might have repaired the door themselves, but that would have been tantamount to an admission that the second respondents were right in their interpretation of the contract, and we do not know what further difficulties this would have created. In any event, it is not found as a ground of fault that the first respondents ought to have repaired but did not repair the doors. And to have made an inspection some time before the day of the accident would have been of little value because the condition could deteriorate rapidly; we do not know how long before the day of the accident the door became jammed. So the first respondents had to choose on the day of the accident between sending the appellant to work as they did and making an inspection before any of their servants went up the ladder into the wheel house. They sent three men that day, and their managing director said in evidence:

" If the men were sent out by the foreman, it was their responsibility to organise the work there and overcome any small snags; if they wanted additional help, they could communicate with the works or with the property owners."

I think that he was justified in taking that course and, if authority be required, I would refer to the speeches in this House in *Winter* v. *Cardiff Rural District Council* (4) ([1950] 1 All E.R. 819), and to the judgments in the Court of Appeal in *Wilson* v. *Tyneside Window Cleaning Co.* (6) ([1958] 2 All E.R. 265). I find it hard to believe that any employer in real life would, in similar circumstances, have made a special inspection before allowing experienced men to go to work.

There must be countless cases where an experienced man is sent to do work in places the present condition of which is unknown to him or his employers. He is left to use his own judgment when he sees what the conditions are. No doubt it is a question of degree whether the conditions, on the information which the employer has, are likely to be so bad that it is unfair to leave it to the man himself to decide what to do. But the present case appears to me to fall far short of that. I think it not unimportant to note that another man, Mr. Wells, who accompanied the appellant, went up the ladder and entered the wheel house more than once during the day but before the accident happened to the appellant, and that he used precisely the same method as that used by the appellant but did not suffer from any movement of the jammed door when he took hold of it. I would dismiss the appeal as regards the first respondents.

Turning to the case against the second respondents, I am unable to agree that there are grounds for inferring that the door was jammed by some person for whom they are responsible. Mr. Webb, the person who manages the property for the second respondents, said that he did not act on the first respondents' reports to do any work on the doors; his reason, as I have already said, was that he thought that this was the responsibility of the first respondents. It must, in my view, be accepted that no one did anything to the doors on his instructions because he was not cross-examined on this point. I agree that, on the evidence of Mr. Wells, it must be accepted that the door was already jammed when the first respondents' men arrived on May 14, so the jamming must have been done by some unauthorised person or by natural agency—the wind. It is not easy to imagine why any unauthorised person should go near the place, and still more difficult to imagine why he should leave things in the condition in which they were found on May 14. The damaged door was jammed, but the other door was left open to flap in the wind; there was nothing to which it could be fastened. I could understand the possibility of someone hearing the doors flapping and going up to stop that, but, in fact, what was done was most irrational and would not stop flapping. If this was done by some unauthorised person, I cannot assume that he was a servant of Mr. Webb or of the second respondents or that he was acting within the scope of his employment in doing it; there does not appear to have been a caretaker in the building.

I am not at all satisfied that the wind could not have jammed the door. Looking at the plans, it is not easy to see how this could happen, but a strong wind can do unexpected things, and the plans represent the doors after repair. They may not have been exactly the same before. The doors had previously been tied together with wire, but we do not know what kind of wire or whether the force of the wind might have broken it. Moreover, Mr. Wells, a witness for the appellant, in his evidence twice refers to the jammed door as having been " blown in ". He was not cross-examined about this, and no one else appears to have said anything about how the door had come to be jammed. I cannot now say, in the absence of evidence, that that was impossible, and, even if it was, to find that the person who jammed the door was someone for whose action the second respondents were responsible seems to me to be a guess rather than a legitimate inference.

But that does not mean that the second respondents must succeed. It is true that they knew no more of the facts than the appellant did. But that is not enough to bring them within the shelter of *London Graving Dock Co., Ltd.* v. *Horton* (1) ([1951] 2 All E.R. 1). The primary duty of an invitor is to do all that is reasonable to remove unusual danger to the invitee of which he has, or ought to have, knowledge. It would have been reasonable and, indeed, easy to repair this door. But, by reason of *Horton's* case (1), the invitor is not in breach of duty if, by means of his warning or otherwise, the invitee recognises " the full significance of the risk " (per LORD PORTER, ibid., at p. 6) or has " full knowledge of the nature and the extent of the danger " (per LORD NORMAND, ibid., at p. 10). The test is not whether he agreed or whether he was free to agree to accept the risk; it is whether he had a sufficient appreciation of the danger. In this case, the appellant saw the position and realised that there might be danger because he tested whether the door would hold before putting his weight on it. But, in my view, his appreciation of the danger fell a good deal short of what is required. Another man might have had a greater appreciation but, as I read the speeches of the majority in *Horton's* case (1), the test which they require is subjective. The other defence open to these respondents is that this was not an unusual danger of which they had, or ought to have had, knowledge. This appears to me to raise difficult questions. I do not think that any useful purpose would be served by discussing it in detail because the doubts which I have with regard to it are not sufficient to require me to dissent from the conclusion that this appeal as regards the second respondents should be allowed.

LORD SOMERVELL OF HARROW: My Lords, I think that the door in the position in which the appellant found it was a trap. It appeared to be firm, but shifted at the crucial moment when he put weight on it in order to raise himself into the loft. To use the door in this way was a natural way to get in, though the appellant normally opened both doors. He could not do that when the door was jammed as it was. He knew the door was defective, but did he realise the full extent of the risk ? The learned trial judge clearly regarded him as a reasonably careful man and not himself to blame. He reasonably thought it was firm and would afford sufficient and steady support. It did not, and that constituted the risk which he did not fully appreciate (*London Graving Dock Co., Ltd.* v. *Horton* (1), [1951] 2 All E.R. 1 at p. 6).

I will now consider whether the second respondents, the occupiers, are liable. I have come to the conclusion that the Court of Appeal were wrong in refusing to accept the judge's finding that a servant of the occupiers had " fixed " the door. It remains somewhat of a mystery but that is, in my opinion, the most probable conclusion. The appellant had left the doors wired on Apr. 27. On the morning of May 14 Mr. Wells found the wire gone and the defective door in the same place as it was found by the appellant later in the day. There was no suggestion that any of the first respondents' men had been there in the interval. It seems impossible to me that the wind could have done it, or that some unknown third party had busied himself in the matter. Mr. Webb, for the occupiers, said they did not act on any of the four reports to do any work on the door. The most probable explanation seems to me, as it did to the learned judge, that someone on behalf of the occupiers, having had these four reports, went to see what was the matter. The occupiers, therefore, knew of the trap and the appellant reasonably did not appreciate the danger. I, therefore, agree with the learned judge that the second respondents are liable.

All the points in this case are near the border-line. The learned judge thought the first respondents, the employers, were also liable. There are many circumstances of possible risk in which an employer is justified when his men are sent out to do work in relying on them to look after themselves. The liability of the employers in this case could only arise after the first or, perhaps, after the second report when they realised the occupiers had done nothing. This door was rather

over a foot above the top rung of the ladder, a place where danger might arise. The learned judge came to the conclusion that the employers should have gone and seen if the place was reasonably safe. I am not prepared to disagree with this finding. A

I accept the learned judge's apportionment of liability. I would allow the appeal and reinstate the judge's order.

B

LORD DENNING: My Lords, in this case your Lordships are called on to consider the duties which arise when an employer sends his servant to work on premises occupied by somebody else. The rules of the common law have recently been modified by the Occupiers' Liability Act, 1957, but that Act only came into force on Jan. 1, 1958, and does not affect this case.

Let me first consider the claim of the workman against the *occupiers*, the second respondents. This workman was beyond doubt an invitee. He came on to the premises in order to do repairs to the lift. His work took him to the machinery in the machine house. The ordinary means of access to it was to go up an iron ladder to a pair of doors which opened the way into the machine house. The occupiers might reasonably expect him to use that means of access to get to the place where he had to work. It was, in those circumstances, their duty to take reasonable care to see that that means of access was reasonably safe. Just as a householder, who calls in a plumber, must take reasonable care to see that the staircase up to the bathroom is reasonably safe, so also these occupiers were under a duty of care to this workman. It is very different from the cases of the window cleaners on which counsel for the second respondents relied, such as *Christmas* v. *General Cleaning Contractors, Ltd.* (2) ([1952] 1 All E.R. 39) and *Bates* v. *Parker* (3) ([1953] 1 All E.R. 768). In those cases the householders did not provide any means of access to the window. They left it to the window cleaner to provide his own means, and they would reasonably expect him to take his own safeguards against the risks incidental to his work, such as ill-balanced weights or loose plywood. So, also, if a householder employs a builder to do repairs on the roof. It is for the builder to put up his own staging and take his own safeguards. But, in this case, the workman was using the means of access provided by the occupiers and that makes all the difference.

C D E F

Was, then, this duty broken by the occupiers ? I think that it clearly was. The doors opening to the machine house were, at all material times,

> " in a state of disrepair. The hinges were in an advanced state of corrosion and the lower hinge of the left-hand door had come away from its supports."

G

Such was the position admitted by the lift repairers, the first respondents, and the case seems to have been fought at the trial on the basis that the admission was correct. I should have thought that those defects made the means of access unsafe. The left-hand door might come off in the wind. It might give way when being opened by a workman. Or in some way or other, owing to the defects, someone might be injured. The particular manner is neither here nor there. The occupiers ought to have remedied the defects. Time after time the lift repairers told them the machine house door was broken and needed refixing. Yet the occupiers did nothing. That was, to my mind, a want of reasonable care on their part.

H

But can the appellant recover for it ? If the negligence of the occupiers was a cause of the accident, then, prima facie, he can recover against them. But there is a point to be considered on causation. It appears that, by the time the appellant came to get in, the left-hand door had become jammed against the floor of the machine house. There was no direct evidence to show how this happened. It was unlikely to be due to the wind or to a stranger. More than likely it was due to some servant of the occupiers or a servant of the lift repairers. It is probable that one of these—seeing the defective condition of the door—tried to jam it so as to make it more secure. But, however it happened, it was a direct

I

consequence of the want of repair and it does not break the chain of causation. Then, when the appellant came to get in, he held on to the jammed door so as to help himself in. It gave way, he fell and was injured. On those facts, his injury seems to me to be a direct consequence of the negligence of the occupiers in not repairing the door, for which he can recover against them unless he is to be defeated by *London Graving Dock Co., Ltd.* v. *Horton* (1) ([1951] 2 All E.R. 1). The Court of Appeal held that he was defeated by *Horton's* case (1); because, as the Master of the Rolls (LORD EVERSHED) put it, " the [appellant] himself knew everything there was to know about the condition of the doors ".

My Lords, I agree that he knew all about the defect, but I do not think he knew all about the danger arising from it. And *Horton's* case (1) only applies when an invitee has, in LORD PORTER'S words ([1951] 2 All E.R. at p. 6), " full appreciation of the danger ", or, in LORD NORMAND'S words (ibid., at p. 10) " full knowledge of the nature and the extent of the danger ", and nevertheless goes on and incurs it. His knowledge is a personal disability on him, which arises from his own individual state of mind, regarded subjectively by reference to his own appreciation of the danger, and not objectively by reference to what a reasonable man would appreciate. It is not enough that he should know of the defective condition of the premises. It is not enough that he should realise there is some risk. He must know and appreciate the full extent of the danger. If he was in any way mistaken about the danger, so that the state of affairs was in fact more dangerous than he thought it was, then he can recover. Put in homely fashion it comes to this: If a man, faced with a dangerous means of getting across a gap, mistakes the risk, saying to himself: " I know it is a bit risky, but so long as I am careful I shall be all right ", he is under no disability. But if he truly measures the risk, saying: " No matter how careful I am, it is very likely I shall fall " and still goes on, he cannot recover. That was Horton's state of mind. He fully appreciated the risk, indeed, he and his workmates had complained of it, but still he went on. Whereas, in the present case, the appellant tested the door—" it seemed safe enough ", he said—and only then, when he had assured himself of its safety, did he go on. He did not fully appreciate the danger and can recover.

I now turn to the claim of the appellant against his own employers, the first respondents, and here again I must make reference to *Horton's* case (1); for it seems remarkable that Horton did not sue his employers as well as the occupiers. The report in the Court of Appeal shows that complaints had been made to the employers' foreman about the insufficiency of the staging (see [1950] 1 All E.R. at p. 182), and in those circumstances one would have thought that it was the employers' duty to take reasonable care for the safety of the men—either by requiring the occupiers to make the staging safe or by withdrawing the men from the use of it. And it is, of course, quite clear that, if Horton had sued his employers, it would have been no defence for them to say that he had full knowledge of the nature and extent of the danger: see *Smith* v. *Baker & Sons* (7) ([1891] A.C. 325). But it must be remembered that, at the date when Horton brought his case—it was in 1948—it was commonly supposed that a man, placed as he was, could not sue his employers. It was often said at that time that employers who send their men out to work on the premises of other people have no responsibility for the safety of those premises; and that it was for the occupiers to see that the premises were safe for the workmen and not for the employers to do so: see, for instance, *Taylor* v. *Sims & Sims* (8) ([1942] 2 All E.R. 375 at p. 378, per LEWIS, J.). So Horton only sued the occupiers. He failed against them, but the speeches in this House contained some hints that he would have done better to sue his employers. LORD PORTER said ([1951] 2 All E.R. at p. 6) that the duty of occupier to invitee " is to be judged by a less exacting standard " than that of employer to employee; and LORD NORMAND distinctly said (ibid., at

p. 11) that, if Horton were allowed to succeed against the occupiers, it would mean that

> " . . . the invitor would owe to the invitee the same duty as an employer owes to his employees . . . "

It seems to me fairly clear that, if Horton had sued his own employers, he would have succeeded. Notwithstanding what was said in *Taylor* v. *Sims & Sims* (8), it has since been held, I think rightly, that employers who send their workmen to work on the premises of others cannot renounce all responsibility for their safety. The employers still have an overriding duty to take reasonable care not to expose their men to unnecessary risk. They must, for instance, take reasonable care to devise a safe system of work (see *General Cleaning Contractors, Ltd.* v. *Christmas* (2), [1952] 2 All E.R. 1110); and, if they know or ought to know of a danger on the premises to which they send their men, they ought to take reasonable care to safeguard them from it. What is reasonable care depends, of course, on the circumstances: see *Wilson* v. *Tyneside Window Cleaning Co.* (6) ([1958] 2 All E.R. 265).

Applying this principle, I think that the judge was entitled in this case to find the employers liable. If the workmen had not reported any difficulty or defect on the premises, the employers would not have been responsible. They would have been entitled to assume that the means of access provided by the occupiers was reasonably safe. But when the workmen reported—as they did—that the machine house door was broken and needed refixing in position, the employers were, I think, put on inquiry whether the means of access provided by these doors was reasonably safe. They ought to have done something but they did nothing beyond report the defect to the occupiers. Report after report, four in all, produced no result. Thereupon the employers ought, I should have thought—and, indeed, as the judge thought—to have gone themselves to see if the means of access was reasonably safe. If they had done so, they would have found it unsafe and would have done something. They might have insisted on the door being mended, or they might have sent a long ladder to enable the men to get safely to the machinery. Having done nothing, they cannot escape liability. I find myself, therefore, in full agreement with the learned judge. I see no reason for disturbing his finding, implicit rather than expressed, that the appellant was not guilty of contributory negligence; or the proportions in which he divided the responsibility between the occupiers and the employers.

My Lords, I would not leave this case without drawing attention to one feature of *Horton's* case (1) which has sometimes been overlooked. Horton's knowledge of the danger was so complete that it would have given rise to the inference that he had willingly accepted the risk as his, but for the fact that he was fettered by his contract of service. It was solely due to his contract of service that he was not in a position to choose freely between acceptance of the risk and rejection of it. So the defence of volenti non fit injuria did not apply. But his contract of service was no concern of the occupiers; and in a contest with them, Horton had to be regarded in law as a free agent, free to choose, although he was not so in fact. LORD NORMAND pointed this out ([1951] 2 All E.R. at p. 11):

> " . . . the invitee's contract of service with his employer cannot be pleaded either by or against the invitor who is a stranger to it . . . He cannot, in my opinion, sue as an invitee and at the same time found on his contract of service as restricting his freedom to act . . . "

If that was the turning point of the decision, as I think it was, it means that *Horton's* case (1) was a particular decision on the position of a servant who sues the occupier of the premises on which he is working instead of the employer who sent him there. It does not otherwise affect the general principle that knowledge of the danger is not a bar in itself but only a factor in considering whether the appellant willingly accepted the risk as his: see *Letang* v. *Ottawa*

Electric Ry. Co. (9) ([1926] A.C. 725); or alternatively whether the accident was due wholly or in part to his own fault: see *A. C. Billings & Sons, Ltd.* v. *Riden* (10) ([1957] 3 All E.R. 1).

Appeal allowed.

Solicitors: *Rowley Ashworth & Co.* (for the appellant); *T. D. Jones & Co.*, agents for *Linsley & Mortimer*, Newcastle-upon-Tyne (for the first respondents); *Isadore Goldman & Son*, agents for *Crute & Sons*, Newcastle-upon-Tyne (for the second respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

COLLINS AND ANOTHER *v.* CLAUGHTON.

[COURT OF APPEAL (Jenkins and Romer, L.JJ., and Roxburgh, J.), November 24, 25, December 15, 1958.]

Rent Restriction—Surrender of tenancy—Statutory tenancy—Surrender by operation of law—Acceptance of wife of statutory tenant as tenant—Whether equivalent to giving up possession.

A statutory tenant can effect a valid surrender by operation of law, but there must be either an actual yielding up of possession, or its equivalent.

On May 10, 1956, the defendant, who was the statutory tenant of a rent-controlled dwelling-house, wrote to the landlords: "As I have come to an agreement with my wife on changing name on rent book into her name, Amy, would you be kind enough to grant same as she is going to see it is paid in the future herself . . . I am enclosing book and stamped envelope for you so as to post it back. I am letting my wife sign this letter along with me". The change was agreed to by the landlords, and thereafter the wife paid the rent, but in January, 1957, the wife left home and on Sept. 14, 1957, she gave notice to the landlords that she was terminating the tenancy on Oct. 14, 1957. The landlords claimed possession from the defendant on the footing that he was a trespasser.

Held: the landlords were entitled to an order for possession, because there would have been a surrender by operation of law of the defendant's tenancy in May, 1956, if it had then been a contractual tenancy and the Rent Restrictions Acts did not in the circumstances of this case prevent the transaction of May, 1956, having the same effect.

Foster v. *Robinson* ([1950] 2 All E.R. 342) applied, and dictum of LORD GREENE, M.R., in *Brown* v. *Draper* ([1944] 1 All E.R. at p. 247) modified and applied.

Appeal dismissed.

[Editorial Note. The decision in *The Bungalows (Maidenhead), Ltd.* v. *Mason* ([1954] 1 All E.R. 1002), which is referred to at p. 98, letters E and F, post, is complementary to the present decision, as it shows that a statutory tenancy can by agreement be converted into, or superseded by, a contractual tenancy.

As to termination of statutory tenancy, see 23 HALSBURY'S LAWS (3rd Edn.) 810, para. 1589; and for cases on the subject, see 31 DIGEST (Repl.) 697, 698, *7886-7894.*]

Cases referred to:

(1) *Brown* v. *Draper*, [1944] 1 All E.R. 246; [1944] K.B. 309; 113 L.J.K.B. 196; 170 L.T. 144; 31 Digest (Repl.) 661, *7624.*

(2) *Old Gate Estates, Ltd.* v. *Alexander*, [1949] 2 All E.R. 822; [1950] 1 K.B. 311; 31 Digest (Repl.) 726, *8090*.
(3) *Middleton* v. *Baldock*, [1950] 1 All E.R. 708; [1950] 1 K.B. 657; 31 Digest (Repl.) 698, *7894*.
(4) *Foster* v. *Robinson*, [1950] 2 All E.R. 342; [1951] 1 K.B. 149; 31 Digest (Repl.) 697, *7888*.
(5) *Oastler* v. *Henderson*, (1877), 2 Q.B.D. 575; 46 L.J.Q.B. 607; 37 L.T. 22; 31 Digest (Repl.) 582, *7020*.
(6) *Rogers* v. *Hyde*, [1951] 2 All E.R. 79; [1951] 2 K.B. 923; 2nd Digest Supp.
(7) *Murray, Bull & Co., Ltd.* v. *Murray*, [1952] 2 All E.R. 1079; [1953] 1 Q.B. 211; 3rd Digest Supp.
(8) *The Bungalows (Maidenhead), Ltd.* v. *Mason*, [1954] 1 All E.R. 1002; 3rd Digest Supp.
(9) *Nightingale* v. *Courtney*, [1954] 1 All E.R. 362; [1954] 1 Q.B. 399; 3rd Digest Supp.

Appeal.

This was an appeal by the defendant from a judgment of His Honour JUDGE McKEE given on Apr. 24, 1958, at Leeds County Court, ordering the defendant to give to the plaintiffs possession of a dwelling-house known as No. 15, Wyther Lane, Leeds.

Donald Herrod for the defendant.

C. P. Heptonstall for the plaintiffs, the landlords.

Cur. adv. vult.

Dec. 15. **ROXBURGH, J.**, read the following judgment of the court: This is an appeal by the defendant, Fred Claughton, from an order made by His Honour JUDGE McKEE in Leeds County Court whereby it was ordered that the plaintiffs should recover possession of a dwelling-house known as No. 15, Wyther Lane, Leeds.

The defendant is in occupation of the dwelling-house. It was originally let to him on Feb. 8, 1945. He was frequently in arrear with his rent, and there were proceedings against him in court, and it is common ground that on May 10, 1956, he was a statutory tenant of rent-controlled premises. The defendant was also involved in matrimonial difficulties. His wife left home, but there was a reconciliation, and the defendant said in evidence that one of the terms of the reconciliation was that the rent book should be put into her name. The defendant and his wife signed a letter to one of the two plaintiffs (who were the landlords) dated May 10, 1956, in the following terms:

> " As I have come to an agreement with my wife on changing name on rent book into her name, Amy, would you be kind enough to grant same as she is going to see it is paid in the future herself. You will see I paid £6 8s. last Monday up to last month ending Apr. 16. I am enclosing book and stamped envelope for you so as to post it back. I am letting my wife sign this letter along with me."

The landlords readily agreed and the rent book was changed into the wife's name, and thenceforward she paid the rent, and the defendant did not. Both continued in occupation of the house, until in January, 1957, the wife again left home. She took unsuccessful proceedings for desertion. In August, 1957, she forced an entry, removed her furniture and never returned again, leaving the defendant still in occupation. He offered to pay rent but this was refused. On Sept. 14, 1957, the wife gave notice to the landlords that she was terminating the tenancy on Oct. 14, 1957, and accordingly the landlords claimed possession from the defendant on the footing that he was a trespasser. The judge held that the letter of May 10, 1956, acted on by all parties operated as a notional surrender of the statutory tenancy and the commencement of a new tenancy in the wife.

A The foundation of the argument for the defendant, both in the county court and before us, has been laid on passages in the judgment of the court delivered by LORD GREENE, M.R., in *Brown* v. *Draper* (1) ([1944] 1 All E.R. 246), especially the following (ibid., at p. 247):

> " A tenant remaining in possession cannot lawfully contract not to avail B himself of the protection which the Acts give him if and when the landlord takes proceedings against him to recover possession. If he wishes to place himself outside the protection of the Acts without putting the landlord to the necessity of taking proceedings, his proper course is to deliver up possession. Unless and until he does so, he is under the shelter of the Acts, whether or not he so desires. No contract, and, a fortiori, no mere state- C ment of his wishes or intentions, can deprive him of the statutory protection."

In *Brown* v. *Draper* (1) it was held that on the facts of the case the tenant had not delivered up possession, and the same conclusion was reached in *Old Gate Estates, Ltd.* v. *Alexander* (2) ([1949] 2 All E.R. 822). This is also true of *Middleton* v. *Baldock* (3) ([1950] 1 All E.R. 708). But these cases bear no close resemblance D to the present.

The questions involved in the present appeal are (i) whether (apart from the Rent Restrictions Acts) the transaction indicated by the letter of May 10, 1956, which was acted on by all parties, would have effected a surrender by operation of law of the defendant's tenancy and the creation of a tenancy in favour of the wife, and (ii) if so, whether the Rent Restrictions Acts prevent the transaction E from having this effect. The defendant remained in occupation throughout, and accordingly this question resolves itself into the question whether the passage in the judgment of LORD GREENE, M.R., in *Brown* v. *Draper* (1) which has been cited, required physical possession to be given up, and if so, whether it has been modified by subsequent decisions of this court.

The test to be applied in the solution of the first question is to be found in F *Foster* v. *Robinson* (4) ([1950] 2 All E.R. 342). The premises in that case were rent controlled, but the tenant at the time of surrender by operation of law was a contractual and not a statutory tenant. When he became unfit to work by reason of age and infirmity in 1946, the landlord told him that he could live in his cottage rent free until he died, and the tenant accepted the offer and paid no further rent. It was held in this court that as a result of this arrangement, G the original tenancy had been surrendered by operation of law. SIR RAYMOND EVERSHED, M.R. (ibid., at p. 346) states the problem thus:

> ". . . if there is a new arrangement which the tenant represents by his conduct that he is asserting, then he is estopped from denying that the landlord was capable of entering into that new arrangement, and, if the new H arrangement could not be entered into if the old agreement subsisted, it follows that the tenant is equally prevented from denying that the old agreement has gone."

Applying this test, the county court judge was right in holding that (apart from the Rent Restrictions Acts) the defendant's tenancy was surrendered in May, I 1956, by operation of law.

The bearing of the Rent Restrictions Acts on the problem needs further statement. Their application to a contractual tenant of rent-controlled premises was indeed decided in *Foster* v. *Robinson* (4). After pointing out that the tenant was a contractual tenant and not a statutory tenant, SIR RAYMOND EVERSHED, M.R., said (ibid., at p. 345):

> ". . . it is equally fair to say that the observation of LORD GREENE is true generally, and that where there is a rent-controlled house . . . Either

there must be an actual giving up of possession or its equivalent . . . or there must be an order against the tenant . . ." A

By the use of the phrase " or its equivalent " SIR RAYMOND EVERSHED, M.R., was either construing or modifying LORD GREENE'S proposition, because the phrase " or its equivalent " necessarily embraces something which is not an actual yielding up of possession, and what he had in mind is made clear in the following passage (ibid., at p. 348): B

" I think it amounts to this, that the determination of the former tenancy was equivalent to delivery up of possession under that tenancy and then a resumption of possession under a new transaction immediately afterwards. . . . to use the language of COCKBURN, C.J., in *Oastler* v. *Henderson* (5) ((1877), 2 Q.B.D. 575 at p. 578) there was a virtual taking of possession. If the key had been handed over and then been handed back the next minute that would have symbolised the delivery up and the grant of possession and I cannot think that it vitally matters that that performance was not gone through." C

Although *Foster* v. *Robinson* (4) concerned a contractual tenant, the reasoning on which it was based was no less applicable to a statutory tenant, and perhaps that is why LORD ASQUITH OF BISHOPSTONE stated the proposition in broad terms in *Rogers* v. *Hyde* (6) ([1951] 2 All E.R. 79) as follows (ibid., at p. 81): D

" If it was a statutory tenancy, there is recent and binding authority for the proposition that a contractual (and non-protected) tenancy can replace a statutory tenancy by a notional surrender and re-grant or by other means: see, for instance, *Foster* v. *Robinson* (4)." E

In *Murray, Bull & Co., Ltd.* v. *Murray* (7) ([1952] 2 All E.R. 1079) MCNAIR, J., found great difficulty in agreeing with this view; but this court in *The Bungalows (Maidenhead), Ltd.* v. *Mason* (8) ([1954] 1 All E.R. 1002), disagreed with MCNAIR, J., on this point, and *Nightingale* v. *Courtney* (9) ([1954] 1 All E.R. 362), in which F a statutory tenant was concerned, proceeded on the footing that the statutory tenancy could be replaced by a notional surrender followed by re-grant, although on the facts it was held that this had not been done. It must, therefore, now be treated as settled that as a matter of law, a statutory tenant can effect a valid surrender by operation of law in the circumstances indicated by the Master of the Rolls in *Foster* v. *Robinson* (4). G

There was ample evidence on which the county court judge could hold that a valid surrender by operation of law had been effected by the defendant in the present case. Accordingly, we are of opinion that the learned judge came to a right conclusion in this case, and would dismiss this appeal.

Appeal dismissed.

Solicitors: *Kingsley Wood & Co.*, agents for *Wade, Kitson & Rigg*, Leeds (for the defendant); *Emsley & Son*, Leeds (for the plaintiffs).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

MOUNTBATTEN (MARQUESS OF MILFORD HAVEN) *v.* MOUNTBATTEN (MARCHIONESS OF MILFORD HAVEN).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Davies, J.), October 6, 7, November 24, 25, 26, December 11, 1958.]

Divorce—Foreign decree—Decree granted to wife in Mexico after one day's residence there—Husband domiciled in England at time of decree—Wife resident normally in New York—Decree recognised by New York court—Whether decree recognised by English court.

The husband and wife were married in 1950 in the United States of America. The husband, and thus the wife also, were at all times domiciled in England. They lived in New York. In 1952 they separated, the husband returned to England and the wife remained in New York. In 1952 the wife started proceedings in New York for divorce or separation. On May 21, 1954, the wife filed a petition for divorce in the State of Chihuahua in Mexico on the ground of incompatibility of temperament. The wife attended the hearing, the husband was represented and submitted to the jurisdiction, admitting the petition; the wife produced a certificate of her residential qualification for the purpose of the proceedings and was actually present in Mexico within the jurisdiction of the court for some twenty-four hours. In Mexican law jurisdiction was based on two grounds, either of which would be sufficient, viz., residence of the wife (which meant her actual presence at the time of granting the qualification certificate), and submission of the parties to the jurisdiction. The decree was pronounced on May 22, 1954, and became final twenty-four hours after it was pronounced. Such decrees were recognised according to the law of New York. On a petition by the husband for a declaration that the Mexican decree validly dissolved the marriage,

Held: in English law domicil was the foundation of jurisdiction in divorce and, the domicil of the parties being English, the court would not recognise the Mexican decree, for it was not based on such residence as would have supported jurisdiction under s. 18 of the Matrimonial Causes Act, 1950, if the residence had been in England, and the fact that the decree was recognised in New York did not compel or permit the English court to recognise the decree. (See p. 110, letter B, p. 113, letters F and G, and p. 118, letters C to F, post.)

Armitage v. *A.-G.* ([1906] P. 135) considered and explained.

Travers v. *Holley & Holley* ([1953] 2 All E.R. 794) and *Robinson-Scott* v. *Robinson-Scott* ([1957] 3 All E.R. 473) distinguished.

PER CURIAM: if the wife had been ordinarily resident for three years in New York at the commencement of her suit there, the court would have recognised a decree obtained in that suit, although the jurisdictional test in New York was one year's residence only (see p. 118, letter A, post); but the wife had deliberately left the place of her ordinary residence and had obtained a certificate of residence in another country in order to give jurisdiction to the courts of that country, and it was doubtful whether she could also retain her residence in New York for the purposes of recognition of a decree obtained there (see p. 115, letters G and H, post).

[Editorial Note. The theory of a dual test for recognition of a foreign decree of divorce is expressly rejected, that theory being that such a decree is entitled to recognition if it is valid either by the law of the domicil or by the law of the place where, as the court recognises, the wife is concurrently entitled to proceed; the second of these alternatives is unjustifiable (see p. 118, letters F and G, post). The court also rejected, incidentally, a contention that the Mexican decree would not be entitled to recognition because it was obtained in proceedings which, though proper in Mexico, would be regarded as collusive by English law (see p. 104, letter B, post).

As to the recognition of foreign decrees of divorce, see 7 HALSBURY'S LAWS (3rd Edn.) 113, para. 200, particularly text and note (u); and for cases on the subject, see 3rd DIGEST SUPP. to title CONFLICT OF LAWS, 11 DIGEST (Repl.) *1023a-1024d.*

For s. 18 of the Matrimonial Causes Act, 1950, see 29 HALSBURY'S STATUTES (2nd Edn.) 405.]

Cases referred to:

(1) *Leviton* v. *Leviton*, (1938), 6 New York Supp., 2nd Series, 535.
(2) *Caswell* v. *Caswell*, (1952), 111 New York Supp., 2nd Series, 875.
(3) *Fricke* v. *Bechtold*, (1957), 168 New York Supp., 2nd Series, 197.
(4) *Armitage* v. *A.-G.*, *Gillig* v. *Gillig*, [1906] P. 135; 75 L.J.P. 42; 94 L.T. 614; 11 Digest (Repl.) 483, *1094.*
(5) *Travers* v. *Holley & Holley*, [1953] 2 All E.R. 794; [1953] P. 246; 3rd Digest Supp.
(6) *Carr* v. *Carr*, [1955] 2 All E.R. 61; 3rd Digest Supp.
(7) *Arnold* v. *Arnold*, [1957] 1 All E.R. 570; [1957] P. 237; 3rd Digest Supp.
(8) *Robinson-Scott* v. *Robinson-Scott*, [1957] 3 All E.R. 473; [1958] P. 71; 3rd Digest Supp.
(9) *Manning* v. *Manning*, [1958] 1 All E.R. 291; [1958] P. 112.
(10) *Gerrard* v. *Gerrard*, (Nov. 18, 1958), The Times.
(11) *Le Mesurier* v. *Le Mesurier*, [1895] A.C. 517; 64 L.J.P.C. 97; 72 L.T. 873; 11 Digest (Repl.) 468, *1011.*
(12) *Stathatos* v. *Stathatos*, [1913] P. 46; 82 L.J.P. 34; 107 L.T. 592; 11 Digest (Repl.) 472, *1039.*
(13) *De Montaigu* v. *De Montaigu*, [1913] P. 154; 82 L.J.P. 125; 109 L.T. 79; 11 Digest (Repl.) 473, *1040.*
(14) *Ogden* v. *Ogden*, [1908] P. 46; 77 L.J.P. 34; 97 L.T. 827; 11 Digest (Repl.) 357, *260.*
(15) *A.-G. for Alberta* v. *Cook*, [1926] A.C. 444; 95 L.J.P.C. 102; 134 L.T. 717; 11 Digest (Repl.) 472, *1030.*
(16) *H.* v. *H.*, [1928] P. 206; 97 L.J.P. 116; 139 L.T. 412; *subsequent proceedings*, sub nom. *Horn* v. *Horn*, (1929), 142 L.T. 93; 11 Digest (Repl.) 469, *1022.*
(17) *Herd* v. *Herd*, [1936] 2 All E.R. 1516; [1936] P. 205; 105 L.J.P. 108; 155 L.T. 355; 11 Digest (Repl.) 351, *201.*
(18) *Keyes* v. *Keyes & Gray*, [1921] P. 204; 90 L.J.P. 242; 124 L.T. 797; 11 Digest (Repl.) 467, *1003.*
(19) *Wall* v. *Wall*, [1949] 2 All E.R. 927; [1950] P. 112; 11 Digest (Repl.) 468, *1020.*
(20) *Deacock* v. *Deacock*, [1958] 2 All E.R. 633; [1958] P. 230.
(21) *Dunne* v. *Saban* (*formerly Dunne*), [1954] 3 All E.R. 586; [1955] P. 178; 3rd Digest Supp.
(22) *Levett* v. *Levett*, [1957] 1 All E.R. 720; [1957] P. 156; 3rd Digest Supp.
(23) *Shaw* v. *Gould*, (1868), L.R. 3 H.L. 55; 37 L.J.Ch. 433; 18 L.T. 833; 11 Digest (Repl.) 481, *1081.*
(24) *Harvey* v. *Farnie*, (1882), 8 App. Cas. 43; 52 L.J.P. 33; 48 L.T. 273; 47 J.P. 308; 11 Digest (Repl.) 481, *1084.*
(25) *Warden* v. *Warden*, 1951 S.C. 508; 11 Digest (Repl.) 504, *732.*
(26) *Fenton* v. *Fenton*, (1957), V.L.R. 17.
(27) *Stransky* v. *Stransky*, [1954] 2 All E.R. 536; [1954] P. 428; 3rd Digest Supp.

Petition.

By petition dated Jan. 15, 1958, the husband sought a declaration that a decree pronounced on May 22, 1954, in the State of Chihuahua, Mexico, validly dissolved his marriage to the respondent which was celebrated in the United States of America in February, 1950. The husband was at all material times

domiciled in England. The residence of the parties during their married life was in New York. The suit was undefended and came before DAVIES, J., on Oct. 6 and 7, 1958, when it was adjourned for argument by the Queen's Proctor.

R. J. A. Temple, Q.C., and *Colin Duncan* for the husband.

R. F. Ormrod, Q.C., and *A. T. Hoolahan* for the Queen's Proctor.

Cur. adv. vult.

Dec. 11. **DAVIES, J.**, read the following judgment: This is a husband's petition dated Jan. 15 and filed on Jan. 16, 1958. It is undefended. By it the husband prays in the first instance for a declaration that the marriage celebrated between the parties on Feb. 4, 1950, at the National Presbyterian Church, in the District of Columbia, United States of America, was validly dissolved on May 22, 1954, by a decree of the First Civil Court of the District of Bravos, sitting at Ciudad Juarez, in the State of Chihuahua in the Republic of Mexico. Alternatively, the husband prays for a decree of dissolution on the ground of desertion, asking for the exercise of the discretion of the court in respect of his own adultery. By an order dated July 15, 1958, proceedings on that part of the prayer which asks for dissolution were stayed pending the hearing of the cause on the prayer for the above-mentioned declaration.

On Oct. 6, 1958, the suit came on for hearing, and it immediately became apparent that it involved an important point of law, such as would be difficult for the court to determine without a presentation of both sides of the case. I, therefore, indicated that I should send the papers to Her Majesty's Proctor in order that he might be represented. Meanwhile, counsel for the husband continued his opening of the case and called his witnesses, the husband, Mr. Valls, an expert on Mexican law, and Mr. Crane, an expert on New York law. The hearing was then adjourned and was resumed on Nov. 24, when the Queen's Proctor appeared by counsel.

Whenever in this judgment the expressions " husband " or " wife " are used, that is merely for convenience and is, of course, entirely without prejudice to the husband's contention that at the date of this petition the parties had ceased to be husband and wife. Again, whenever reference is made to Mexico, Mexican law, Mexican court, Mexican decree or divorce, this means, unless by the context it otherwise appears, the State of Chihuahua, the law of that state, the court which applies that law, and the decree or divorce pronounced by such court.

The husband's domicil of origin is English. The parties were married on Feb. 4, 1950, the wife being the divorced wife of one William Simpson. At all material times they lived at 510, Park Avenue, New York City. There are no children. I am satisfied that, subject always to the effect of the wife's short visit to Mexico in May, 1954, and her actions and declarations there, the wife has continuously lived in New York State from the date of the marriage down to July of this year. At the date of the marriage the husband was employed in the United States, but he made it plain to his wife that he had no intention of abandoning his domicil of origin. At the end of 1952 the husband's appointment in the United States was coming to an end and, according to his evidence, he told his wife that he wished her to come and live with him in England, but she refused. On Dec. 11, 1952, in New York, he was served with a summons for separation in an action commenced by the wife in the Supreme Court of New York. At first I was under the impression that this action was something different from the wife's action for divorce or separation; but it is clear from the pleadings in the New York action that these actions were one and the same. On Dec. 19, 1952, the husband left New York for England, where he has lived ever since. Since that date he has not seen his wife nor had any direct communication with her.

On Apr. 29, 1953, he was served with his wife's complaint in the New York action, in which she alleges cruelty, desertion and adultery and prays for divorce

or alternatively separation. Only two paragraphs of that document require specific mention. Paragraph 2 reads:

> "At the time of the commencement of this action and for more than one year past, the plaintiff has continually resided at 510, Park Avenue, New York City, New York."

The point of this allegation is that, as Mr. Crane said in evidence, the jurisdiction in divorce in the courts of New York depends on one year's residence. Paragraph 36 reads as follows:

> "No decree of divorce has been obtained by the defendant against the plaintiff in any of the courts of any State or Territory of the United States, or in any court of this State of competent jurisdiction, nor has any other action been brought nor is any pending between the plaintiff and defendant for the relief demanded herein."

This averment no doubt appears in pursuance of some rule similar to r. 4 (1) (h) of the Matrimonial Causes Rules, 1957.

The husband delivered a defence denying all the wife's allegations and cross-praying for a separation on the ground of desertion. The copy of this document is not dated. On Oct. 15, 1953, an order for alimony pendente lite and what we should call security for costs was made. On Nov. 24, 1953, the amount of alimony was reduced on appeal by the Appellate Division of the Supreme Court. In an affidavit sworn on Jan. 22, 1954, the husband's New York lawyer, Mr. Granville Whittlesey, stated that on behalf of the husband he had approached the wife's lawyers with a view to "an amicable disposition of the entire matter" and he adumbrated a cross-charge of adultery against the wife. On Jan. 25, 1954, Mr. Edward Bennett, the wife's New York lawyer, swore an affidavit stating that the husband's lawyer had suggested that the wife should discontinue her action in New York and should go to Reno, in the State of Nevada, and commence an action for desertion to which the husband would file an appearance. The underlying suggestion is, of course, that such an action would not be defended. On Feb. 2, 1954, an order was made on the wife's application for the taking of evidence on commission and also an order giving leave to the husband to amend his defence. There are no further documents in the bundle of pleadings; but I was told by counsel for the husband that on June 7, 1954, the New York action was by consent discontinued.

There is no evidence before the court as to what discussions and negotiations went on between the parties through their lawyers. But two most important documents were put in evidence. The first of these dated Apr. 14, 1954, is a power of attorney given by the husband to one Negrete, a Mexican lawyer. It was executed in London and one of the attesting witnesses was the husband's London solicitor. It is in Spanish. The English translation is in these terms:

> "I, David Michael Mountbatten, of full age, residing in the City of London, England, British subject, a merchant, in the full exercise of my civil rights, hereby make known: That I grant a special power of attorney to Licentiate Francisco Alfredo Negrete, a resident of Ciudad Juarez, State of Chihuahua, Republic of Mexico, to represent me before the courts of the said State of Chihuahua in legal proceedings for divorce which have been or are about to be brought against me by my wife, Romaine Pierce Mountbatten née Simpson until recently a resident of the City, County and State of New York, and for this purpose I authorise the said advocate to continue the action throughout all its stages until a final decision is given; to appear on my behalf, and ratify and confirm the petition, since incompatibility of temperament actually exists between my wife and myself, dispute and lodge objections, submit proofs, including that of admission, make and answer interrogatories, renounce in my name and for this special purpose the jurisdiction of my domicil and expressly to submit me to the jurisdiction

of the said courts in accordance with articles 22, 23 and 24 of the Law of Divorce in the State of Chihuahua; to receive notifications, appear at hearings of every kind; to challenge with or without cause, judges, magistrates and other officials of justice; to intervene in all legal appeals and to withdraw therefrom; including injunction; execute agreements and make stipulations which in his judgment may be expedient; to substitute this power of attorney and revoke substitutions, reserving to himself at all times the exercise thereof; and finally I grant him such powers as may be necessary to fulfil the special objects of these presents, by which I ratify and confirm all and every one of the acts which my attorney may carry out and also those done by persons appointed as substitutes. This power of attorney is signed by me before a notary public and witnesses who sign in the City of London, England, today Apr. 14, 1954."

It is plain, therefore, that Mr. Negrete was being given by the husband complete power, in the undefended divorce suit that the wife was going to start in Mexico, to make every admission, to submit to the jurisdiction and to do everything to facilitate the obtaining of a divorce by the wife. There is one phrase that perhaps needs a little explanation: "to receive notifications." The point of that is that, as was explained by Mr. Valls, the time for appeal from such a decree, as was eventually pronounced by the courts of Mexico, is the somewhat surprisingly short time of twenty-four hours from notification, and "notification" means, if the parties are present or represented in court, the actual pronouncing of the decree. However strange it may appear to us English lawyers, it seems clear that in Mexican law there is nothing objectionable in a document such as this power of attorney. Indeed, according to the evidence of Mr. Valls, such a document appears to be welcomed by the Mexican courts as tending to facilitate the speedy dispatch of judicial business. It is, nevertheless, somewhat surprising that his London solicitor was prepared to associate himself with such a venture.

The second document was signed in New York, on May 15, 1954, by the wife, and on May 14, 1954, on behalf of the husband, by his attorney, Granville Whittlesey, his New York lawyer, mentioned above. It provides by cl. 1 that

> "each party may reside from time to time at such place, and conduct, carry on, and engage in such employment, business, or profession as either shall desire, without any control, interest or rights, restraint or interference, direct or indirect, by the other party hereto."

Clause 2 provides for the payment by the husband to the wife of the sum of ten thousand dollars in full and complete discharge of the husband's obligations past and future for the support and maintenance of the wife. There are a number of other provisions regarding property, and cl. 6 provides as follows:

> "In the event that either of the parties shall hereafter prosecute an action for absolute divorce against the other in any court, this agreement shall be presented to the court as constituting the voluntary and complete settlement between the parties of property rights and all claims for support and maintenance of the wife and either party may request the court to incorporate this agreement in so far as it makes provision for the support of the wife in any decree or judgment which it shall render, and neither party will request nor consent to any decree or judgment as to the maintenance and support of the wife other than as herein provided, and this agreement shall not merge in any such judgment or decree but shall survive."

Those two documents make it plain, in my judgment, that the petition which the wife in a matter of days after the execution of the second of them presented in the Mexican court was, according to our notions, wholly collusive. In saying that, I wish to make it clear that there is no suggestion that there was any fraud on the Mexican court. What I mean is that the petition was presented

in Mexico as a result of a bargain made between the parties that the wife should do so on the basis of a financial settlement between them and on the understanding that the husband would not defend. It is right that it should be categorically stated in fairness to both husband and wife that it is clear that whatever they did they did with the advice and assistance throughout of their lawyers, American, Mexican and English*.

It is contended by counsel for the Queen's Proctor that this finding of collusion is a material matter for consideration in deciding whether the Mexican decree is entitled to recognition in this court. But, in my opinion, that submission is not correct. There is abundant authority† for the proposition that if the decree of a foreign court is otherwise entitled to recognition, the fact that the law and practice of the foreign court is different from ours does not matter, save, possibly, if it can be shown to be contrary to natural justice. Moreover, it is important that one should not allow one's instinctive dislike and disapproval of a transaction of this sort to affect the consideration of the point of law which arises in this case. I do not pause to consider what, if any, effect the agreement between the parties for a divorce and the provisions of cl. 1 of the document executed in May, 1954, would have on the allegation that thereafter the wife was in desertion of the husband. That question is not now before the court, and, in any case, the written document is by its express terms to be construed and interpreted according to the laws of the State of New York.

The evidence as to the obtaining of the Mexican decree is derived entirely from the decree itself and the explanation of it given by Mr. Valls. The decree is, of course, in Spanish. There are two translations of it into English and these differ somewhat from each other. But their effect appears to be the same. The material parts of the decree are as follows:

> "Citizen Rodolfo Silva, secretary to the First Court in Civil Matters of the District of Bravos, State of Chihuahua, Mexican Republic, certifies that in the proceedings for necessary divorce brought by Romaine Pierce Mountbatten, née Simpson, against David Michael Mountbatten, a decree was issued in the following terms:—Decree.—City of Juarez, Chihuahua, on May 22, 1954. Whereas to give a final decision in the proceedings for necessary divorce brought by Romaine Pierce Mountbatten née Simpson against David Michael Mountbatten. [Then there is a reference to a case number.] And whereas:—By petition dated in this city the twenty-first day of the present month and year [the wife] stating that she is a resident thereof as appears from the certificate granted to her by the Municipal Presidency which is annexed to her said petition, and furthermore submitting herself to the jurisdiction of the court, instituted proceedings for necessary divorce against [the husband] alleging incompatibility of temperament between the two of them as grounds therefor, and declaring:—That the marriage was contracted on Feb. 4, 1950, in the District of Columbia, United States of North America, as appears from the respective certificate of marriage which was enclosed, together with its translation into Spanish owing to its being drawn up in [English]. That there are no children of the said marriage. [The wife] also added in her petition that regarding the property, rights and obligations of her marriage, [the husband] and herself had entered into an extra-judicial contract by mutual agreement, for which reason she does not consider it necessary to produce the same to the court. The petition was accepted the respective notification being ordered to be given to [the husband] and [the wife] having appeared personally before the undersigned judge to submit her petition, she was notified of the decision

* Leading counsel for the husband on this petition was not the leading counsel acting for the husband at the time of the Mexican proceedings.

† See 7 HALSBURY'S LAWS (3rd Edn.) 115, 116, para. 203.

accepting the same and she stated:—That she ratifies her petition in every respect including what is stated as to her express submission which she makes to the jurisdiction of this court and produced the certificate of her registration in the Municipal Registry of residents of this city and by notification dated the day of the date hereof the Licentiate Francisco Alfredo Negrete as legal attorney of [the husband] replied on his behalf to the petition lodged against him, admitting it in every respect and submitting expressly to the jurisdiction of this court, applying furthermore for the decision which is now being given in view of the fact that all the legal requirements have been complied with, including payment for the publication of the same; and whereas this court is competent to hear and give a decision on the present case according to what is stipulated in arts. 22, 23 and 24 of the Divorce Law, by virtue of the fact that [the wife] proved, by the certificate from the Municipal President's Office which she produced, that she has the necessary residential qualification for instituting proceedings and appeared and ratified her petition before the undersigned judge, lastly submitting herself expressly to the jurisdiction thereof, and in accordance with what is stipulated by art. 28 of the said law, the certificate of marriage of the parties, together with its translation into Spanish, was enclosed. As grounds for divorce, [the wife] put forward incompatibility of temperament, being a reason allowed by s. XIX of art. 3 of the aforesaid Divorce Law and on a claim being admitted in every respect it is considered to be fully proved according to art. 370 of the Code of Civil Procedure; subsidiarily: As it is stated in the petition that there are no children of the marriage and that regarding the property, rights and obligations arising from the marriage they had entered into an extra-judicial contract by mutual agreement, no decision may be given in this decree in respect of those aspects. Wherefore and by virtue, furthermore, of [and then certain articles are recited] it is decreed:—First: The marriage entered into by [the husband] with [the wife] on Feb. 4, 1950 in the District of Columbia, United States of North America, is declared dissolved with all the legal consequences thereof, both parties being legally entitled to enter into another marriage. Second: [The wife] is authorised to re-assume her maiden name. Third: Let the present decision be registered, let it be published, let the certified copies that may be applied for be issued to the parties concerned and in due course let the documents in the proceedings be placed among the records. Giving a final decision, thus Citizen Licentiate Fernando Romero Figueroa, First Judge in Civil Matters of the District of Bravos decreed [and signed]."

Then there are various signatures. From this it appears that the wife's petition was filed on May 21, 1954, in the Mexican court. It is, perhaps, odd that the New York lawyers did not—either on the ground of expediency or out of courtesy to their own court—arrange for the New York action to be discontinued before the Mexican proceedings were started. The petition was based on incompatibility of temperament and was accompanied by a certificate from the Municipal Presidency that the wife was a resident of Ciudad Juarez and the wife submitted herself to the jurisdiction of the court. She appeared personally in court. It is not clear to me whether she appeared personally in court both on May 21 and 22; but it seems probable that it was only on the latter day—what we should call the day of the hearing. The husband was represented by Negrete, who admitted the contents of the petition and submitted expressly to the jurisdiction of the court. On May 22 the decree of dissolution was made.

This decree, according to Mr. Valls' evidence which, of course, I accept, is by Mexican law conclusive proof of a decree of divorce. It is recognised all over Mexico, and, by the Treaty of Monte Video of 1889, in Bolivia, Paraguay, Peru and Uruguay. It is final unless appealed from within twenty-four hours from notification. As I have already said, notification in the present case

was the reading of the decree in court, both parties being represented. Jurisdiction was based on two grounds, either of which would have been of itself sufficient. The first ground was the residence of the wife as certified by the Municipal Registry: astonishingly enough, according to our ideas, residence connotes nothing more than mere physical presence at the moment of the granting of the certificate. The second ground was that both parties expressly submitted to the jurisdiction. It may be observed, incidentally, that the Mexican law in terms contemplates divorce by mutual consent.

The only remaining question of fact is as to the law of the State of New York, that is to say, whether the courts of that state are prepared to recognise decrees, such as the one in question, granted by the courts of Chihuahua as validly dissolving the marriage of persons resident in the State of New York. The evidence of Mr. Crane on this point was quite definite.

> "The question has come up on a great many occasions. It is perfectly clear and I think beyond question of doubt that a divorce in the State of Chihuahua where one party to the suit there appears in person, irrespective of how long, and the other party appears by counsel—as I understand the case to be here—will be accepted without question in the State of New York as a matter of comity."

He supported this view by reference to three decided cases:—*Leviton* v. *Leviton* (1) ((1938), 6 New York Supp., 2nd Series, 535), *Caswell* v. *Caswell* (2) ((1952), 111 New York Supp., 2nd Series, 875) and *Fricke* v. *Bechtold* (3) ((1957), 168 New York Supp., 2nd Series, 197).

The *Leviton* case (1) was heard in the New York Supreme Court in 1938 before McCook, J. His judgment is in these terms:

> "In this action for divorce by a woman against her husband the amended complaint makes the following allegations: The parties were married in London, England, July 17, 1934, being at that time residents of the State of New York; between Aug. 1, 1936, and the commencement of the action the defendant committed adultery with a woman calling herself defendant's wife (not the plaintiff); the defendant, after a bigamous re-marriage, has lived and is living in adulterous intercourse with that woman in New York, California and other states. Plaintiff asks that the bonds of marriage be dissolved and that reasonable provision for her support be made. The answer interposes four defences. In the first it sets forth that: The Civil Court of First Instance of the Bravos District at the City of Juarez, State of Chihuahua, Republic of Mexico, was a court of general jurisdiction over divorce and dissolution of marriage; on Aug. 6, 1935, the plaintiff instituted a divorce action against the defendant in that court; in her petition the plaintiff attached a residence certificate dated Aug. 6, 1935, issued by the Mayor's office of the City of Juarez, stating that her name was inscribed in the Municipal Register of residents of that city, and a certificate to the same effect containing the defendant's name was also attached; defendant was personally served with process in that city; he appeared by attorney, submitted himself to the jurisdiction of that court and filed an answer; on Aug. 6, 1935, both parties were in Juarez and appeared personally before the court; the law of Mexico applicable to the action provides that in 'mutual consent' cases the residence is fixed by the residence of either party and is proven by the certificate of the Municipal Registry; on Aug. 6, 1935, the court rendered judgment in favour of the plaintiff, a copy of the judgment being annexed to the answer; the judgment recited, among other things, that the domicil of the parties and the cause of action had been proven and that the competency of the court to adjudge had been properly established; on Aug. 6, 1935, the judgment was duly filed and recorded."

A It will be seen, therefore, that, in essence, that case is the same as this, save that in that case both parties were in Mexico and that apparently that decree was obtained in one day, whereas in this case it took two days, or, at any rate, twenty-four hours.

" The second defence sets forth that, in reliance upon the Mexican divorce and induced by it, the defendant, re-married and the plaintiff recognised B defendant's re-marriage, herself contracted to re-marry, and is estopped from questioning the validity of defendant's re-marriage. The third defence alleges that the adultery, if any, was committed with the plaintiff's consent, procurement, etc. The fourth defence sets forth that the defendant was legally re-married after a lawful and valid Mexican divorce, and that plaintiff by her act in procuring that divorce induced the re-marriage C and recognised it, fully condoning and forgiving the defendant. All four defences depend upon the Mexican divorce of Aug. 6, 1935. The answer nowhere alleges that at the time of the institution of the Mexican divorce action the parties in fact either resided or were domiciled in Mexico.

" The general principles of law with respect to foreign divorces are clear D and have been stated frequently by the courts of the state. This case, however, presents a novel situation, and neither counsel has adduced controlling authority. The decisions cited by plaintiff, chiefly relating to constructive or other defective appearance in foreign divorce actions, are clearly distinguishable.

" (1) Moral, ethical or social considerations, when embodied in the E declared public policy of this state, undoubtedly permit our courts on appropriate occasion to refuse recognition of divorces granted by other jurisdictions. The Federal Constitution does not forbid such refusal. On the other hand, New York courts customarily give full recognition to divorces granted in other states and countries even where the ground, the domicil, or other prerequisites, singly or together, are found to be such that they F would be held insufficient towards securing a New York decree after a trial taking place here. The ultimate question raised by the first defence is, therefore, whether our public policy justifies departure, in this case, from the general rule.

" (2, 3) The so-called mail-order divorces, Mexican and otherwise, have been held invalid. Careful scrutiny is always applied to judgments without G personal appearance by the defendant. In any collateral attack, however, our court ordinarily will not question the result where both parties have appeared and where on the face of the decree is presented clear evidence of jurisdiction over them by the court which rendered the judgment.

" (4, 5) On this motion there can be no dispute that all the acts enumerated H in the first defence actually were performed. The circumstances that they transpired within twenty-four hours of one another is not in and of itself sufficient to upset the decree. Upon the face of the complaint now under discussion we may discover an element of suspicion through the simultaneous occurrence of so many material events. That is, however, answered and overcome by our duty to recognise the jurisdiction of the Mexican court, I established by the appearance of both parties before it. The Mexican law respecting residence has been followed. The establishment of a domicil or residence in the strict sense is a question both of intent and act. The parties acted; we must accept the Mexican court's conclusion upon their intent.

" An illustration from one of our sister states: The period now required in Nevada is even shorter than previously, but the abridgement does not prevent us from recognising residence, nor can it lead to an inference of no jurisdiction in the Nevada court. We may disagree with the law of Mexico

or Nevada establishing rules for residence. We may even disapprove them as expressing theories repugnant to our own standards, as applied to corresponding litigation initiated within this state. It does not follow that we should disturb a decree entered either in Nevada or Mexico if it complies with the requirements of their statutes, for we then say that the court had jurisdiction of the subject-matter and the parties, and thus was competent to act."

It may be (and I speak with the utmost deference on a matter of which, of course, I have no knowledge at all) that there is a distinction, or there might be a distinction, between the attitude of the New York courts to decrees of other states of the Union and foreign states. For the clause in the constitution may be material with regard to the one, whereas, of course, it cannot apply to the other. I do not think that I need read any more of the learned judge's judgment. The grounds on which he proceeded and the reasoning are perfectly plain and clear from the extract that I have already read.

The only other case to which I need refer is *Fricke* v. *Bechtold* (3), the last one on this point. It is very short. The learned judge, RABIN, J., says ((1957), 168 New York Supp., 2nd Series, at p. 198):

"Although the plaintiff aided and abetted the defendant to obtain her Mexican decree, and indeed financed the entire project, that factor does not bar him from attacking the Mexican decree . . . Nevertheless such decree, grounded as it was upon the personal appearance of the defendant in the divorce granting court and the filing of a notice of appearance by her first husband through an attorney designated by him, is entitled to recognition under the doctrine of comity."

Then a number of authorities are cited by the learned judge. It is plain from the citations in the latter case that there is a considerable body of authority to the same effect.

Mr. Crane added that in his opinion the wife would at the present time unquestionably be held by the New York court to be a single woman. He also dealt in his evidence with another point which was troubling me a little—namely, whether the attitude of the New York courts to the recognition of the Mexican decree would be in any way affected by the fact that at the date of that decree there was already pending in the New York court a suit between the same parties for dissolution. Mr. Crane's evidence on this point starts in this way. I asked:

"Is there any reference to the previous proceedings which [the wife] had previously commenced in New York?"

Counsel for the husband said:

"I do not think so, but I will make certain. I do not think she did. Mr. Crane, would the recognition of the Mexican decree be affected in any way by the fact that the wife had commenced proceedings in the courts of New York? A.—I do not think so, sir. I cannot see why. Q.—The fact that she called the machinery of the state into operation based on her residence there, would that in any way affect the validity, by New York law, of her Mexican decree? A.—No, sir."

Then I asked a question:

"Arising out of your last answer, Mr. Crane, you have told me about these other cases: supposing this case now by [the husband], instead of being in the English court, were, in more or less parallel circumstances, before a New York court and the New York judge had before him the fact that in December, 1952, apparently, the wife commenced some proceedings for a separation, that in April of 1953 she commenced proceedings

A for a dissolution or, alternatively, for a separation, and that that suit had been proceeding happily with a lot of interlocutory proceedings for some twelve months until February, 1954, and then she went off to Mexico: would not the American judge say, 'But now, when a New York court is seized with this matter, what did she go off to Mexico for ? ' ? "

B Mr. Crane answered:

> " I would say this, my Lord. The New York judge might not be all that pleased about it, but I feel quite certain, on the basis of the cases I have produced, that he would do nothing about it whatsoever. It is entirely my feeling. I think this stems back to a concept of American law, which is the ability of the female party to a marriage to adopt any residence or
> C domicil she pleases for the purpose of obtaining a divorce—which is a very old principle of American law."

Mr. Crane was unable to produce any authority in support of this view. But the Queen's Proctor did not call any evidence to the contrary and expressed no wish to cross-examine Mr. Crane. I feel, therefore, that I am bound to find
D that the New York courts would recognise as validly dissolving the marriage of these parties the decree obtained in Mexico by the wife.

On these facts, then, it is possible to state the question of law which arises for decision in the present case. The submission for the husband is as follows:— (1) The New York court is the court of the residence of the wife. (2) The New
E York court would recognise the Mexican decree. (3) While formerly our courts took the view that the court of the domicil of the parties was the only court which had jurisdiction to dissolve their marriage, nevertheless we would recognise the validity of a decree pronounced alibi if such a decree was recognised as valid by the court of the domicil (*Armitage* v. *A.-G.* (4), [1906] P. 135). (4) As a result of the decisions in *Travers* v. *Holley & Holley* (5) ([1953] 2 All E.R. 794),
F *Carr* v. *Carr* (6) ([1955] 2 All E.R. 61), *Arnold* v. *Arnold* (7) ([1957] 1 All E.R. 570), *Robinson-Scott* v. *Robinson-Scott* (8) ([1957] 3 All E.R. 473), *Manning* v. *Manning* (9) ([1958] 1 All E.R. 291), and *Gerrard* v. *Gerrard* (10) (The Times, Nov. 18, 1958), the English courts now recognise foreign decrees pronounced in the suit of a wife if the wife at the time of the presentation of her petition had been for three years resident within the jurisdiction of the court which pro-
G nounced the decree, even though the jurisdictional test of the foreign court is other than that of three years' residence and the ground of the decree was not a ground on which this court could act. (5) Therefore, this court by an extension of the principle of *Armitage* v. *A.-G.* (4), should in the present case recognise the Mexican decree, since it is recognised by the court in whose jurisdiction the wife has resided for three years and whose competence to dissolve
H the marriage we would now recognise.

It is important, before considering those submissions and the arguments by which they are supported, to premise two fundamental matters. In the first place, it is freely admitted by counsel for the husband—as, indeed, he has to admit—that, if the question before this court were whether this court would give direct recognition to a Mexican decree granted to one of two parties domiciled
I in England and there were no question of the interposition of the jurisdiction of the New York court or of any residential qualification of the wife in that jurisdiction, this court would certainly not recognise the decree. Secondly, it is expressly conceded in this case that in our law the wife never at any time after the marriage had or preserved a New York domicil and that at all material times her domicil was English. Whether the contrary could have been successfully argued, I do not know; but that point is fundamental to the consideration of the present case.

The approach by counsel for the husband to the problem involved was first of all to examine the history of the doctrine of domicil as the test of the jurisdiction of our own courts and thereafter to consider to what extent a change in the application of that doctrine has affected the attitude of our courts towards the recognition of foreign decrees. Domicil as the test of jurisdiction, as is rightly pointed out, depends in the first instance on case law. Not even down to the present Matrimonial Causes Act, 1950, is it expressly enacted by statute that the jurisdiction of this court to dissolve a marriage depends on the domicil of the parties. It is plain, however, that at any rate from 1895 and the decision of the Privy Council in *Le Mesurier* v. *Le Mesurier* (11) ([1895] A.C. 517) the doctrine was really beyond dispute; and it would serve no purpose to cite any of the other authorities on the point. It is not necessary to consider the apparent breach of this rule made by *Stathatos* v. *Stathatos* (12) ([1913] P. 46) and *De Montaigu* v. *De Montaigu* (13) ([1913] P. 154), following a dictum of SIR GORELL BARNES, P., in *Ogden* v. *Ogden* (14) ([1908] P. 46 at pp. 82, 83). For those decisions are now discredited (see *A.-G. for Alberta* v. *Cook* (15), [1926] A.C. 444; *H.* v. *H.* (16), [1928] P. 206; *Herd* v. *Herd* (17), [1936] 2 All E.R. 1516, and *Travers* v. *Holley & Holley* (5), [1953] 2 All E.R. at pp. 799, 800, per HODSON, L.J.).

The law on this subject apart from statute is conveniently and succinctly summarised by LORD MERRIVALE, P., in *H.* v. *H.* (16) ([1928] P. at p. 212):

> "... under English law [I substitute 'English' for 'British'] the jurisdiction to decree divorce depends on domicil; that the domicil of the husband determines the domicil of the wife; and that independent authority to decree divorce cannot, consistently with English law, co-exist at the same time in two sovereign states."

The history of the Indian Divorce Act, 1869, an Act of the Indian legislature, is an interesting example of the omnipotence of this principle. That Act, in effect, purported to empower the High Courts of India to grant divorces to Christians resident in India if the marriage had been celebrated in India or the matrimonial offence had been committed there. In *Keyes* v. *Keyes & Gray* (18) ([1921] P. 204) it was held that that Indian Act did not empower the Indian courts to grant divorces to persons not domiciled in India. In order to remedy the serious situation which then arose owing to the invalidation of divorces pronounced by the Indian courts, there was passed by Parliament the Indian Divorces (Validity) Act, 1921*. This provides as follows by s. 1:

> " Any decree granted under the Act of the Indian legislature known as the Indian Divorce Act, 1869, and confirmed or made absolute under the provisions of that Act, for the dissolution of a marriage the parties to which were at the time of the commencement of the proceedings domiciled in the United Kingdom, and any order made by the court in relation to any such decree, shall, if the proceedings were commenced before the passing of this Act, be as valid, and be deemed always to have been as valid, in all respects, as though the parties to the marriage had been domiciled in India."

As I see it, the legislature is there giving express recognition to the principle that the criterion of jurisdiction is domicil and is legalising an exception to it. By the Indian and Colonial Divorce Jurisdiction Acts, 1926 and 1940†, a limited jurisdiction was given by the Imperial Parliament to the courts of India to dissolve marriages of parties domiciled in the United Kingdom as if they were domiciled in India. The underlying principle is obviously the same. It is interesting to note that by the Indian Independence Act, 1947‡, this jurisdiction

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* 11 & 12 Geo. 5 c. 18; see 3 HALSBURY'S STATUTES (2nd Edn.) 1157.

† See 3 HALSBURY'S STATUTES (2nd Edn.) 1158, 1172.

‡ 10 & 11 Geo. 6 c. 30; see 6 HALSBURY'S STATUTES (2nd Edn.) 414.

—delegated to the Indian courts by the earlier Acts—was expressly taken away on the creation of the two independent Dominions of India and Pakistan.

The next matter to which counsel for the husband referred, going back in order of date, was the Matrimonial Causes (Dominions Troops) Act, 1919*. That Act so far as material provided by s. 1:

> "Where a marriage has been contracted in the United Kingdom during the present war by a member of His Majesty's Forces domiciled in any of His Majesty's possessions or protectorates to which this Act applies, the competent court in that part of the United Kingdom where the marriage took place shall, any question of domicil or residence notwithstanding, have full jurisdiction and power to entertain, hear and determine any of the matrimonial proceedings specified in the Schedule to this Act, where such proceedings are instituted by either party to the marriage, and to make decrees and orders in relation to such proceedings, as though the parties to the marriage were domiciled or (where the jurisdiction of the court depends upon residence) resident in that part of the United Kingdom: Provided that this Act shall not apply in any case where the parties to the marriage have at any time since the marriage resided together in the country of the husband's domicil."

"Residence", referred to between the brackets in that enactment, refers to such things as judicial separation. Here again is special legislation to deal with a special situation, and the phrases "any question of domicil or residence notwithstanding" and "as though the parties . . . were domiciled or (where the jurisdiction of the court depends upon residence) resident in that part of the United Kingdom" are a clear recognition by the legislature that in general jurisdiction in divorce depends on domicil. It is also to be noted that it is provided that the Act shall not apply if the parties at any time since marriage resided together in the country of the husband's domicil.

In my opinion, no great assistance is to be derived from a consideration of s. 8 of the Matrimonial Causes Act, 1937†, now replaced by s. 16 of the Matrimonial Causes Act, 1950‡, and the decision of PEARCE, J., thereunder in *Wall* v. *Wall* (19) ([1949] 2 All E.R. 927). In effect, the learned judge held that on a petition for dissolution and presumption of death it would be absurd to attach any weight to the domicil of the husband who ex hypothesi was supposed to be dead and that the residence of the wife was sufficient (see *Deacock* v. *Deacock* (20), [1958] 2 All E.R. 633). That section was added to by s. 1 (3) of the Law Reform (Miscellaneous Provisions) Act, 1949§, which provides:

> "In proceedings under s. 8 (1) of the Matrimonial Causes Act, 1937 (which enables the court to make a decree of presumption of death and dissolution of marriage) the court shall have jurisdiction in the following cases only, that is to say—(a) in any proceedings, if the petitioner is domiciled in England; (b) in proceedings by the wife, if she is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings; and in determining for the purposes of this sub-section whether a woman is domiciled in England, her husband shall be treated as having died immediately after the last occasion on which she knew or had reason to believe him to be living."

One sees there again that domicil is brought in and that a wife is given an alternative qualification of three years' ordinary residence. The relevant statutory provision is now s. 16 of the Act of 1950 which enacts by sub-s. (1):

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* 9 & 10 Geo. 5 c. 28; repealed by the Statute Law Revision Act, 1927.

† 1 Edw. 8 & 1 Geo. 6 c. 57.

‡ 14 Geo. 6 c. 25; see 29 HALSBURY'S STATUTES (2nd Edn.) 403.

§ 12, 13 & 14 Geo. 6 c. 100; repealed by the Matrimonial Causes Act, 1950.

"Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may, if he is domiciled in England, present a petition to the court to have it presumed that the other party is dead and to have the marriage dissolved, and the court, if satisfied that such reasonable grounds exist, may make a decree of presumption of death and of dissolution of the marriage."

There in the current Act, therefore, the test of domicil for the exercise of this particular jurisdiction is the basic one, though the alternative qualification for a wife of three years' ordinary residence is preserved by s. 18 (2).

The Matrimonial Causes (War Marriages) Act, 1944*, was passed to deal with special cases of hardship similar to those covered by the Matrimonial Causes (Dominions Troops) Act, 1919. It applied to marriages during the war by women domiciled in England to men domiciled outside the United Kingdom. It did not apply to any case where the parties at any time after the marriage had resided in the country of the husband's domicil. What it did was to provide that in the case of marriages to which the Act applied this court should have jurisdiction as though both parties were domiciled in England. Here again it appears that Parliament is expressly recognising that the test of jurisdiction is domicil.

The last and most important of the statutory provisions in the history of this matter is the present s. 18 (1) of the Act of 1950. Section 18 (1) (a) replaces s. 13 of the Matrimonial Causes Act, 1937, which was the section discussed in *Travers* v. *Holley & Holley* (5) and s. 18 (1) (b) replaces s. 1 (1) of the Law Reform (Miscellaneous Provisions) Act, 1949. Section 18 (1) of the Matrimonial Causes Act, 1950, provides:

"Without prejudice to any jurisdiction exercisable by the court apart from this section, the court shall by virtue of this section have jurisdiction to entertain proceedings by a wife in any of the following cases, notwithstanding that the husband is not domiciled in England, that is to say:—(a) in the case of any proceedings under this Act other than proceedings for presumption of death and dissolution of marriage, if the wife has been deserted by her husband, or the husband has been deported from the United Kingdom under any law for the time being in force relating to the deportation of aliens, and the husband was immediately before the desertion or deportation domiciled in England; (b) in the case of proceedings for divorce or nullity of marriage, if the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man."

Sub-section (2) has nothing to do with this point. Sub-section (3) provides:

"In any proceedings in which the court has jurisdiction by virtue of this section, the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in England at the time of the proceedings."

The two paragraphs of s. 18 (1) deal with different cases. Paragraph (a) is concerned with the case of the wife of a man domiciled here who deserts her or is deported; it allows her to take proceedings here despite any subsequent change of domicil by the husband. The provision, as it were, notionally preserves her English domicil for the purpose of taking proceedings. Paragraph (b) is, of course, far wider. It allows a wife to take proceedings here, whatever her domicil, if she has been ordinarily resident here for three years, provided that the husband is not domiciled in any other part of the United Kingdom or in

* 7 & 8 Geo. 6 c. 43; see 11 HALSBURY'S STATUTES (2nd Edn.) 845.

the Channel Islands or Isle of Man. It is, as I think, important to note the provisions of s. 18 (3), which seem to indicate that these special provisions are exceptions to the general rule and that apart from express statutory provisions the principle and the law of domicil are still paramount.

It is submitted by the husband that for wives the jurisdictional basis in our law has been expanded and that for them we have equated three years' residence with domicil. A wife, it is said, in our law retains all her rights in the court of her domicil and has in addition a parallel and concurrent right to proceed in the courts of the place where she has resided for three years. To the extent to which our law so provides, that is undoubtedly true. But I venture to repeat what I said in *Dunne* v. *Saban* (*formerly Dunne*) (21) ([1954] 3 All E.R. 586 at p. 592), which, of course, was a recognition case not a jurisdiction case:

> "It seems to me that the statutory exceptions to the law regarding domicil as being the test of the jurisdiction to dissolve a marriage are exceptions and that the rule, apart from these exceptions, remains in full force."

The same view was expressed by HODSON, L.J., in *Levett* v. *Levett* (22) ([1957] 1 All E.R. 720 at p. 723) (another recognition case) where he said that the position in this country is that domicil is the foundation of jurisdiction and that there are exceptions to the rule.

What then is the effect of these statutory alterations of the jurisdiction of our own courts on the principles on which we recognise foreign decrees and on the question whether in the present case we should recognise the decree of the Mexican court as being good in law here? It must be remembered that the decree was not pronounced by the court of the wife's domicil nor by the court of a place in which she had resided for three years or at all, unless one is to accept the technical residence in the Mexican sense for, it seems, something like twenty-four hours. The claim for recognition, I repeat, is based on the fact that the decree is recognised by the court in which it is said that the wife had been resident or ordinarily resident for three years.

There is no doubt that in general our courts have for many years refused to recognise the decrees of any foreign court other than those of the court of the domicil of the parties. It is not necessary to do more than refer to the decision of the House of Lords in *Shaw* v. *Gould* (23) ((1868), L.R. 3 H.L. 55), and in particular to the speech of LORD WESTBURY at pp. 80-88. Since that date the current of high authority has been constant. It is argued that this rule was based on a wrong view of foreign law and a misunderstanding of the jus gentium. Whether that contention be right or wrong—and I am far from saying that it is right—it is, in my opinion, far too late in the day to ask any court in this country to depart from this well-established principle.

It is said that there is an exception to this rule. The exception which is relied on in the present case is that based on *Armitage* v. *A.-G.* (4). The usual statement of the effect of the decision in that case may conveniently be taken from 7 HALSBURY'S LAWS OF ENGLAND (3rd Edn.), title "Conflict of Laws," p. 114, para. 202:

> "The English courts will recognise as having extra-territorial validity any decree of divorce which is also recognised as valid by the courts of the country of the domicil, whether those courts have themselves pronounced the decree or not."

It is doubtful, however, whether the actual decision in that case justifies so wide a proposition, as to which an interesting discussion by one of the gentlemen

who gave expert evidence on American law in the case is to be found in Vol. 17 of the Transactions of the Grotius Society, pp. 131, 134. The headnote in *Armitage* v. *A.-G.* (4) is as follows:

> "The courts of this country will recognise the binding effect of a decree of divorce obtained in a state where the husband was not domiciled, if the courts of the country or state of his domicil would recognise the validity of the decree. G., an American citizen temporarily resident and carrying on business in England, but who never abandoned his domicil of origin in the State of New York, married an Englishwoman in England. She afterwards instituted proceedings under the Guardianship of Infants Act, 1886, which were compromised by a deed of separation. Some years later she instituted, in the State of South Dakota, proceedings for a divorce, to which he put in an answer and cross-claim, the latter being dismissed, and a decree being pronounced on the wife's petition, upon a ground which would not constitute a ground for dissolving the marriage either in the courts of the husband's domicil or in this country. Upon evidence which satisfied this court that the courts of the husband's domicil would recognise a decree so obtained:—*Held*, that the South Dakota decree of divorce must be recognised as a valid dissolution of the marriage, and that the subsequent marriages of the respective spouses were consequently valid."

Before turning to the judgment of the learned President (SIR GORELL BARNES), it is important to note an express finding of fact by him which is, of course, taken from his judgment, on p. 137 of the report. I will read from the second paragraph:

> "She finally determined to break with this country and to restart her life in America. In proceeding thither she had in her mind the idea that she might take proceedings there for a divorce from her husband, Mr. Gillig; but she had absolutely determined to quit this country and to establish herself in America. She proceeded to Yankton, in the State of South Dakota, and one of her objects in doing so was to institute proceedings there for divorce. She acquired a domicil there in a sense which is recognised in America, but is foreign to our notions in this country. According to the evidence of Mr. John Arthur Barratt, if a woman is separated from her husband under circumstances which would have given her a cause of action against him she may acquire a separate domicil."

Then (ibid., at p. 141):

> "The only question that remains for consideration is this question of English law: Are we to recognise in this country the binding effect of a decree obtained in a state in which the husband is not domiciled if the courts of the state in which he is domiciled recognise the validity of that decree? This point has not been distinctly determined in the courts of this country."

Then the learned President refers to *Harvey* v. *Farnie* (24) ((1882), 8 App. Cas. 43) and proceeds:

> "The evidence, in the present case, shows that in the State of New York the decision of the Court of South Dakota would be recognised as valid. The point then is: Are we in this country to recognise the validity of a divorce which is recognised as valid by the law of the domicil? In my view, this question must be answered in the affirmative. It seems to me impossible to come to any other conclusion, because the status is affected and determined by the decree that is recognised in the State of New York —the state of the domicil—as having affected and determined it."

In view of the express finding of fact by the learned President that the wife there had by New York law, the law of the domicil, acquired a domicil in South

Dakota, it seems that perhaps a more accurate statement of the effect of that case would be that our courts will recognise a decree of divorce which is recognised as valid by the court of the husband's domicil as having been pronounced by a court in the jurisdiction of which the wife had obtained a separate domicil. But despite this, it is right, in my opinion, that as a judge of first instance I ought to act on the interpretation in *Armitage* v. *A.-G.* (4) which has been current and accepted for the last fifty years.

The next step in the argument for the husband is, of course, to show that the rule in *Armitage* v. *A.-G.* (4) must now be taken to necessitate the recognition by our courts of a decree recognised as valid by the courts of the jurisdiction within which the wife had resided for three years at the date of the petition or suit, even though the decree was pronounced not by that court but by a third court within the jurisdiction of which she could not in our law be said to have been domiciled or resident. That proposition is based on the decision in *Travers* v. *Holley* (5) ([1953] 2 All E.R. 794) and the subsequent cases on recognition of foreign decrees. It is right that I should mention that counsel for the Queen's Proctor expressly desires to keep open for future argument in the appropriate place the question whether *Travers* v. *Holley* (5) was rightly decided. It is pointed out that the decision to the opposite effect by LORD STRACHAN in *Warden* v. *Warden* (25) (1951 S.C. 508) was apparently not cited to the Court of Appeal in *Travers* v. *Holley* (5). It is also to be observed that in *Fenton* v. *Fenton* (26) ((1957), V.L.R. 17), the Full Court of Victoria (which normally follows the English Court of Appeal), after a review of the earlier cases, expressly refused to follow *Travers* v. *Holley* (5) (see in particular the judgment of O'BRYAN, J., at p. 33); but *Travers* v. *Holley* (5) is, of course, binding on me. It is, I suppose, correct to say that the subsequent cases of *Arnold* v. *Arnold* (7), *Robinson-Scott* v. *Robinson-Scott* (8), *Manning* v. *Manning* (9), and *Gerrard* v. *Gerrard* (10), which undoubtedly extended the doctrine of *Travers* v. *Holley* (5), are not strictly binding on me. But it is plainly desirable, in my opinion, that I should accept and follow these decisions unless and until they are disapproved of by higher authority. I propose to do so.

There is one other matter which should be mentioned before turning to those cases. Counsel for the husband concedes that it is essential to the success of his argument that it should be shown that the wife was ordinarily resident in New York for the three years immediately preceding the commencement of her suit for divorce in Mexico. In view of the fact that she obtained for the purpose of taking proceedings in Mexico a certificate that she was resident there, even though the conception of residence in Mexican law is so different from ours, it seems to me to be most doubtful whether it can be said that at that moment she retained her New York ordinary residence. Accidental or casual breaks in a period of ordinary residence—for example, breaks for the purpose of business or holiday, such as were discussed in *Stransky* v. *Stransky* (27) ([1954] 2 All E.R. 536), are an entirely different matter. Here we have a case of a woman who quite deliberately, with the knowledge and consent of her husband, left the place where she was ordinarily resident, went abroad and obtained a certificate of residence in a foreign country in order to give jurisdiction to the courts of that country. I do not think it necessary for the purpose of this judgment to express any final opinion on this point, but I have the gravest doubts about it.

In *Travers* v. *Holley* (5) a husband and wife, shortly after their marriage in the United Kingdom in 1937, went out to Sydney, New South Wales, taking with them all their belongings, the husband believing that the Commonwealth offered him better prospects. He invested money in a business in Sydney, which, however, collapsed on the outbreak of war. For a time he worked on a sheep farm in northern New South Wales, leaving the wife in Sydney, where a child had been born in 1938. Later, the husband obtained a commission in the

Australian forces, and subsequently transferred to the British forces. In August, 1943, the wife, alleging that she had been deserted since August, 1940, filed a petition for divorce in the Supreme Court of New South Wales, and was granted a decree which was made absolute on Nov. 13, 1944. The husband was served with notice of the petition, but did not defend it, and both husband and wife later re-married. In 1952 the husband, whose second marriage had not proved to be satisfactory, obtained a decree of divorce in the present action on the ground that the Australian decree was invalid because at the time it was granted neither husband nor wife was domiciled in New South Wales, and the wife, by re-marrying, had been guilty of adultery. The wife appealed. It was held, JENKINS, L.J., dissenting, that the husband had acquired a domicil of choice in New South Wales, and the appeal should be allowed. It was therefore unnecessary to decide whether the conduct of the husband in not defending the wife's petition was conduct conducive to the wife's re-marriage and alleged adultery. Further, it was held by the whole court that the courts of New South Wales by s. 16 (a) of the New South Wales Matrimonial Causes Act, No. 14, 1899, and the English courts by s. 13 of the Matrimonial Causes Act, 1937, claimed the same jurisdiction, and it would be contrary to principle and inconsistent with comity if the courts of this country refused to recognise a jurisdiction which mutatis mutandis they claimed for themselves; and that even if, while in desertion, the husband had reverted to his English domicil of origin, the New South Wales court would not be deprived of jurisdiction.

The only point in that case that concerns this judgment is whether or not, if the foreign statute gives relief to a wife or allows a wife to present a petition in exactly parallel circumstances or almost exactly parallel circumstances to those in which a wife is entitled to proceed here, although that court is not the court of the domicil, a decree pronounced by it is entitled to recognition here.

This all important question was dealt with very shortly by SOMERVELL, L.J. ([1953] 2 All E.R. at p. 797), and it was dealt with equally shortly by JENKINS, L.J. ([1953] 2 All E.R. at pp. 798, 799). But HODSON, L.J., discussed the matter in some detail, and I now turn to his judgment ([1953] 2 All E.R. at p. 800). After reciting the existing law as to domicil being the test for recognition he then refers to s. 13 of the Matrimonial Causes Act, 1937, the Matrimonial Causes (War Marriages) Act, 1944, and s. 18 of the Matrimonial Causes Act, 1950, and he proceeds:

> " It seems to me, therefore, that Parliament has cut the ground from under the argument put forward on behalf of the husband. If English courts will only recognise foreign decrees of divorce where the parties are domiciled in the territory of the foreign court at the time of the institution of proceedings because that is the jurisdiction which they themselves claim, what is the situation when the courts of this country arrogate to themselves jurisdiction in the case of persons not domiciled here at the material date? It must surely be that what entitles an English court to assume jurisdiction must be equally effective in the case of a foreign court."

It is, of course, on the rarest of occasions and with the utmost diffidence that one ventures even to whisper a word of difference from anything that falls from that learned lord justice. But I am inclined to think that he was perhaps a little hard on the courts when he used the phrase " when the courts of this country arrogate to themselves jurisdiction." I venture to think that it would be more apt to say that the courts of this country have imposed on them by the legislature the duty of exercising jurisdiction in those cases. The learned lord justice then quotes LORD WATSON in the *Le Mesurier* case (11), and then goes on to say ([1953] 2 All E.R. at p. 800):

> ". . . it seems that where it is found that the municipal law is not peculiar to the forum of one country, but corresponds with a law of a second country,

A such municipal law cannot be said to trench on the interests of that other country. I would say that where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which mutatis mutandis they claim for themselves. The principle laid down and followed since the *Le Mesurier* case (11) must, I think, be interpreted in the light B of the legislation which has extended the power of the courts of this country in the case of persons not domiciled here."

HODSON, L.J., in the later case of *Levett* v. *Levett* (22) ([1957] 1 All E.R. at p. 723), stated that the effect of *Travers* v. *Holley* (5) was accurately summarised by me (DAVIES, J.) in *Dunne* v. *Saban* (21), as follows:

C "In my judgment the observations in *Travers* v. *Holley* (5) merely decide that this court will recognise the right of other [foreign] courts to encroach on the principle of domicil only to the extent to which this court also does."

Travers v. *Holley* (5) dealt with recognition of a foreign decree pronounced in circumstances similar to those covered by the present s. 18 (1) (a) of the Matri- D monial Causes Act, 1950, as did *Carr* v. *Carr* (6).

The subsequent cases of *Arnold* v. *Arnold* (7), *Robinson-Scott* v. *Robinson-Scott* (8), *Manning* v. *Manning* (9) and *Gerrard* v. *Gerrard* (10) were more in the nature of s. 18 (1) (b) cases and undoubtedly extended the principle laid down in *Travers* v. *Holley* (5). It is not necessary to consider those cases in detail. Their essence is, in my opinion, to be found in the judgment of E KARMINSKI, J., in *Robinson-Scott* v. *Robinson-Scott* (8) ([1957] 3 All E.R. at p. 478):

"I believe that the true question to be answered in this case is whether the courts of this country can recognise a foreign decree where in fact the wife was resident in the territory of the foreign court for three years F immediately preceding the commencement of the proceedings here, even though the jurisdiction of the foreign court was based on different grounds. In my view this question has not yet been asked or answered by our courts, and I am therefore without the guidance of direct authority. Writing in December, 1951, in the HARVARD LAW REVIEW (Vol. 65 at p. 231), an eminent American jurist, DEAN ERWIN GRISWOLD, used these words: 'If G the heavy hand of the *Le Mesurier* case (11) can be lifted—as to a point which was never decided in that case—the courts should have little difficulty in concluding that a common law state may properly recognise a foreign divorce granted under the factual circumstances where it would itself grant a divorce.' In 1953 the Court of Appeal in *Travers* v. *Holley* (5) lifted the heavy hand of the *Le Mesurier* case (11), or at least mitigated its weight.

H "In my view the correct answer to the question which I have asked myself is this: Where in fact there has been three years' residence by a wife in the territory of the foreign court assuming jurisdiction in a suit for dissolution, the English court should accept that as a ground for exercising jurisdiction because it would itself accept jurisdiction on proof of similar residence in England. It is not essential for recognition by this I court that the foreign court should assume jurisdiction on the grounds laid down by s. 18 of the Matrimonial Causes Act, 1950. It is sufficient that facts exist which would enable the English courts to assume jurisdiction."

It was on this basis that recognition was given to the decrees of the foreign courts in whose jurisdiction the wife in each case had in fact been resident for over three years, although the jurisdiction of the foreign court by the law of that court depended on the last common residence of the parties (in *Arnold* v. *Arnold* (7) and *Manning* v. *Manning* (9)) the acquisition of a separate domicil

by the wife (*Robinson-Scott* v. *Robinson-Scott* (8)) or the last common residence or the residence of the wife (*Gerrard* v. *Gerrard* (10)). It follows, therefore, from those decisions that, provided that the wife in the present case had been ordinarily resident in New York for three years at the commencement of a suit by her there, this court would recognise a decree pronounced in such a suit, notwithstanding that the jurisdictional test in New York is one year's residence only.

Does it follow from that and from the fact that the New York courts would recognise the Mexican decree that that decree is entitled to recognition in this court? Giving to the decision in *Armitage* v. *A.-G.* (4) its widest meaning and assuming that the wife was still ordinarily resident in New York when she instituted the suit in Mexico, I am quite unable to see that it does. *Armitage* v. *A.-G.* (4) decides that this court will give recognition to a decree, wherever pronounced, which is recognised by the court of the domicil of the parties. In my judgment, it necessarily follows that this court will not recognise decrees which are not recognised by the court of the domicil, except, of course, decrees pronounced by this court itself in favour of a wife in the exercise of its jurisdiction under s. 18 of the Matrimonial Causes Act, 1950, and similar legislation and decrees pronounced by foreign courts in strictly analagous circumstances. Subject to those exceptions, the court of the domicil is still, in our law, the paramount authority. To the extent of those exceptions this court will recognise a decree pronounced by a court other than the court of the domicil. Apart from those exceptions, however, there is nothing in the authorities which compels or indeed permits this court to recognise a decree which is neither pronounced by nor directly recognised by the court of the domicil.

This court is in the present case the court of the domicil. As such, it does not recognise the Mexican decree. It is, in my judgment, impossible to hold that a decree to which this court would not give direct recognition is owing to the interposition of a residential qualification of the wife in a third state entitled on account of such residential qualification to be recognised here.

The proposition advanced for the husband is that the test for recognition is now a dual one. Is the decree valid either by the law of the domicil or by the law of the place in which we recognise that the wife is concurrently entitled to proceed? If the answer to either of these questions is in the affirmative, then, it is said, the decree is entitled to recognition here. The proposition is, in my judgment, a wholly illegitimate extension of the principle of comity on which *Travers* v. *Holley* (5) and the subsequent cases turn. It is not difficult to frame an example to illustrate the impossibility of such an extension. Suppose a husband and wife domiciled in, say, Victoria, Australia. The wife goes off to New York and ordinarily resides there for over three years. She then goes to Mexico and obtains a decree there in similar circumstances to those in which the present wife obtained her decree. That Mexican decree is not recognised by the courts of the domicil, Victoria, but is recognised by the courts of the wife's residence, New York. In subsequent proceedings in the English courts the validity of the Mexican decree is called in question—for example, in proceedings as to legitimacy or inheritance after a subsequent marriage of one of the parties. This court would be faced with the position that the Mexican decree was not recognised by the court of the domicil but was recognised by the court of the wife's residence. Can it possibly be doubted that this court would hold, following the court of the domicil, that the decree was not entitled to recognition?

In my opinion, that is in all essentials the situation here. It is argued for the petitioner that from the point of view of public policy it is most undesirable that these parties should be regarded as single in New York and as married in England and that by New York law another marriage by either should be

permissible but would be considered bigamous here. So to hold, it is said, would create the sort of inconvenience, confusion and scandal which is referred to in so many of the authorities. In so far as any complications of this sort have been caused by the legislature by creating exceptions to the general application of the test of domicil, the courts have but to apply the law as enacted. The underlying principle of *Travers* v. *Holley* (5) and the subsequent decisions, as I see it, is that we should recognise here the validity of foreign decrees granted to wives by courts other than those of the domicil in the exercise of a jurisdiction strictly analogous to that exercised by this court under s. 18 of the Matrimonial Causes Act, 1950. That jurisdiction is exercised for the protection of wives whose husbands have abandoned their domicil by desertion or through being deported or of wives who have ordinarily resided within the jurisdiction for three years and may be said to be bona fide or genuinely resident. The circumstances of the present case are far different. The wife was never domiciled in Mexico and never had any ordinary bona fide or genuine residence there. It may be nothing to the point that it is conceded by the husband that, if it had been he who had gone to Mexico and obtained a decree, such a decree, though recognised in New York, would certainly be invalid here. But, as I see it, to give effect to the husband's contention in the present case would merely be to make confusion worse confounded. For any inconvenience, confusion and scandal which arise in the present case the parties have only themselves and their advisers to blame. Proceedings could have been validly instituted by either party in this court. Equally, as the law stands, the wife, if she had succeeded in proving her case, could in her New York action have obtained a decree which would have been valid here. They chose instead to resort to Mexico. Hence this trouble.

In my judgment, this part of the petition (the prayer for a declaration) fails.

Declaration refused.

Solicitors: *Theodore Goddard & Co.* (for the husband); *Queen's Proctor.*

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

WARNER *v.* SAMPSON AND ANOTHER.

[COURT OF APPEAL (Lord Denning, Hodson and Ormerod, L.JJ.), November 19, 20, 24, 25, December 18, 1958.]

Landlord and Tenant—Lease—Forfeiture—Denial of landlord's title by lessee—Denial in pleadings—Action for possession for breach of covenants—Defence containing general traverse—Claim of forfeiture in reply—Whether sufficient denial of landlord's title.

Pleading—Defence—General traverse—Effect—Action for possession—Whether general traverse denial of landlord's title entailing forfeiture.

Pleading—Amendment—Effect—Landlord's action for possession—Defence and counterclaim containing general traverse—Subsequent amendment admitting landlord's title—Claim of forfeiture based on denial of landlord's title by the original defence—Whether amendment removed effect of original denial.

In an action for possession of demised premises brought by the landlord, the statement of claim recited the original lease, alleged a derivative title to the reversion in the landlord and to the term in the defendants, as personal representatives of S., and alleged breaches of covenants. The defence of the second defendant contained an admission that she was executrix of S., denied the alleged breaches of covenant and concluded " Save and except for the admission herein contained this defendant denies each and every allegation in the statement of claim as if the same were specifically set out and traversed seriatim ". The landlord in her reply pleaded " The plaintiff hereby exercises her said right to forfeit the said term and claims to be thereby entitled to re-enter on the premises " on the ground of the denial of her title. The tenant obtained leave to amend the defence and delivered an amended defence admitting the lease and the landlord's title and counterclaiming for relief against forfeiture. The landlord delivered a further reply claiming that the lease was forfeited by the original denial of her title in the defence; she had not at that time issued a further writ for possession based on the alleged denial of her title, nor had she re-entered the premises.

Held: the landlord was not entitled to possession of the premises by way of forfeiture for the following reasons—

(i) the general traverse in the defence of the second defendant only put the landlord to proof, and did not give rise to a forfeiture, for it did not assert that the title to the reversion was in the tenant or a stranger.

Kisch v. *Hawes Bros., Ltd.* ([1934] All E.R. Rep. 730) overruled.

(ii) (per HODSON and ORMEROD, L.JJ.) if the general traverse was such a denial of the landlord's title as did amount to a renunciation of the lease, forfeiture did not arise until the landlord had subsequently re-entered or issued a writ for possession, and, the defence having been amended before the landlord had completed her re-entry, the position at the trial was that there was no denial of the landlord's title (see p. 130, letter D, and p. 132, letter I, to p. 133, letter A, post).

Decision of ASHWORTH, J. ([1958] 1 All E.R. 44) reversed.

[As to the impugning of a landlord's title as ground for forfeiture, see 20 HALSBURY'S LAWS (2nd Edn.) 248, para. 281.

As to the effect of amendments of pleadings, see 25 HALSBURY'S LAWS (2nd Edn.) 256, 257, paras. 421, 422, and 26 HALSBURY'S LAWS (2nd Edn.) 55, 56, paras. 89, 90; and for cases on the subject, see DIGEST (Practice) 92, 93, *778-785.*]

Cases referred to:

(1) *British & Colonial Land Assocn., Ltd.* v. *Foster & Robins*, (1888), 4 T.L.R. 574; Digest (Practice) 6, *5.*

(2) *Adkins* v. *North Metropolitan Tramways Co.*, (1893), 63 L.J.Q.B. 361; Digest (Practice) 44, *360.*

(3) *MacLulich* v. *MacLulich*, [1920] P. 439; 89 L.J.P. 242; 124 L.T. 66; Digest (Practice) 191, *1618.*

(4) *Danford* v. *McAnulty*, (1883), 8 App. Cas. 456; 52 L.J.Q.B. 652; 49 L.T. 207; Digest (Practice) 180, *1555.*

(5) *Kisch* v. *Hawes Bros., Ltd.*, [1934] All E.R. Rep. 730; [1935] Ch. 102; 104 L.J.Ch. 86; 152 L.T. 235; Digest Supp.

(6) *Henry Vavasour*, (1334), Y.B. 18 Edw. 3, No. 33; H.M.S.O. reprint, 366.

(7) *Plesington's Case*, (1393), Fitz. Abr., tit. Quid Juris Clamat 20.

(8) *Saunders* v. *Freeman*, (1561), 1 Plowd. 209; 2 Dyer, 209a; 75 E.R. 321; 30 Digest (Repl.) 280, *478.*

(9) *Dicksee* v. *Spencer*, (1587), Moore K.B. 212; Godb. 105; Gouldsb. 40; 3 Leon. 169; Owen, 81; sub nom. *Barkhouse's Case*, 4 Leon. 3.

(10) *Sir William Pelham's Case*, (1590), 16 Rep. 14b; 2 Leon. 60.

(11) *Doe d. Graves* v. *Wells*, (1839), 10 Ad. & El. 427; 8 L.J.Q.B. 265; 113 E.R. 162; 31 Digest (Repl.) 522, *6441.*

(12) *United Australia, Ltd.* v. *Barclays Bank, Ltd.*, [1940] 4 All E.R. 20; [1941] A.C. 1; 109 L.J.K.B. 919; 164 L.T. 139; 2nd Digest Supp.

(13) *Barton* v. *Reed*, [1931] All E.R. Rep. 425; [1932] 1 Ch. 362, 375; 101 L.J.Ch. 219; 146 L.T. 501; 31 Digest (Repl.) 171, *3049.*

(14) *Jones* v. *Mills*, (1861), 10 C.B.N.S. 788; 31 L.J.C.P. 66; 142 E.R. 664; 31 Digest (Repl.) 480, *6057.*

(15) *Doe d. Lewis* v. *Cawdor*, (1834), 1 Cr. M. & R. 398; 3 L.J.Ex. 239; 149 E.R. 1134; 31 Digest (Repl.) 522, *6447.*

(16) *Doe d. Williams & Jeffery* v. *Cooper*, (1840), 1 Scott N.R. 36; 1 Man. & G. 135; 9 L.J.C.P. 229; 133 E.R. 278; 31 Digest (Repl.) 521, *6429.*

(17) *Moore* v. *Ullcoats Mining Co., Ltd.*, [1908] 1 Ch. 575; 77 L.J.Ch. 282; 97 L.T. 845; 31 Digest (Repl.) 529, *6523.*

(18) *Jones* v. *Carter*, (1846), 15 M. & W. 718; 153 E.R. 1040; 31 Digest (Repl.) 290, *4252.*

(19) *Fenn d. Matthews & Lewis* v. *Smart*, (1810), 12 East. 444; 104 E.R. 173; 31 Digest (Repl.) 472, *5987.*

(20) *Sneade* v. *Wotherton Barytes & Lead Mining Co.*, [1904] 1 K.B. 295; 13 Digest 484, *338.*

(21) *Wallace* v. *Daly & Co., Ltd.*, [1949] I.R. 352.

(22) *Wisbech St. Mary Parish Council* v. *Lilley*, [1956] 1 All E.R. 301; 3rd Digest Supp.

(23) *Doe d. Ellerbrock* v. *Flynn*, (1834), 1 Cr. M. & R. 137; 3 L.J.Ex. 221; 149 E.R. 1026; 31 Digest (Repl.) 522, *6443.*

Appeal.

By a lease dated Feb. 23, 1905, the predecessors in title of the landlord, the plaintiff, Mrs. Annie Mary Warner, demised premises comprising a house at 18, Park Avenue South, Hornsey, for a term of ninety-nine years from June 24, 1900. Before 1947, the term had become vested in Mrs. Gertrude Annie Sampson, who died in 1949 having bequeathed the premises to her executors, the defendants, Mr. Arthur Cecil Sampson and Miss Elsie Mary Gandy, on trust. On Apr. 27, 1955, the plaintiff issued a writ against the defendants claiming possession of the premises on the ground of breaches of covenant. On May 27, 1955, she obtained judgment in default of appearance against the first defendant, but this judgment was set aside by Master GRUNDY on Aug. 26, 1955. On June 15, 1955, she was served with the defence of the second defendant, which contained a general traverse of allegations in her statement of claim except that the second defendant admitted that she was executrix of Mrs. Sampson. By her reply delivered on June 29, 1955, the plaintiff claimed to exercise a right to forfeit the term and to be entitled to enter on the premises. On Aug. 26, 1955, the second defendant was given leave to withdraw her defence by Master GRUNDY, but on Oct. 6, 1955, this order was varied by PEARSON, J., on appeal

by giving leave to amend but not to withdraw the defence. On Feb. 14, 1956, she delivered an amended defence admitting the lease and the plaintiff's title and counterclaiming for relief against forfeiture and the first defendant delivered her defence. On Feb. 27, 1956, the plaintiff delivered a reply in which she claimed possession of the premises on the ground that by reason of the denial of her title in the original defence of the second defendant the term had become forfeited. On Dec. 5, 1957, ASHWORTH, J., held that the plaintiff was entitled to forfeit the lease on the ground of this denial ([1958] 1 All E.R. 44, 314). The defendants appealed to the Court of Appeal. The plaintiff had died on Nov. 8, 1956, and on Mar. 1, 1957, it was ordered that the proceedings should be continued between Miss Marion Warner and Miss Kathleen Warner, her administratrices, and the defendants.

*J. H. Hames** and *P. S. A. Rossdale** for the defendants (appellants).

L. G. Scarman, Q.C., and *C. Gibbons* for the respondent administratrices of the plaintiff.

Cur. adv. vult.

Dec. 18. The following judgments were read.

LORD DENNING: The detailed facts of this case are all set out by ASHWORTH, J., in his judgment. They are contained in the reports ([1958] 1 All E.R. at pp. 45-47; [1958] 1 Q.B. 404) and I need not repeat them now. Suffice for present purposes to say that the statement of claim recited the original lease, its covenants and the proviso for re-entry. It alleged a derivative title in the plaintiff saying that the reversion was vested in her by " divers mesne assurances and acts in law ", then a derivative title in the defendants saying that the term became vested in Gertrude Annie Sampson, and that the defendants were her legal personal representatives. It then alleged that the defendants had committed breaches of covenant by non-payment of rent, failure to insure, to paint and repair. It alleged a notice to remedy breaches and a failure to remedy. It ended with a claim for possession and mesne profits.

The defence of the second defendant admitted that she was executrix of the will of Gertrude Annie Sampson, denied that she had committed the alleged or any breaches of covenant, and then concluded with this general denial, on which the whole case turns:

> " Save and except for the admission herein contained this defendant denies each and every allegation in the statement of claim as if the same were specifically set out and traversed seriatim."

The judge has held that by putting in that general denial the second defendant denied the plaintiff's title, and that thereupon the plaintiff was entitled to forfeit the lease. As soon as the plaintiff elected to exercise her right, as she did in her reply, the forfeiture was complete, and nothing that the defendant could do to avoid that result would avail her anything. It was incurable by amendment. No relief could be given against it. It was final and irrevocable. So the judge has decided. Yet the rent, we were told, has been paid or is ready to be paid. The repairs done, or almost done. All the breaches will be remedied. Everything made good save for this general denial which, if the judge be right, cannot be cured by art or skill. Strike it out, amend it as it now has been amended, but still the effect remains. The rest of this term with forty years still to run, valued at over £3,000, is forfeited to the landlord. How must the unfortunate counsel who drafted the defence reproach himself for having brought this on his client ! If he had not used the word " denies " but had said " does not admit ", there would, it is agreed, have been no forfeiture; but this denial brings with it an inexorable fate from which, if this decision stands, there is no escape.

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* Counsel and solicitors acting for the defendants did not act for the second defendant at the time when the defence was delivered on June 15, 1955.

A Since so much effect has been given to this general denial, I would say a word about it. It is used in nearly every defence which goes out from the Temple. It comes at the end. The pleader has earlier gone through many of the allegations in the statement of claim and dealt with them. Some he has admitted. Others he has denied. Whenever he knows there is a serious contest, he takes the allegation separately and denies it specifically. But when B he has no instructions on a particular allegation, he covers it by a general denial of this kind, so that he can, if need be, put the plaintiff to proof of it at the trial. At one time the use of this general denial was said to be embarrassing, see *British & Colonial Land Assocn., Ltd.* v. *Foster & Robins* (1) ((1888), 4 T.L.R. 574); but since 1893 it has been recognised as convenient and permissible, see *Adkins* v. *North Metropolitan Tramways Co.* (2) ((1893), 63 L.J.Q.B. 361). Sometimes the C pleader " denies ", sometimes he " does not admit " each and every allegation, but whatever phrase is used it all comes back to the same thing. The allegation is to be regarded " as if it were specifically set out and traversed seriatim ". In short, it is a traverse, no more and no less.

Now the effect of a traverse has been known to generations of pleaders. It " casts upon the plaintiff the burden of proving the allegations denied ", see D BULLEN AND LEAKE'S PRECEDENTS OF PLEADINGS (3rd Edn.), p. 436. So this general denial does no more than put the plaintiff to proof. Counsel for the plaintiff did suggest at one stage that it might indirectly involve a positive averment. For instance, if pleaded in a libel action, it would involve a denial that the words were false and hence it would carry the implication that they were true and would amount to a plea of justification. But he did not pursue E this illustration and I think it clearly untenable. There are some denials which do involve an affirmative allegation, see *MacLulich* v. *MacLulich* (3) ([1920] P. 439), but not this general denial. It only puts the plaintiff to proof.

The effect of this general denial, in an action to recover land, is therefore the same as the classic plea: " The defendant is in possession ". This plea of possession was good against everyone except against a plaintiff who could show F a better title. It put the plaintiff to proof of his title as much as if the defendant had expressly denied, or had expressly stated that he did not admit, the whole and every one of the allegations contained in the plaintiff's pleading, see *Danford* v. *McAnulty* (4) ((1883), 8 App. Cas. 456). In my junior days I often put in this plea of " possession ", and I should have been shocked to find that I had thereby involved my client in a forfeiture. Yet that was the result of such a plea if a G decision of FARWELL, J., in 1934 was right. He held in *Kisch* v. *Hawes Bros., Ltd.* (5) ([1934] All E.R. Rep. 730), that a plea of " possession " was a cause of forfeiture on the ground that it amounted to a denial of the plaintiff's title, and that a denial of the plaintiff's title was a ground on which a lessor was entitled to forfeit the lease: and that, as soon as the plaintiff delivered a reply claiming the right to re-enter on that ground, there was a forfeiture, irrevocable and H incurable by amendment, and enforceable in those very proceedings, although the cause of forfeiture only arose after the date of the writ. In the present case the judge has followed *Kisch* v. *Hawes Bros., Ltd.* (5), as no doubt he felt he ought to do; but we have been invited to overrule it, and for this purpose we have been taken back to the old books on forfeiture by matter of record.

The history starts in feudal times. When a lord allotted a feud or fee to a I tenant, there was a condition annexed to it that the tenant should do service faithfully to him by whom the lands were given: for which purpose the tenant took an oath of fealty; and in case of breach of this condition and oath the lands reverted to the lord who granted them. If the tenant did anything tending to impair the title of his lord to the lands, it was a breach of his oath of fealty and gave rise to a forfeiture. This is well seen by a reference to GLANVILLE, who was Chief Justice in the reign of Henry 2. In his treatise composed about 1181 A.D. he says (book IX, ch. 1) (BEAM'S TRANSLATION, 1812, p. 219) that

"No one can by law, consistently with the faith implied in homage, do any thing which tends to deprive his lord of his inheritance, or to affix a personal stain upon him . . . if a tenant should do any thing to the disinherison of his lord, and should be convicted of it, he and his heirs shall . . . for ever lose the fee held of such lord."

Amongst the acts which tended to the disinherison of the lord, the most important for present purposes was a disclaimer by the tenant by matter of record. This was a denial by the tenant in a court of record of his lord's title. It commonly arose in this way. If a tenant failed to perform the services due to his lord, the lord used to take action to recover them. The usual thing he did was to take the tenant's cattle by way of distress so as to compel the tenant to perform the services. In order to regain the cattle the tenant would bring replevin in the Court of Common Pleas (a court of record) and, when the lord avowed for services in arrear, the tenant would enter a disclaimer in these words:

"He doth not hold of the said lord the land aforesaid but the same to hold of the said lord altogether disavows and disclaims."

This disclaimer was a very powerful weapon in the hands of the tenant, for by it the lord was barred of all possessory remedies for the services. The result was that, although the distress and avowry of the lord were lawful, yet the tenant would regain and retain his cattle and recover damages from the lord. It tended, therefore, greatly to the prejudice of the lord. But the lord could have his revenge, provided always that he could prove his title. By bringing a writ of right on the disclaimer he could forfeit the tenant's interest altogether. This is all explained by FINCH in his LAW, ch. VI, pp. 269-272. He says (ibid., at p. 271) that:

"And if in this writ of right for disclaimer he can prove the land to be holden of him, he shall recover the land itself, for ever; because the disclaimer is of record."

I have dealt thus much on disclaimer because it is the only instance that I have found in the old law in which a denial on the record of the landlord's title by itself gave rise to a forfeiture. The reasons for it are, as BLACKSTONE says, "most apparently feudal", see 2 BLACKSTONE COMMENTARIES, p. 275, and, when the feudal tenures died out, the law on the subject died too. Never since feudal times has a denial of title by itself given rise to a forfeiture until *Kisch* v. *Hawes Bros., Ltd.* (5) in 1934.

There are many other instances in the old books of acts which tend to the disinherison of the lord, but in all of them you will find that the tenant is acting contrary to the faith which he owes to his lord. He is not defending the reversion as he ought to do. He is claiming the fee simple to be in himself or in another, and not in the lord. If he claims it on the record of the court, it is a cause of forfeiture. Thus if a writ of right was brought against a tenant for life and he took it on himself in his pleadings "to join the mise upon the mere right" (which means that he put it in issue who hath the best or clearest right, see TERMES DE LA LEY, 1641, p. 204), that amounted to a claim on the record that he himself was entitled to the fee simple, and on being proved gave rise to a forfeiture: see COKE UPON LITTLETON, pp. 251b, 252a. Or, if the tenant allowed a stranger to recover the land by not taking the trouble to defend the case, or by making default in pleading, or by pleading feintly, i.e., covinously in collusion with the stranger, this was a cause of forfeiture. On the contrary, if the tenant had acted in good faith towards his lord and had done nothing to allow the stranger to win but "loses by discretion of the court on a mispleading", there was no forfeiture. This appears from a case in 1344 on a writ of entry against *Henry Vavasour* (6). It is reported in the YEAR BOOK of 18 Edw. 3, No. 33, which will be found with a translation in the official reprint published by Her Majesty's Stationery Office, p. 366.

These rules were afterwards extended to include not only tenants for life,

A but also tenants for years. There are a number of cases which show that, if a tenant for years, on the face of the record, claimed the freehold for himself, that was a ground on which the reversioner could forfeit the lease. The point used to arise in this way. The original lessor sold his reversion to a purchaser and assigned the property to him. The purchaser then called on the tenant to attorn to him and to pay rent. Instead of doing so, the tenant resisted the B demand and claimed for one reason or other that he was himself entitled to the freehold. If that issue was tried out and decided against the tenant, the reversioner was entitled to forfeit the lease: but in order to do so he had to bring a fresh action to recover possession: see *Plesington's Case* (7) ((1393), Fitz. Abr. tit. Quid Juris Clamat 20), and *Saunders* v. *Freeman* (8) ((1561), 1 Plowd. 209; 2 Dyer, 209a). In 1587 there was an exceptional case of this kind which deserves C special mention. It is reported as *Dicksee* v. *Spencer* (9) (1587), 3 Leon. 169) in some places and as *Barkhouse's Case* (9) in another. Barkhouse let premises to Spencer for a term of years. Barkhouse afterwards sold the reversion to Dicksee. Dicksee sued Spencer for rent. Spencer pleaded that he had bought the reversion from Barkhouse before Dicksee bought it. Dicksee did not wait for the issue to be tried out but re-entered at once on the ground that by this plea the tenant D Spencer had forfeited the lease. Was this re-entry lawful? The question was much debated in the various courts. It first came up in the Court of Hustings at the Guildhall, where it was referred for the opinion of the Court of Common Pleas (Moore K.B. 212). When it came before the Common Pleas, two judges at first held there was no forfeiture (Godb. 105), but three judges later held there was a forfeiture (Gouldsb. 40, Owen 81, 4 Leon. 3). When it got back to the Court of E Hustings, the court there refused to abide by the opinion of the three judges and held there was no forfeiture. Dicksee thereupon brought a writ of error before the special commission of three judges which heard appeals from the Court of Hustings. These seem to have been of opinion that there was a forfeiture, but it is reported that " after many arguments the said justices moved the parties to a friendly course to compound the matter " (3 Leon. 169). F The issue was thus left undetermined. The case can hardly be considered as of much authority. It only shows that the judges of that time got into difficulties just as we do.

The latest case on this mediaeval law was in 1590, *Sir William Pelham's Case* (10) (1590), 16 Rep. 14b, 2 Leon. 60) which was argued by Sir Edward Coke himself when he was counsel. He did a great deal of research and cited many G cases from the Year Books. He made the results of all this learning available to the profession at large when he came to write his commentary upon Littleton. He says there (Vol. II, p. 251b) that forfeiture *by matter of record* may be made by a particular tenant by

> " three manner of ways. First by alienation. Secondly, by claiming a greater estate than he ought. Thirdly, by affirming the reversion or remainder H to be in a stranger."

He gives instances of these three ways. Throughout his discourse it is plain that a disclaimer by a tenant in a court of record does not give rise to a forfeiture unless it amounts, expressly or impliedly, to an assertion or affirmance by the tenant of title in himself or in a stranger. His analysis of the law on the I subject has been accepted by all who have followed him, notably SIR JOHN COMYNS, C.B., in his DIGEST FORFEITURE A.2, A.4, A.5, and SIR WILLIAM BLACKSTONE in his COMMENTARIES II, pp. 275, 276. I am sure that MATTHEW BACON in his ABRIDGEMENT meant to say nothing to the contrary.

So ends the mediaeval law as to forfeiture by matter of record. Thenceforward it seems to have fallen into disuse for over three hundred years. There is no case, so far as I know, in which it has been applied between *Pelham's Case* (10) in 1590 and *Kisch* v. *Hawes Bros., Ltd.* (5) in 1934. There is mention of it once or twice as, for instance, in *Doe d. Graves* v. *Wells* (11) ((1839), 10 Ad. & El.

427), where it was held that a disclaimer (not of record) does not work a forfeiture; but otherwise it has been out of sight and out of mind. It is a pity that it was not left in oblivion, for it is quite inappropriate at the present day. All the circumstances which gave rise to this mediaeval law have now disappeared; and with their passing the old law has gone too. A tenant for years does not owe homage to his landlord. He does not take an oath of fealty. He is under no duty to defend the interest of the reversioner. His rights and duties are defined by the lease; and there is no room for any implied condition that he is not to dispute the landlord's title, either on the record or off it. The landlord is sufficiently protected by the rule that the tenant is estopped from denying his landlord's title. This rule ensures that no denial of title is of any avail to the tenant except in those cases where he may properly put the plaintiff to proof. To go further and say that the denial involves a forfeiture would be a punishment on the tenant which cannot be justified. This form of pleading does the landlord no harm, and the tenant should not suffer by reason of it. When these old feudal rules are brought up to exact a penalty for an innocent plea of this kind, I call to mind the words of LORD ATKIN in *United Australia, Ltd.* v. *Barclays Bank, Ltd.* (12) ([1940] 4 All E.R. 20 at p. 37):

> " When these ghosts of the past stand in the path of justice, clanking their mediaeval chains, the proper course for the judge is to pass through them undeterred."

That spiritual advice, if I may so describe it, was given on a like occasion when it was sought to deprive a man of his rights because of his form of pleading. The House of Lords did not permit him to be trapped there by the old rules. Nor should we here. I have no hesitation in holding that a denial in a pleading of the landlord's title does not today give rise to a forfeiture. In so far as *Kisch* v. *Hawes Bros., Ltd.* (5) held that it did, it was wrong and should be overruled.

I would only add that, if the mediaeval law were to be revived, it would not, on a proper understanding of it, enable the landlord to forfeit the lease. This general denial only puts the landlord to proof. It does not affirm the fee to be in the defendant or in a stranger. If it were by some mischance to be so construed, it would be a " mispleader " which would not cause a forfeiture. Moreover, a defendant in the old days was not bound by the words of his professional pleader unless he had expressly or tacitly adopted them: see POLLOCK & MAITLAND I, p. 212, and this would apply especially in a case where the pleading might give rise to a forfeiture: see FINCH, p. 266. In this case again there was no re-entry or its equivalent; and in any case the plea has been amended. I do not stay, however, to consider these matters; nor any of the law relating to forfeiture by acts in pais, nor those cases when a tenant from year to year by his conduct has waived the necessity for a notice to quit. Suffice it to say that in my opinion a denial in a pleading by a tenant of his landlord's title does not today give rise to forfeiture.

I would therefore allow this appeal and remit the case for hearing on the other issues.

HODSON, L.J.: This was an action for possession brought by a landlord against the two personal representatives of the lessee on the grounds of non-payment of rent and breaches of covenants contained in the lease. Judgment was entered against the first defendant in default of appearance. The second defendant entered a defence (which was subsequently amended) containing this paragraph:

> " Save and except for the admission herein contained this defendant denies each and every allegation in the statement of claim as if the same were specifically set out and traversed seriatim."

The defence as originally drawn contained no counterclaim for relief against forfeiture. By her reply the landlord claimed that by her defence the second defendant had disclaimed and disputed the landlord's title as landlord and that she (the landlord) was entitled and thereby exercised her right to forfeit the term. The learned judge, applying the decision of FARWELL, J., in *Kisch* v. *Hawes Bros., Ltd.* (5) ([1934] All E.R. Rep. 730), gave judgment for the plaintiff, not on the grounds claimed in the writ but on the ground of forfeiture as claimed in the reply.

This case cannot be distinguished in any way favourable to the defendants from *Kisch* v. *Hawes Bros., Ltd.* (5). There the landlord followed the course which has been taken here, namely, he took the point in reply to the defence that by their defence the defendants had denied the plaintiff's title and that a denial of the plaintiff's title by a tenant is a ground on which a lessor is entitled to forfeit the lease. It should be noted that in *Kisch's* case (5) the effect of the defence was derived from consideration of R.S.C., Ord. 21, r. 21, which by its then terms introduced into the pleading a statement that the defendant denies or does not admit the allegations of the statement of claim. In argument an earlier case of *Barton* v. *Reed* (13) ([1931] All E.R. Rep. 425), was referred to, in which the point was taken but not decided that a defendant forfeited his lease by pleading a denial of his landlord's title. Counsel for the plaintiff has not sought to uphold *Kisch's* case (5) on the basis that failure to admit title creates a forfeiture, for he concedes that at least when there is a derivative title, as there was in that case as well as in this, a defendant is entitled to put to proof or not to admit title without imperilling his lease. See *Jones* v. *Mills* (14) ((1861), 10 C.B.N.S. 788), and *Doe d. Lewis* v. *Cawdor* (15) ((1834), 1 Cr. M. & R. 398). He, however, has contended that in this case the defendant has gone beyond non-admission and the mere putting to proof by setting up a denial in clear and unambiguous terms which entitles the landlord to claim a forfeiture of the lease.

The legal principle involved goes back to feudal times and is stated as follows in BACON'S ABRIDGEMENT (Dodd's Edition) (Vol. 3, p. 196):

> "Another way of forfeiture in a court of record is, by claiming a greater estate than he had by the feudal donation, or by affirming the reversion to be in any other person than his lord. This seems to be grounded on a rule in the old feudal law, that if a vassal denied that he held the feud of his lord, and it was proved against him, such denial was a forfeiture."

Examples are to be found in the books of denial by record involving the setting up of an adverse title. Cf. *Dicksee* v. *Spencer* (9) ((1587), 3 Leon. 169), where the lessee for years in an action of debt brought against him for the rent reserved claimed fee by bargain and sale of his lessor the which bargain and sale the plaintiff traversed. All three judges were clearly of opinion that, notwithstanding the traverse, it is a forfeiture, for the very claim is a forfeiture which cannot be saved by matter subsequent. The same case appears to be reported under the name *Barkhouse* (9) (4 Leon. 3), where it is recorded:

> "Debt against lessee for years for rent: The defendant claimed fee in the land whereas he had no fee: it was resolved that it was a forfeiture."

The principle is later stated in clear language in *Doe d. Williams & Jeffery* v. *Cooper* (16) ((1840), 1 Scott N.R. 36). TINDAL, C.J., said (ibid., at p. 41):

> "To constitute a disclaimer, there must be a renunciation by the party of his character of tenant, either by setting up the title of a rival claimant, or by asserting a claim of ownership in himself."

COLTMAN, J., in the same case said (ibid., at p. 48):

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> "A disclaimer I understand to be the setting up of a title that is inconsistent with the title of the landlord . . . [He ended his judgment by saying (ibid.)] I think the jury were well warranted in concluding that the defendant had no intention to deny the right of the lessors of the plaintiff, but merely desired to secure himself from liability to be called upon again by Kent."

The other members of the court gave judgment to the same effect.

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On the construction of the defence, I agree with the learned judge that the words of para. 3, which I have quoted above, are clear and specific. There is here a denial which, if today there is any validity in the distinction between denial and putting to proof, goes beyond the non-admission to be found in *Kisch's* case (5). The question still remains whether this denial involves the affirmative setting up of an adverse title to be found in the authorities. Counsel for the plaintiff contends that this must be so, for to deny is equivalent to the assertion of the opposite and must of necessity involve the tenant in asserting a title in himself or a stranger. While conceding that there may be cases where, as a matter of construction, a denial may in a pleading be pregnant with an affirmative allegation, cf., *MacLulich* v. *MacLulich* (3) ([1920] P. 439), I do not think this is such a case. Bearing in mind that the courts lean against forfeiture, I think that it is wrong to read into the general denial contained in the paragraph of the defence which I have read an affirmative allegation of the kind supposed by the learned judges who formed the court in *Doe d. Williams & Jeffery* v. *Cooper* (16). In my opinion at the present time, although the practice of pleaders may vary, there is no effective line to be drawn between non-admission, on the one hand, and denial on the other. Certainly a general traverse of the kind used in the defence here should not be taken against the defendant as going beyond a putting to proof and ought not to be taken to involve an affirmative contradictory allegation that the title in the land was in himself or in a stranger. Indeed on the form of pleading it would not be legitimate for him to give evidence to that effect.

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This conclusion is enough to dispose of the appeal in favour of the defendants for, if the pleader did not destroy his client's term by his denial, there is no forfeiture. I should add that, as the learned judge pointed out, the pleader in question was not the counsel now engaged in the case on behalf of the defendant. If I am wrong in saying that the defence created no forfeiture, the question remains whether the landlord has effectively elected to claim the forfeiture. I have said that the plaintiff followed the line taken in *Kisch's* case (5) by taking the point in his reply that there was a forfeiture and electing by that reply to accept the forfeiture so created.

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Again counsel for the plaintiff does not seek to support *Kisch's* case (5) in this respect, for he recognises that to make his election the landlord must either re-enter or issue a writ of possession, or take some equivalent step in order to make his election, and he does not contend that the reply in its original form would have any greater effect than a notice of intention to re-enter which would be insufficient. The position is fully stated by WARRINGTON, J., in *Moore* v. *Ullcoats Mining Co., Ltd.* (17) ([1908] 1 Ch. 575). He said (ibid., at p. 587):

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> "I am of opinion upon the authorities—and I refer particularly to *Jones* v. *Carter* (18) ((1846), 15 M. & W. 718) and to a dictum of BAYLEY, J.'s in *Fenn d. Matthews & Lewis* v. *Smart* (19) ((1810), 12 East, 444)—that where the condition in the lease is that the landlord may re-enter he must actually re-enter, or he must do that which is in law equivalent to re-entry, namely, commence an action for the purpose of obtaining possession. PARKE, B., in *Jones* v. *Carter* (18) puts that quite plainly. In the particular case to which he was referring the proviso for re-entry was in a different form to that in the present case—a form which one sometimes finds, namely,

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A that upon breach the lease shall be determined. What he says is this: 'An entry, or ejectment, in which an entry is admitted'—that is, having reference to the old form of procedure—'would be necessary in the case of a freehold lease, or of a chattel interest, where the terms of the lease provided that it should be avoided by re-entry. Whether any other act unequivocally indicating the intention of the lessor would be sufficient to B determine this lease'—that is, the lease in the form of the one with which he was dealing—'which is made void at the option of the lessor, we need not determine, because an ejectment was brought, and proceeded with to the consent-rule, by which the defendant admitted an entry, and the entry would certainly be an exercise of the option'. In *Fenn* v. *Smart* (19) BAYLEY, J.—although it is only a dictum in the course of the argument, C but it shows the view he took—said: 'Must not the necessity of an entry depend upon the wording of the condition? If the words be, that upon the doing of such an act, the reversioner may enter, there must be an entry to avoid the estate; but if the estate be granted upon condition that if the grantee do such an act, the estate shall thereupon immediately cease and determine, there no entry is necessary'. He there draws a D distinction between the two classes of cases. In my opinion the present case falls within the first class, and I do not see how it is possible, on any construction of this proviso for re-entry, to say that the lessors have re-entered, when all that they have done is to give a notice of their intention to re-enter, founded on a statement that the lease had determined, which had not in fact happened, or a demand for possession founded on that E notice."

The plaintiff, not having re-entered or issued a writ of possession founded on the forfeiture relied on, was not in a position to obtain judgment for possession in this action.

Counsel for the plaintiff has argued, however, that in this case the plaintiff F has, although he has not issued a writ of possession, done the equivalent in his reply to the amended defence which, since it contained a counterclaim, entitled him by way of counterclaim to the counterclaim to raise the question to save multiplicity of actions. I am not persuaded that as a matter of procedure this step is effective, but the point is of little more than academic interest since, if counsel for the plaintiff is right, the landlord can still claim the for- G feiture by issuing a writ of possession if the defendant has by his plea given rise to a forfeiture. There is, however, in this case a fatal objection to the plaintiff's claim, since, as in *Kisch's* case (5), the defence was amended before trial so that the denial of title was struck out and the action came to trial without it. Moreover, the defence was amended before the reply claiming forfeiture on which the plaintiff now relies came into existence. I do not think H that this amendment can be ignored. Once pleadings are amended, what stood before amendment is no longer material before the court and no longer defines the issues to be tried. Here the defendant has obtained leave to amend, and there has been no appeal against that order, and, whatever may have taken place at the hearing of the application to amend, the court must, I conceive, regard the pleadings as they stand; the purpose of amendment being to deter- I mine the real question in controversy between the parties. See *Sneade* v. *Wotherton Barytes & Lead Mining Co.* (20) ([1904] 1 K.B. 295), where LORD COLLINS, M.R., said (ibid., at p. 297):

> "It appears to me that the writ as amended becomes for this purpose the original commencement of the action . . ."

A somewhat similar situation arose in *Wallace* v. *Daly & Co., Ltd.* (21) ([1949] I.R. 352), a case decided by the Supreme Court of Ireland, to which we were referred. Two members of the court, who formed part of a majority in a court

of five, were of this opinion, although counsel had by agreement abstained from taking the point that the forfeiture had been cured by amendment. To this counsel for the plaintiff replies that, although the position as to amendment is, generally speaking, as I have stated it, yet here the pleading as originally drawn had an irrevocable effect which could not be cured by amendment, since it was a breach of the condition under which the defendant held his lease. He relied on the position as stated in BACON'S ABRIDGEMENT (Dodd's Edition) (Vol. 4, at p. 884):

> "Here it is to be observed, that any act of the lessee, by which he disaffirms or impugns the title of his lessor, occasions a forfeiture of the lease. For to every lease the law tacitly annexeth a condition, that if the lessee do any thing that may impair the interest of his lessor, the lease shall be void, and the lessor may re-enter. Indeed, every such act necessarily determines the relation of landlord and tenant; since to claim under another, and at the same time to controvert his title, to hold under a lease, and at the same time to destroy the interest out of which the lease ariseth, would be the most palpable inconsistency."

It is said that the condition having been broken this cannot be cured by amendment even though the breach of condition is contained in a pleading which normally is capable of amendment. I cannot accept that this pleading should be regarded as any more immutable than any other pleading, and, accordingly, if it were necessary, would hold that the appeal should succeed on the ground that, before the landlord had re-entered or taken effective proceedings for re-entry, the defendant by amending his defence had removed from it the denial of title which it had previously contained.

The position as to the case of *Kisch* v. *Hawes Bros., Ltd.* (5) seems to be as follows: The decision itself cannot be supported since (i) there was no denial of the landlord's title; (ii) there was no election by the landlord to take advantage of the forfeiture in the manner required by law; (iii) judgment was delivered against the tenant although leave had been given to amend the pleading so as to remove that part which was said to have caused the forfeiture. The plaintiff cannot succeed independently of *Kisch* v. *Hawes Bros., Ltd.* (5) since (i) the mere denial of title in the defence is insufficient to cause a forfeiture; (ii) by his amended counterclaim in the action the landlord has not effectively taken advantage of the forfeiture; (iii) the defence was amended before the judgment was given so as to remove in this case also the part of the pleading which was said to have caused the forfeiture.

I would allow the appeal and remit the case for hearing on the other issues raised in the action.

ORMEROD, L.J.: The fundamental question in this appeal is whether the plaintiff can regard the general traverse contained in the defence of the second defendant as a disclaimer of his title so as to be entitled to re-enter the premises.

Counsel for the plaintiff agreed that the insertion of the paragraph in question was a lapse on the part of counsel. Nevertheless the plaintiff has sought to take advantage of this lapse, which, of course, he is entitled to do, whatever be the merits of the case, if there has been such a disclaimer of the plaintiff's title as to entitle him to forfeit the lease. As has been pointed out in the judgments which have already been delivered, the rule that the setting up of a title adverse to that of the lessor may involve the lessee in the forfeiture of his lease has its origin in the old feudal law. The question has been considered recently by this court in *Wisbech St. Mary Parish Council* v. *Lilley* (22) ([1956] 1 All E.R. 301) when SIR RAYMOND EVERSHED, M.R. (ibid., at p. 303) cited a passage

A from the judgment of LYNDHURST, C.B., in *Doe d. Ellerbrock* v. *Flynn* (23) ((1834), 1 Cr. M. & R. 137 at p. 141):

> " ' I think that the jury, upon the facts proved at the trial, came to a right conclusion. If the tenant sets up a title hostile to that of his landlord, it is a forfeiture of his term: and it is the same if he assists another person
B to set up such a claim. Whether he does the act himself, or only colludes with another to do it, it is equally a forfeiture'."

The Master of the Rolls then goes on to say ([1956] 1 All E.R. at p. 303):

> " The conception of the relations of landlord and tenant has undergone many changes since that case was decided in 1834. The rule asserted
C was founded on the feudal law, as counsel in that case pointed out. Still, if the facts were strictly brought within the scope of the decision in *Doe d. Ellerbrock* v. *Flynn* (23), I do not doubt that even today the court would come to the same conclusion."

ROMER, L.J., said (ibid., at p. 304):

> " I accept, however, counsel's submission that, even now, if a tenant
D deliberately asserts a title in himself adverse to his landlord or if he lets a stranger into possession with the intention of enabling him to set up a title adverse to the landlord, that amounts to a repudiation of the landlord's title . . ."

We were referred to numerous authorities, many of them very old, but it
E seemed to me that *Doe d. Williams & Jeffery* v. *Cooper* (16) ((1840), 1 Scott N.R. 36) stated the position clearly when TINDAL, C.J., said (ibid., at p. 41):

> " To constitute a disclaimer, there must be a renunciation by the party of his character as tenant, either by setting up the title of a rival claimant, or by asserting a claim of ownership in himself."

F Did the defendants by reason of the general traverse contained in the defence of one of them renounce their character as tenant by setting up the title of a rival claimant, or asserting a claim of ownership in themselves or one of them? The statement of claim set out the plaintiff's title to the reversion. The title was a derivative one. This averment of title was therefore one of the matters which was dealt with in the general traverse, since there was no other mention
G of it in the defence. It was argued on behalf of the defendant that the effect of the traverse was to do no more than to put the plaintiff to proof of her title. For the plaintiff it was argued that it went much further than that. If the words in the paragraph, instead of being a denial, had read " This defendant does not admit ", and so on, then, says the plaintiff, there would have been no cause for complaint, but in fact there was a denial of the plaintiff's title,
H and that amounts to a disclaimer. I am bound to say that for my part I cannot accept this contention. The methods of pleaders vary, but the use of a general traverse in one form or another is very common indeed. Some pleaders, if they wish to go no further than to put the plaintiff to the proof of the matters averred in the statement of claim, will use the form " The defendants do not admit ". Others will say " The defendants deny ". Having regard to the
I modern practice of pleaders, I have always regarded the two forms as having a similar effect, and indeed it is difficult to see what other effect in the ordinary case a denial could have than putting the plaintiff to proof, unless the defence also contained some positive averments. If this be the effect of a general traverse such as the one under consideration here, and for my part I think it is, then the pleading cannot amount to a renunciation by the defendants of their character as tenant. The learned judge clearly considered that he should follow the decision of FARWELL, J., in *Kisch* v. *Hawes Bros., Ltd.* (5) ([1934] All E.R. Rep. 730) and in his judgment he said ([1958] 1 All E.R. at p. 47):

"In my judgment the denial of the lessor's title contained in para. 3 is in clearer and more direct form than the denial held in *Kisch* v. *Hawes Bros., Ltd.* (5), to be involved in the plea that the defendants were in possession."

It was pleaded in the defence in that case, where the defendants were being sued for possession of some premises in Notting Hill Gate, that the defendants were in possession of the premises. By R.S.C., Ord. 21, r. 21, in its then form, it was provided as follows:

"No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession, and it shall be taken to be implied in such statement that he denies, or does not admit, the allegations of fact contained in the plaintiff's statement of claim. He may nevertheless rely upon any ground of defence which he can prove except as hereinbefore mentioned."

The plaintiff submitted that she was entitled to re-enter on the ground that the said plea amounted to a denial of the plaintiff's title, and that a denial of the plaintiff's title by a tenant was a ground for forfeiture of the lease. FARWELL, J., accepted this contention and held that the plaintiff was entitled to possession of the property. It follows from what I have said above that, in my view, this decision cannot be regarded as good law. The plea that the defendant was in possession of the premises did nothing more than put the plaintiff to proof of her title. It made no attempt to set up an adverse title either in the defendant himself or in anyone else. It would indeed cause great hardship to lessees if a plea, such as the one we are considering in this case, were to render a lease liable to forfeiture. Such a plea cannot do the landlord any harm, nor can it put him in any worse position than he was in before. He is simply put to the proof of his title.

But, even if the true construction of the paragraph of the defence in question should be that it does amount to a renunciation by the defendants of their character as tenants, the plaintiff would still, in my judgment, not be entitled to succeed. The statement of claim was delivered with the writ, which was issued on Apr. 27, 1955. The first defendant allowed judgment to go by default, but the defence of the second defendant was delivered on June 15, 1955. The plaintiff delivered her reply on June 29, 1955, para. 3 of which was as follows:

"The plaintiff hereby exercises her said right to forfeit the said term, and claims to be thereby entitled to re-enter upon the said premises."

Nothing was done at that time to complete the re-entry, and counsel for the plaintiff agrees that the paragraph in the reply without the issue of a writ would be insufficient for the purpose. The judgment obtained against the first defendant was ultimately set aside, and on Feb. 14, 1956, an amended defence was delivered on behalf of the second defendant, admitting the lease and the plaintiff's title, and counterclaiming for relief against forfeiture, and on Feb. 27, 1956, the plaintiff delivered a reply claiming possession of the premises on the ground that by reason of the denial of the title in the original defence the term had become forfeited. Counsel for the plaintiff argued that the plaintiff acquired the right to forfeit when the defence was delivered in its original form, and no amount of amendment could deprive her of that right. This is a proposition that I find some difficulty in following. The defence in question is a pleading which is capable of amendment like any other pleading. Once it is amended

A it takes its place on the record as a part of the pleadings, setting out the issues on which the action will be tried. When the amended defence was delivered, nothing had been done by the plaintiff to claim possession of the premises. Had a writ claiming possession been issued before the amendment, the position might have been different. This was not done, and when a claim was made the position on the record was that the plaintiff's title was admitted.

B I agree that the appeal should be allowed.

Appeal allowed. Case remitted for further hearing on issues to be determined.

Solicitors: *Wilders & Sorrell** (for the defendants); *Murray, Hutchins & Co.* (for the administratrices of the plaintiff).

C [*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

D

PRINCE AND ANOTHER *v.* GREGORY AND ANOTHER.

[COURT OF APPEAL (Hodson and Ormerod, L.JJ.), December 12, 1958.]

E *Practice—Striking out pleading—Statement of claim—No cause of action—Negligence—Pile of lime mortar left in gutter outside defendant's house—Piece thrown by boy injuring plaintiff—Whether evidence of negligence by defendant.*

Child—Negligence—Allurement—Highway—Pile of lime mortar left in gutter outside house—Piece thrown by boy injuring plaintiff—Whether evidence of

F *negligence by occupier.*

In an action for damages against two defendants, the plaintiff, a boy of ten years of age, alleged that he had been injured by a piece of lime mortar thrown by another boy of fourteen years of age, who had picked it up from a pile left by the second defendant in the gutter of the road outside his house. The mortar was so left pending its use by the second defendant presumably

G in connexion with repairs. The plaintiff claimed that the second defendant had been negligent in placing or leaving the lime mortar in the gutter of the road, when he knew that children " habitually played in the said road ".

Held: the statement of claim so far as it affected the second defendant disclosed no cause of action and should be struck out, since the second

H defendant could not reasonably be expected to apprehend danger to children from the lime mortar being left where it was, pending its use for a useful purpose.

Jackson v. *London County Council & Chappell* ((1912), 76 J.P. 217) distinguished.

Appeal allowed.

I [As to degree of care required in relation to acts by children, see 23 HALSBURY'S LAWS (2nd Edn.) 584, para. 836; and for cases on the subject, see 36 DIGEST (Repl.) 114-120, *565-599.*]

Cases referred to:

(1) *Buckland* v. *Guildford Gas Light & Coke Co.*, [1948] 2 All E.R. 1086; [1949] 1 K.B. 410; 113 J.P. 44; 2nd Digest Supp.

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* See footnote, p. 122, ante.

(2) *Davis* v. *St. Mary's Demolition & Excavation Co., Ltd.*, [1954] 1 All E.R. 578; 3rd Digest Supp. A

(3) *M'Alister (or Donoghue)* v. *Stevenson*, [1932] All E.R. Rep. 1; [1932] A.C. 562; 1932 S.C. (H.L.) 31; 101 L.J.P.C. 119; 147 L.T. 281; 36 Digest (Repl.) 85, *458*.

(4) *Jackson* v. *London County Council & Chappell*, (1912), 76 J.P. 217; 19 Digest 557, *21*. B

Appeal.

The second defendant appealed against an order of THESIGER, J., made on Nov. 11, 1958, allowing an appeal by the plaintiff against an order of Mr. District Registrar KEWISH made on Oct. 16, 1958. The district registrar ordered the statement of claim in the plaintiff's action for damages so far as it related to the second defendant, against whom negligence was alleged, to be struck out on the ground that it showed no cause of action against the second defendant and was vexatious and oppressive. C

C. M. Clothier for the second defendant.

W. G. O. Morgan for the plaintiff.

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HODSON, L.J.: I will ask ORMEROD, L.J., to deliver the first judgment.

ORMEROD, L.J.: The facts of the case, so far as they are known to the court, are all set out in the statement of claim, which is the only pleading in the action so far. The first-named plaintiff was an infant of ten years of age, and he brought the action by his mother and next friend. The two defendants were first E an infant aged about fourteen years and a man who was the owner and occupier of 21, Downing Road, Bootle, near Liverpool. According to the statement of claim, he had at all material times left outside this house in the gutter what is described as a pile of lime mortar. The allegation of the plaintiff is that at about 5.30 p.m. on Aug. 6, 1957, he was playing in Downing Road, Bootle, when the first-named defendant came along and picked up a quantity of lime mortar and F threw it at the plaintiff causing injury, the injury being, according to the pleading, to the right eye, which caused some loss of sight. The allegation in the particulars to the statement of claim was that the second defendant was guilty of negligence in placing or leaving this lime mortar in the gutter of the road, when he knew that children " habitually played in the said road ". There is a further allegation in the particulars that he caused or permitted the existence of a danger in the G road " which he knew or ought to have known to be an allurement to the said children ", and that he had taken no reasonable steps to prevent children coming in contact with the said lime mortar. There was a further allegation in the statement of claim that the lime mortar in the circumstances constituted a nuisance on the highway, but that allegation has been abandoned, for the purposes of this appeal at any rate, and it is unnecessary to deal with it. H

Put shortly, the submission of counsel for the second defendant is that the householder was doing a reasonable thing in leaving this lime mortar in the gutter outside his house for the purpose for which he required it, presumably in connexion with some repairs, and that it was not reasonably within his contemplation that a boy of the age of fourteen would come along and pick up a piece of this lime mortar and throw it at the plaintiff or any other passer-by. The sub- I mission is that a pile of lime mortar of this kind is no more likely to be thrown by children in these circumstances than is anything else which may from time to time be left outside the door of a house, and, if in circumstances of this kind it were to be regarded as a potential danger for which the householder might be liable, it would place an intolerable burden on the householder, because it would have the effect of making the householder liable if he left anything at all outside the door of his house. In the course of his argument, counsel for the second defendant cited the case of a milk bottle, frequently left on people's doorsteps,

which in the hands of a mischievous child might be a weapon capable of causing considerable harm. It was argued that there is no reason to suppose that a pile of lime mortar left in these conditions is any more likely to be something with which one child will injure another than any other things which are normally, reasonably and properly left outside the door of a house, and there was no reason why this householder should expect that any danger would arise from leaving the pile of lime mortar in this way. Counsel says that, having regard to the inherent jurisdiction of this court, if the court is satisfied that the action against the second defendant must fail, in such circumstances the statement of claim should be struck out so far as the second defendant is concerned.

The way the case is put by counsel for the plaintiff, as I understand it, is this. Here was something which in fact has caused damage to the plaintiff, and, if there were a jury in the case, it would be proper to submit to the jury the question whether or not this lime mortar left in this position was in fact a danger against which the householder should have provided, and, if there was a question of fact of that kind to be left to the jury or to be decided by the judge trying the case, then the statement of claim should not be struck out as there was clearly a matter to be decided at the trial. He cited in support of his argument *Buckland* v. *Guildford Gas Light & Coke Co.* (1) ([1948] 2 All E.R. 1086) and *Davis* v. *St. Mary's Demolition & Excavation Co., Ltd.* (2) ([1954] 1 All E.R. 578). Both cases were decided, not by this court, but in the Queen's Bench Division. In the case of *Buckland* (1) a girl who had been with a party of other girls was moved to climb a tree when she was legitimately crossing a field, although she had no right to climb the tree. In climbing the tree she came into contact with overhead cables which were heavily charged with electricity and caused her death. It was decided by MORRIS, J., that the owners of the cable were liable, because, although the girl was a trespasser so far as the tree was concerned, she came within the class of neighbour as defined by LORD ATKIN in *M'Alister (or Donoghue)* v. *Stevenson* (3) ([1932] All E.R. Rep. 1). In *Davis* v. *St. Mary's Demolition & Excavation Co., Ltd.* (2), a boy was injured when trespassing on land where some buildings were being demolished, a place where it was known that children regularly trespassed; complaints had been made constantly, because the children were in the habit of going on the land and playing in the buildings, which were in a dangerous state. There, again, it was held that the children came within the definition of neighbour and therefore the defendants were liable. Those are cases on quite a different basis from the present case. Here something is left outside in the gutter, not for children to play with or for any other purpose than that of doing whatever necessary repairs had to be done to the house. It seems to me quite impossible to say that, in the case of children playing in the street where one picks up a piece of mortar and throws it so as to injure another child, that child can be said to be a neighbour of the householder within the terms of LORD ATKIN'S definition.

Perhaps the strongest case cited by counsel for the plaintiff in support of his submission was *Jackson* v. *London County Council & Chappell* (4) ((1912), 76 J.P. 217). That was a case tried by judge and jury where a load of material, of much the same kind as in this case, had been taken to a school for the purpose of some repairs being done to the school and on the instructions of the caretaker had been put in a corner of the playground. At that time the school was not in session, but two days later, when the school reassembled, the head master realised this might be a danger and gave instructions to Chappell, the builder, to have it moved to a safer place. Chappell appears to have given instructions to a second man to do this, but the man failed to do it, and, the material being in the playground, the boys threw it at one another with the result that one of them was injured, and it was held that Chappell was liable and the school also was liable.

In his judgment, VAUGHAN WILLIAMS, L.J., after setting out certain questions which had been put to the jury and their answers, said (76 J.P. at p. 218): A

> "I take it upon that the jury must have meant to find that this was a dangerous thing to leave in the position in which it was left."

The argument of counsel for the plaintiff was that, in circumstances very similar to those in the present case, a question was properly left to the jury which it answered in the affirmative, and that that answer this court found no reason to disturb. He argued that there was no reason why the same question should not be put in this case, i.e., whether this lime mortar, being left in this position as it was, was a dangerous thing. That argument could be used in every case, I suppose, where something is left and an accident happens. It appears to me to be a question of degree. In *Jackson's* case (4) the place in question was a place where boys were intended to play and were no doubt sent to play at certain intervals of the day. It is not unreasonable to say in those circumstances that anything left in the playground was something with which they would be likely to play. That seems to me to be a very different thing from something left in the street for a useful and necessary purpose. Mischievous children may from time to time throw at other children things which they pick up in the street, but to expect householders to foresee that anything properly left in the street would be so used would be to put a very heavy burden on them. B C D

In these circumstances it is reasonable to take the view that there is not a question here to be left to a jury. If the court is of the opinion that this lime mortar, left as it was, was something from which danger could not reasonably be apprehended, then it appears to me that it is the duty of this court to say that the statement of claim should be struck out. This seems to be a plain and obvious case. It was a reasonable thing for this defendant to leave this lime mortar as he did. There was no reason why he should expect that some mischievous boy would pick it up and throw it at another boy who happened to be passing by, or playing in the street. In my opinion, therefore, the statement of claim, so far as it affects the second defendant, should be struck out, and I would allow this appeal. E F

HODSON, L.J.: I agree, and for the same reasons.

Appeal allowed,

Solicitors: *Lightbounds, Jones & Co.*, agents for *E. R. Hoskinson, Montgomery & Co.*, Liverpool (for the second defendant); *Jaques & Co.*, agents for *Thomas R. Jones*, Liverpool (for the plaintiff).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

MOHAMEDALI JAFFER KARACHIWALLA v. NOORALLY RATTANSHI RAJAN NANJI AND OTHERS.

[PRIVY COUNCIL (Lord Radcliffe, Lord Tucker and Mr. L. M. D. de Silva), July 14, 15, October 2, 1958.]

Privy Council—Kenya—Mortgage—Sale of mortgaged property—Whether proviso for redemption in mortgage a contract to the contrary within the Indian Transfer of Property Act, 1882 (No. 4 of 1882), s. 67.

Mortgage—Proviso for redemption—Construction of mortgage providing for repayment by instalments and redemption on date when last instalment repayable.

By a third mortgage, dated Oct. 29, 1951, and made between the appellant as mortgagor and the first respondent as mortgagee, the mortgagor assigned certain leaseholds in Mombasa (subject to two prior mortgages) to the mortgagee and covenanted to repay to him certain sums secured by the mortgage together with interest thereon payable monthly. Mortgagor's covenants in the mortgage provided that the principal was to be paid off by instalments at specified dates which would result, if the instalments were so paid, in the whole amount being repaid by June 30, 1968; and, if the mortgagor failed to pay interest punctually or to carry out any of his covenants, the mortgagee was entitled to demand a repayment of and to recover the principal and interest. Finally, the mortgagee covenanted that "if the mortgagor shall repay the total principal sum . . . together with interest thereon due as hereinbefore provided by June 30, 1968, the mortgagee will . . . re-assign and surrender the lands and all buildings to the mortgagor . . . ". Interest fell into arrear and the principal money due under the mortgage became immediately payable. By s. 67 of the Indian Transfer of Property Act, 1882*, as applied to Kenya, the mortgagee then had, in the absence of any contract to the contrary, a right to obtain from the court an order that the property should be sold. In an action in which the third mortgagee was sole plaintiff, and the first and second mortgagees were joined as defendants, the Supreme Court in Kenya made an order for sale under which the sale was to take place if the mortgagor did not bring into court what was due under all three mortgages. The preliminary order for sale also contained personal decrees against the mortgagor for any balances due under the three mortgages not satisfied out of the proceeds of sale, and, though the final orders did not contain these personal decrees, they gave liberty to the mortgagees (i.e., to the first and second mortgagees as well as to the third mortgagee) to apply for them. Objection based on the procedural matters mentioned in the last two sentences was not taken before the Supreme Court in Kenya or before the Court of Appeal for Eastern Africa, but was raised before the Judicial Committee.

Held: (i) the third mortgage did not contain a " contract to the contrary " within s. 67 of the Indian Transfer of Property Act, 1882, because, on the true construction of the mortgage, the mortgagee might demand and take proceedings to recover the outstanding principal and interest without waiting until June 30, 1968, if the mortgagor made default in the observance of his covenants before then.

Williams v. *Morgan* ([1906] 1 Ch. 804) distinguished.

(ii) it was now too late for the appellant to maintain successfully that the orders for sale were erroneous in requiring him to bring into court the money secured by the three mortgages, since he had not raised the objection at the time when the orders for sale were made.

Observations on the inclusion in the preliminary order of a personal decree for payment by the mortgagor to the first and second mortgagees in view

* The terms of s. 67 are printed at p. 139, letter E, post.

of r. 21 of the Kenya Rules of Court (Mortgage Suits), the first and second mortgagees not being plaintiffs in the suit (see p. 143, letters C to F, post).

Appeal dismissed.

[As to the position where a proviso for redemption is conditional on payment of principal at a distant date with interest meanwhile, see 23 HALSBURY'S LAWS (2nd Edn.) 462, para. 679.]

Case referred to:

(1) *Williams* v. *Morgan*, [1906] 1 Ch. 804; 75 L.J.Ch. 480; 94 L.T. 473; 35 Digest 547, *2761.*

Appeal.

Appeal by Mohamedali Jaffer Karachiwalla from an order of the Court of Appeal for Eastern Africa (WORLEY, P., BRIGGS and BACON, JJ.A.), dated Mar. 27, 1956, dismissing with costs an appeal by the appellant from a judgment of the Supreme Court of Kenya at Mombasa (MAYERS, J.), dated Nov. 11, 1954, and all proceedings subsequent thereto in an action in which the first respondent, Noorally Rattanshi Rajan Nanji, was the plaintiff, and the appellant, the second respondents, Ismailia Corporation, Ltd., and the third respondent, Karmali Khimji Pradhan, were the defendants. The action was begun by a plaint dated Aug. 8, 1953, whereby the first respondent as third mortgagee under an indenture of mortgage dated Oct. 29, 1951, claimed judgment against the appellant for, inter alia, (i) Shs. 163,874/94, being Shs. 150,000/- principal sum due under the third mortgage, and Shs. 13,874/94 interest thereon as set out in the third mortgage from Feb. 1, 1952, to July 31, 1953; (ii) further interest on the principal sum of Shs. 150,000/- at the rate and in the manner set out in the third mortgage from Aug. 1, 1953, until judgment; (iii) order for the sale of the mortgaged premises if the appellant failed to pay the total decretal amount by a date to be fixed by the court, payment to the second and third respondents of the respective amounts due under their respective mortgages, and payment to the first respondent of his decretal amount; (iv) personal decree for balance (if any) after the realisation of the security in full. The facts appear in the judgment of the Board.

H. E. Francis for the appellant.

Arthur Bagnall for the respondents.

LORD RADCLIFFE: This appeal from the Court of Appeal for Eastern Africa relates to proceedings instituted in the Supreme Court of Kenya at Mombasa by the first respondent to enforce his security under a mortgage of certain land on the Island of Mombasa which was granted to him by the appellant. The second and third respondents hold prior mortgages of the same property, so that the mortgage now in question is a third mortgage.

The Supreme Court gave judgment in favour of the first respondent on Nov. 11, 1954, upholding the validity of his mortgage. This judgment was followed by three orders in the same court dated respectively Nov. 15, 1954, Jan. 21, 1955, and May 20, 1955, the effect of which was to pass a final decree for sale of the mortgaged property, and for satisfaction out of the proceeds of sale of the sums found due to the respective mortgagees on their several mortgages, the mortgagees being given liberty to apply for personal decrees against their mortgagor for payment of any balances due to them, if the proceeds of sale proved insufficient to satisfy them in full. An appeal against these orders was dismissed by the Court of Appeal on Mar. 27, 1956. The appellant's main point in his argument before this Board has been to the effect that, having regard to the provisions of s. 67 of the Indian Transfer of Property Act, 1882, as applied to Kenya, and to the terms of the third mortgage, the first respondent was not entitled to obtain an order for sale from the court. This point was not raised during the hearing of the case in the Supreme Court, which was concerned with other issues affecting the enforceability of the mortgage, but was argued, though

A unsuccessfully, before the Court of Appeal. The appellant has also raised two points, essentially procedural, which impugn in some respects the form of the Supreme Court order dated Jan. 21, 1955, which was a preliminary decree for sale. These points were raised neither before that court nor before the Court of Appeal. For the reasons which will be mentioned more fully later, it is not the intention of their Lordships to give any decision on these procedural points
B which, in the circumstances, are not open to the appellant.

The appellant's main argument is that the proviso for redemption in the third mortgage amounted to an agreement that so long as the mortgage money and interest were paid up by June 30, 1968, the mortgagor should be entitled to the return of his security on that date or thereafter. It is not in dispute that the monthly interest stipulated for by the mortgage had fallen into arrear before
C proceedings were commenced or that, by virtue of this and notice given in respect of it, the principal moneys due on the mortgage had become immediately repayable; but the mortgage is so drawn, it is said, that nevertheless the undertaking for reconveyance on or after June 30, 1968, remains in force so that, until that date, the mortgagor has a continuing chance of recovering his property by tendering the full amount of principal and interest contracted for. Such an undertaking
D then—and, if the premise is right the conclusion may well follow—amounts to a " contract to the contrary " within the meaning of s. 67 of the Transfer of Property Act, 1882, and, therefore, precludes the possibility of a sale or foreclosure under the process of the court before that date. The section in question runs as follows:

E > " In the absence of a contract to the contrary, the mortgagee has at any time after the mortgage money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage money has been paid or deposited as hereinafter provided, a right to obtain from the court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property
F be sold."

To assess the validity of this contention, it is necessary to decide what the contractual scheme of the third mortgage amounts to. It is a somewhat complicated document which is not drawn with any great nicety of draftsmanship. But, for all that, there is no need to make any mystery about its effect or the expressed intentions of the parties. Properly understood, the document appears
G to their Lordships to afford no support to the appellant's highly improbable construction. It is best to set out a summary of the main provisions of the mortgage, as they affect this point, in the order in which they appear in the deed, and then to say what, read together, they amount to as a contractual scheme.

H (i) The mortgage was by indenture dated Oct. 29, 1951, and was made between the appellant as mortgagor and the first respondent as mortgagee.

(ii) The deed recited first and second prior mortgages of the same date and stated that the consideration for the mortgage was the sums of 130,000 shillings advanced and 20,000 more shillings to be advanced to the mortgagor by the mortgagee on the security of the intended third mortgage.

I (iii) The mortgagor covenanted in consideration of the sums of 130,000 shillings lent and 20,000 shillings to be lent on Nov. 15, 1951, to pay to the mortgagee the sum of 150,000 shillings on June 30, 1968, together with interest thereon at varying rates on different sectors of the total sum, all such interest to " be paid . . . at the end of every month as it accrues due and becomes payable".

(iv) Certain leasehold interests in land on the Island of Mombasa were assigned to the mortgagee as security for the mortgage, subject to the two prior mortgages.

(v) The mortgagor entered into a number of covenants with the mortgagee, among them covenants to complete buildings on the mortgaged property; to pay all sums becoming due either for principal or interest on the prior mortgages; to observe the terms of the head leases of the land mortgaged and to pay ground rent, rates, taxes and outgoings; to keep the buildings on the site insured and to pay the premiums required.

(vi) Three of the mortgagor's covenants were in the following terms:

" (e) Should the mortgagor make any default in payment of the ground rents, municipal rates and taxes insurance and payments of premium or premia in respect thereof or should he fail to pay interest regularly and punctually to the mortgagee under the first and second mortgages or should he fail to pay the interest due on the principal sum or sums advanced regularly as hereinbefore provided or should he fail to carry out any of the covenants and conditions and agreements herein contained then in any one of such cases the mortgagee shall be at liberty to demand the repayment of the principal sum together with all interest due thereon notwithstanding the time for repayment thereof hereinbefore provided and shall be entitled to recover the same through a court of law Provided always that the mortgagee shall not enforce his right to claim and recover the whole principal sum in event of any of the above defaults until after Jan. 1, 1952, and even after the said date until after a five week previous written notice is first given by the mortgagee to the mortgagor demanding the compliance of any default or breach as aforesaid and Provided always that the mortgagor shall not permit any increase of amount under either or both of the two previous mortgages in respect of interest, premium ground rents municipal rates or in any other way whatsoever and should the mortgagor permit such an increase after Jan. 1, 1952, the mortgagee shall also be entitled if after a notice in writing of five weeks any of such amounts are not paid up to claim the whole amount of loan and interest forthwith notwithstanding the period of repayment.

" (f) He the mortgagor agrees that he will repay the sum of Shs. 150,000/- (one hundred and fifty thousand shillings) to be advanced hereunder by twenty-five half yearly instalments of Shs. 5,000/- (five thousand shillings) the first of such half yearly instalments to be paid on June 30, 1952, and the remaining twenty-four at the end of every six months and thereafter the balance by eight half yearly instalments the first seven instalments of Shs. 3,000/- (three thousand shillings) each and the eighth instalment of Shs. 4,000/- (four thousand shillings) thus paying off the whole amount by June 30, 1968, as hereinbefore provided and from such half yearly payments the mortgagee shall accept Shs. 3,000/- (three thousand shillings) towards the reduction of the sum of Shs. 100,000/- and Shs. 2,000/- towards the reduction of the first Shs. 25,000/- and after the first Shs. 25,000/- has been paid of the subsequent payment of Shs. 2,000/- towards the reduction of the second Shs. 25,000/- and after such payments interest will run on the balance or balances due in respect of the respective sums Provided always and it is hereby agreed that the mortgagee shall appropriate the first payment or payments towards the amount or amounts expended by him the mortgagee for insurance, interest due and other outgoings and only after satisfaction in full of all such payments the payments will be applied towards the reduction of the principal sum or sums.

" (g) The mortgagor shall be entitled to make payment of any amount but not less than Shs. 5,000/- at any time other than the instalments hereinabove stated towards the amount due under this mortgage and the same shall be appropriated by the mortgagee as stated in cl. (f) hereof."

(vii) Finally, the proviso for redemption took the form of a covenant by the mortgagee with the mortgagor as follows:

A "... if the mortgagor shall repay the total principal sum advanced under these presents together with interest thereon due as hereinbefore provided by June 30, 1968, the mortgagee will at any time thereafter after the expiry of the stipulated date at the request and cost of the mortgagor re-assign and surrender the lands and all buildings to the mortgagor as he the mortgagor may direct."

B There are, of course, certain parts of this scheme which are not capable of being reconciled with each other in literal terms. If the mortgagor was under obligation to repay the whole 150,000 shillings on June 30, 1968, he could not at the same time be required or entitled to pay off parts of that sum by instalments during the intervening period. If the principal money became immediately payable in default of interest, etc., under cl. (e), the mortgagor could not C continue thereafter to be under a simultaneous liability to pay up either the principal sum on June 30, 1968, or instalments of it at fixed dates in the interim. A similar difficulty on the wording of the document would arise if the mortgagor exercised his power of anticipating mortgage payments under cl. (g).

But these difficulties are not so great as to call for any such desperate expedient D as rejection of one or more parts of the deed on the ground of inconsistency. On the contrary, their Lordships are of opinion that the scheme agreed on was easily intelligible from the document read as a whole and its total effect can be summarised under the following heads: (i) The mortgagor was to pay interest monthly on sums outstanding on the mortgage, to pay off the principal by the instalments and at the dates specified in cl. (f) and, if the instalments were paid E off according to that schedule, thus wiping out the debt by June 30, 1968, and interest were paid monthly in the meantime, the security was to be reconveyed on or after that date. (ii) On the other hand, if the mortgagor failed to observe any of his various covenants and obligations under the mortgage deed, including his obligation to pay instalments and current interest, the mortgagee was entitled from Jan. 1, 1952, to give five weeks' notice calling in the whole principal F sum then outstanding and to resort to a court of law to enforce the payment by any form of process which it might be within the power of the court to grant.

So construed, the mortgage deed contains no "contract to the contrary" within the meaning of s. 67. The appellant's argument seeks to extract such a contract from the proviso for reconveyance by interpreting that proviso as meaning that, no matter to what extent the scheme of payment provided by the G earlier clauses or the covenants for protecting the value of the security had broken down, so that the enforcement provisions of cl. (e) had had to be brought into play, nevertheless the mortgagor was still entitled to have the security retained, unsold or unforeclosed, until June, 1968, on the chance that he might turn up by that date with a full tender of principal and interest owing. No doubt there can be cases in which, either by accident or design, a proviso for redemption H or reconveyance may express some such arrangement between mortgagor and mortgagee. *Williams* v. *Morgan* (1) ([1906] 1 Ch. 804), which was referred to in argument, is an instance of such a case. But this mortgage is not one of them. It is sufficient to mention two reasons for that conclusion. In *Williams* v. *Morgan* (1), the condition on which the mortgagee was to return to the mortgagor his pledged estate had not been broken. The obligation stood. Here the I condition has been broken, since the proviso requires that interest on the mortgage money should have been paid "as hereinbefore provided", and the foregoing provisions of the deed call for interest to be paid monthly and not otherwise. The obligation does not therefore stand. Secondly, the mortgage in *Williams* v. *Morgan* (1) contained no stipulation comparable with cl. (e) of the present deed. Clause (e) explicitly negatives the idea that the mortgagee is in all circumstances to wait until June, 1968, before enforcing his security. There is no warrant for cutting down the meaning of such phrases as "recover the same through a court of law" and "enforce his right to claim and recover ..." to

extend only to an action for personal debt. But, if the words of cl. (e) are accorded their natural meaning and the proviso for reconveyance which follows is read in the light of them, it must result that the rights and obligations created by that proviso are only binding so far as they are not rendered incapable of effect by an earlier assertion of the mortgagee's rights under cl. (e).

Their Lordships will now notice the procedural points which were raised by the appellant in argument before them. It is desirable that they should be attended to, even though no decision is given on them, since they are not insubstantial, and it is possible that they indicate some looseness of practice in the courts in Kenya to which the attention of the judicial authorities there might usefully be directed.

The first point made is that the order of the Supreme Court dated Nov. 15, 1954, and the two consequent decrees for sale were erroneous in that the sale was ordered to take place if the mortgagor did not bring into court within the time specified the sums of money due on all three outstanding mortgages; whereas, it is argued, the condition required of him should have been limited to his bringing into court the money due on the third mortgage only. The third mortgagee was the sole plaintiff in the action, the sole party explicitly claiming relief, and the contingent sale decreed by the court for the purpose of affording that relief should not have been made dependent on compliance with a condition the effect of which was to secure payment in full to the first and second mortgagees as well, parties who were asking for no relief in the action. The form of order for foreclosure or sale which is prescribed by s. 86 and s. 88 of the Transfer of Property Act, 1882, does not envisage that the preliminary decree will provide for the mortgagor bringing into court anything more than the sum due to the mortgagee who is the plaintiff seeking relief, and the court, it is said, had no power to extend the content of such an order by requiring security for the sums due on the first and second mortgages as well.

To decide on the validity of this argument would require a careful review of the regulations and practice of the Kenya courts. If the matter were being dealt with under English practice, there would be force in it, because the prior mortgagees would not be likely or necessary parties to the third mortgagee's action against the mortgagor, and the sale of that mortgagee's security could take place without affecting their rights, which would have priority over the rights of a purchaser of the property sold. But it does not follow that the position was the same in Kenya. In this suit, the prior mortgagees were, in fact, joined as defendants. It may even be that, having regard to s. 85 of the Transfer of Property Act, 1882, they must be regarded as necessary parties. Whether they were so or not depends on the meaning to be attributed to the words " property comprised in a mortgage " in that section. In the event, neither of these mortgagees put in a defence; their counsel's submission, as recorded by the trial judge was,

> " If plaintiff succeeds, provision should be made for prior rights of first and second mortgagees. Instructions are to support Patel [counsel for the plaintiff] in all his arguments."

Presumably they must be taken as consenting that the sale that was ordered should be made free from their securities within the meaning of s. 96 of the Act. If so, it would follow necessarily that provision would have to be made for an account of the sums respectively due to them and for payment of these sums out of the proceeds.

The appellant maintained that, in raising this point about the form of the orders, he was raising a point of jurisdiction before the Board to which attention must be given as of right. Their Lordships do not accept this view at all. The most that can be said against the orders is that, in one respect, they may have

A subjected the mortgagor to a condition more burdensome than that which in law could be required of him. But every order that is defective in form in that sense is not an order made without jurisdiction, since an order may be wrong without its being beyond the capacity of the court to make it. Whether in this particular case the right forms were gone through or not it seems plain that, with all the parties before the court and the prior mortgagees explicitly asking B that their prior rights should be protected, they either were treated as, or could have put themselves in the position of, being additional plaintiffs claiming relief against the mortgagor. If he had made at the time the objections which he has sought to raise now, any necessary adjustment of parties or pleadings could have been made. In the circumstances, their Lordships are of opinion that he must abide by the result and that no question of any want of jurisdiction arises.

C The second point of procedure raised by the appellant requires only brief notice, since it appears that it is still open to him to take it, if he wishes to, in the courts of Kenya. The preliminary decree for sale dated Jan. 21, 1955, contained, among other directions, provisional personal decrees against the appellant in favour of the three mortgagees for the amount of any balance found due to them respectively and not provided for out of the proceeds of sale of the mort-D gaged property. The appellant draws attention to the fact that, under r. 21 of the Kenya Rules of Court (Mortgage Suits), no personal decree may issue against a mortgagor for a balance of money payable to any party not a plaintiff in the suit. This point is another one which, if valid, could probably have been disposed of in the course of proceedings by amendment. It should have been taken at the time of the drawing up of the preliminary decree. It was not, nor was E any reference made to it before the Court of Appeal; and it is now of contingent importance only since the final decrees, which for this purpose superseded the preliminary decree, did not pass any personal decrees for payment, but merely directed that, if the net proceeds of the sale then ordered were insufficient to pay the amounts found due and subsequent interest and costs in full, the several mortgagees should be at liberty to apply for personal decrees for the amount of F the balance. If any such application is made by either of the respondent mortgagees, the appellant can put forward his point that, as defendants in the suit, they cannot as such be granted a personal decree against their mortgagor.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondents' costs.

Appeal dismissed.

Solicitors: *Herbert Oppenheimer, Nathan & Vandyk* (for the appellant); *Waltons & Co.* (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

A

BROWN *v.* JAMIESON AND ANOTHER.

[COURT OF APPEAL (Lord Evershed, M.R., Lord Cohen and Sellers, L.J.), November 28, December 1, 2, 18, 1958.]

B

Landlord and Tenant—Notice to quit—Business premises—Notice to quit given before but expiring after decontrol by Rent Act, 1957—Notice not in form required by Landlord and Tenant Act, 1954—Whether notice effective—Landlord and Tenant Act, 1954 (2 & 3 Eliz. 2 c. 56), s. 24 (3) (b).

In 1944 a shop with living accommodation above it was let to the tenants at a rent of 25s. per week, the tenancy being determinable by twelve months' notice on either side. On Nov. 14, 1956, the landlord served on the tenants a written notice to quit the premises on Nov. 16, 1957. The tenancy was within the protection of the Rent Restrictions Acts until July 6, 1957, when the Rent Act, 1957, came into operation, and therefore (up to that date), was excluded from the scope of the Landlord and Tenant Act, 1954, by s. 43 (1) (c) of the latter Act. On the premises becoming decontrolled by virtue of the Act of 1957, they fell within the application of Part 2 of the Act of 1954, because the ground floor was used as business premises. The notice to quit was conceded to be a good notice within the terms of the tenancy agreement, but it did not constitute a notice complying with the Act of 1954 and the regulations made under it. On the question whether the notice to quit was effective to determine the tenancy,

C

D

Held (LORD COHEN dissenting): the operation of the notice was not affected by reason that the tenancy became one to which Part 2 of the Act of 1954 applied after the giving of the notice, because its validity was preserved by s. 24 (3) (b)* of the Act of 1954, within the terms of which the facts precisely fell; and the notice was accordingly effective.

E

Orman Bros., Ltd. v. *Greenbaum* ([1955] 1 All E.R. 610) distinguished and explained.

Appeal allowed.

F

[As to continuation and termination of tenancies, see 23 HALSBURY'S LAWS (3rd Edn.) 887-890, paras. 1709-1711.

For the Landlord and Tenant Act, 1954, s. 24 (3), see 34 HALSBURY'S STATUTES (2nd Edn.) 410.]

G

Cases referred to:

(1) *Orman Bros., Ltd.* v. *Greenbaum*, [1954] 3 All E.R. 731; *affd.* C.A., [1955] 1 All E.R. 610; 3rd Digest Supp.

(2) *Castle Laundry (London), Ltd.* v. *Read*, [1955] 2 All E.R. 154; [1955] 1 Q.B. 586; 3rd Digest Supp.

(3) *Re Bleachers' Assocn., Ltd.'s Leases, Weinbergs Weatherproofs, Ltd.* v. *Radcliffe Paper Mill Co., Ltd.*, [1957] 3 All E.R. 663; 3rd Digest Supp. H

(4) *Royal Crown Derby Porcelain Co., Ltd.* v. *Russell*, [1949] 1 All E.R. 749; [1949] 2 K.B. 417; 30 Digest (Repl.) 217, *598*.

Appeal.

This was an appeal by the plaintiff, the landlord, from a judgment of His Honour JUDGE COHEN given on June 16, 1958, at the Stockton-on-Tees County Court, dismissing an action for possession of premises consisting of a general dealer's shop with living accommodation behind and over it, known as No. 97, Yarm Road, Stockton-on-Tees, of which the defendants were the tenants. I

P. V. Baker for the landlord.

L. A. Blundell for the tenants.

* The terms of s. 24 (3) (b) are printed at p. 145, letter G, post.

Cur. adv. vult.

Dec. 18. The following judgments were read.

LORD EVERSHED, M.R.: The facts of this case are extremely short; and the question for our determination may be no less shortly stated. In 1944 the defendants became the tenants of the plaintiff of premises consisting of a shop, known as "Park Lane Stores", and living accommodation above it, being No. 97, Yarm Road, Stockton-on-Tees. The rent was 25s. per week and the tenancy was determinable by twelve months' notice on either side. It is not disputed that at the date of the tenancy and thereafter until the coming into operation on July 6, 1957, of the Rent Act of that year, the tenancy was within the protection of the rent restriction legislation and, as such, was excluded by the terms of the Landlord and Tenant Act, 1954, s. 43 (1) (c), from the scope of the latter Act; but that, on the premises becoming decontrolled, Part 2 of the Act of 1954 then became applicable to them, seeing that the ground floor was being used for business purposes (see s. 23 (1)). On Nov. 14, 1956, the landlord served on the tenants a written notice to quit the premises on Nov. 16, 1957. It is conceded by the tenants that that notice was a good notice as required by the terms of the tenancy agreement; and it is conceded on the landlord's side that it was not a notice that complied with the Act of 1954 and the regulations made thereunder. It follows from my recital, that at the date when the premises became decontrolled (i.e., lost the protection of the rent restriction legislation and ceased, therefore, to be excluded from the application of the Act of 1954 by virtue of s. 43 of that Act) a notice to quit, effectual according to the contract, had been duly served, but had not expired. The question for the court is whether, by virtue of s. 24 (3) (b) of the Act of 1954 the notice took full effect so as to determine the tenants' right of occupation on its expiry on Nov. 16, 1957; or whether, since the notice did not satisfy the requirements of the Act of 1954 and the regulations thereunder, the tenants' tenancy still subsists and will continue so to do until determined in due accordance with the last-mentioned Act and regulations.

Section 24 (1) of the Act of 1954 provides:

> "A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act . . ."

Then there are certain further provisions which I need not read. Sub-section (3) of the same section is in the following terms (so far as relevant):

> "Notwithstanding anything in sub-s. (1) of this section,—(a) where a tenancy to which this Part of this Act applies ceases to be such a tenancy, it shall not come to an end by reason only of the cesser . . . (b) where, at a time when a tenancy is not one to which this Part of this Act applies, the landlord gives notice to quit, the operation of the notice shall not be affected by reason that the tenancy becomes one to which this Part of this Act applies after the giving of the notice."

On a first reading of s. 24 (3) (b), it would appear precisely to cover the present case. At a time when the tenants' tenancy was not one to which Part 2 of the Act of 1954 applied the landlord had given a notice to quit, fully complying with the contract of tenancy. It follows, therefore, according to the argument on the landlord's behalf, that "the operation of the notice" (which must mean its effect to determine the tenancy) is not affected by the circumstance that, after the giving of the notice but before its expiry, Part 2 of the Act of 1954 became applicable to the tenancy.

The learned judge in a reserved judgment rejected the landlord's claim. His conclusion was based on certain decisions of the courts and particularly on the decision of this court in *Orman Bros., Ltd.* v. *Greenbaum* (1) ([1955] 1 All E.R. 610), affirming the judgment of DEVLIN, J. ([1954] 3 All E.R. 731) as binding

him to hold that s. 24 (3) (b), notwithstanding the generality of its language, must be treated as limited in its operation to cases where the application of the Act of 1954, after the giving of a notice to quit, is exclusively attributable to a change of user of the premises since that date; or at any rate to matters of fact as distinct from the mere operation of legislation as respects the premises concerned. A

The landlord has appealed from His Honour's rejection of his claim. In the circumstances, the first question for our consideration is: What is the true scope and effect of the *Orman* decision (1) ? There is no doubt that the facts in that case differed from those in the present case in this material respect, that in the former, the notice to quit, though given after the Act of 1954 had received the royal assent, was given before, but expressed to take effect after, the Act came into operation. In *Orman's* case (1), therefore, the reason for the non-application of the Act of 1954 at the date of the notice did not depend on the premises in question being, by reason of the particular facts or circumstances relating to them, excluded from the Act's operation so long as those facts or circumstances were unchanged; but depended on the single circumstance that at such date the Act itself had not come into operation at all. B C

In the view of DEVLIN, J. ([1954] 3 All E.R. at p. 735), the words " at a time when a tenancy is not one to which this Part of this Act applies " in s. 24 (3) (b) clearly carry with them the implication that at the relevant time (i.e., the date of the giving of the notice) the Act of 1954 is already in force—an implication plainly inherent (I may add) in the language of para. (a) of the same sub-section. In this court LORD GODDARD, C.J., in giving the leading judgment, described DEVLIN, J.'s judgment as " entirely right and impeccable ". The view of DEVLIN, J., which I have quoted, affirmed in this court in the language which I have also cited—a view with which I respectfully most fully concur—was sufficient to determine *Orman's* case (1) but would have no decisive effect in the present action; since in this case the Act of 1954 was in force at the date of the giving of the notice by the landlord on Nov. 14, 1956. But did the decision of DEVLIN, J., and its affirmation go further ? Can it be said that its ratio or one of its rationes was that which I have attempted to express above, namely, that s. 24 (3) (b) is limited in its operation to cases where the application of the Act of 1954 to the premises after the date of the notice (but before its expiry) depends on a change of user of the premises ? The proposition which, according to counsel for the tenants in this court, is enshrined and inherent in the decision in *Orman's* case (1), was expressed by him as follows: The words in the sub-section " the tenancy becomes one to which this Part of this Act applies " refer not to the moment when the Act of 1954 becomes operative as a matter of law as respects that tenancy, but to a change in the physical circumstances as to user, etc. which determine whether a tenancy is a " business tenancy " to which Part 2 of the Act applies. The words " et cetera " are inserted in his formula by counsel for the purpose of making allowance for the possible effects of the provisions of s. 41 and s. 42. D E F G H

The argument of counsel for the tenants depends first on two passages in the judgment of DEVLIN, J.: and since, as I have earlier stated, LORD GODDARD, C.J., described that judgment as " entirely right and impeccable ", it is necessary to set out those two passages in full. The first is ([1954] 3 All E.R. at p. 734): I

> " That is subject to the alternative argument of counsel for the landlords, which is that if he is caught by s. 24 (1), then he is taken out of it by s. 24 (3) . . . I think the object of that sub-section is clear enough. It is not intended merely as a transitional provision to cover notices to quit that are served before the coming into force of the Act; it is intended as a permanent provision of the Act and its object is to deal with the situation in which there is a change of user between the serving of the notice and its taking effect,

A a change of user which might bring the tenancy within the Act. Thus, if instead of reading 'tenancy is not one to which this Part of this Act applies' I call it, not precisely but no doubt for general purposes sufficiently accurately, a 'business tenancy', then the sub-section would read in this way: 'where, at a time when a tenancy is not a business tenancy, the landlord gives notice to quit, the operation of the notice shall not be affected B by reason that the tenancy becomes a business tenancy after the giving of the notice'. That is a plain, simple and, no doubt, necessary provision."

Immediately after his expression of the view which I earlier cited in this judgment, DEVLIN, J., continued (ibid., at p. 735):

"It is perfectly true, of course, that the Act does not apply to any C tenancies before Oct. 1, 1954, or, at any rate, before July 30, 1954, but that division in time is not what is intended by this sub-section. The sub-section intends a division in character, and I think counsel for the tenant is right in his argument when he says that when one is applying that sub-section at a time when a tenancy is not one to which this Part of this Act applies, one has to assume that the Act itself is already in force and applying, and D then consider whether in its terms it does or does not cover that particular class of tenancy."

It will be observed from the opening words of the earlier of these two passages that, in them, DEVLIN, J., was dealing only with an alternative argument put before him on the landlord's behalf. Neither of the two passages was in terms cited in the judgments on the appeal in this court. The alternative argument E in question was dealt with by LORD GODDARD, C.J., in the short paragraph at the end of his judgment where he said ([1955] 1 All E.R. at p. 613):

"The only other point on which I think that it is necessary to say a word is this. Counsel for the landlords' submission was that if we were against him on the point with which I have just dealt, the position is saved for him by s. 24 (3) . . . The learned judge thought that it was quite clear that that F sub-section meant that if one has a tenancy, we will say, of a private house to which Part 2 does not apply at all, and notice to quit that house is given, that notice will remain good and effective, although before the notice becomes effective the house has been turned into a shop, and therefore would otherwise be the subject of Part 2 of the Act. That was the view that the learned judge took of the meaning of that sub-section, and it is one with which G I entirely agree. I think the judgment of DEVLIN, J., was perfectly right, and that this appeal fails."

SINGLETON, L.J., confined himself to concurrence with LORD GODDARD, C.J., and I find nothing pertinent to the point now in question in the judgment of ROMER, L.J., save that he, too, expressed agreement with LORD GODDARD, C.J. H I do not, however, forget that LORD GODDARD, C.J., both at the beginning and at the end of his judgment expressed entire concurrence with the judgment of DEVLIN, J. How far, then, to pose again the essential question already formulated, must the language of DEVLIN, J., be taken to amount to an exegesis of the sub-section, in the sense for which counsel for the tenants contends, binding on this court by reason of this court's affirmation of the judgment in its entirety?

I I first observe that in strictness the question, as it is now sought to be formulated, was not necessary to DEVLIN, J.'s conclusion. I observe also, for what it is worth, that there is neither in the facts as appearing in the report, nor in DEVLIN, J.'s judgment itself, any precise statement of the nature or circumstance of the tenants' business, as might (I think) have been expected had DEVLIN, J., intended to found himself on the interpretation of the sub-section attributed to him. We are told that the premises in question were factory premises and that the tenancy was a business tenancy. But that is all. True, the learned judge paraphrased the sub-section by substituting the words "business tenancy"

for the longer statutory formula. But the paraphrase was after all not expressed as intended to be precise. Likewise, DEVLIN, J., had qualified his rejection of the view of the sub-section as a " transitional provision " by the use of the adverb " merely " in the phrase " merely as a transitional provision to cover notices to quit that are served before the coming into force of the Act ". And in the same way the exposition of LORD GODDARD, C.J., is shown to be illustrative by his use of the word " say ". It seems to me that both DEVLIN, J., and LORD GODDARD, C.J., were illustrating the real basis of their conclusion, viz., that the sub-section was intended, and only intended, to apply where, the Act of 1954 having been in force at all relevant times, its partial application depended on some change in the situation or status of the premises—by reference to the most obvious case of the change arising from a change of user. But I have in the end, and with a hesitation proper to the circumstance that the noble lord, LORD COHEN, has formed a contrary view, come myself to the conclusion that it would not (in the absence of some other compelling reason) be right to treat those judgments as laying down a far-reaching interpretation of the sub-section on a point not necessary to their decision, and thereby of substituting for the Parliamentary language some wholly different terms. For that would be the effect of accepting counsel for the tenants' argument. It would mean that henceforth the sub-section must be interpreted by the courts as though it had read: " where, at a time when a tenancy is not a business tenancy, the landlord gives notice to quit, the operation of the notice shall not be affected by reason that the tenancy becomes a business tenancy after the giving of the notice ". But that is not the language which Parliament has enacted. Had Parliament intended so to enact, there would clearly have been no difficulty in so doing. I cannot for myself think that (unless, again, there is some compelling reason for so doing) we ought now to hold that DEVLIN, J., in 1954 and this court in 1955 intended so rigidly to interpret (and require thereafter to be interpreted) the apparently simple language of the Act—and so by anticipation to determine the question which has now arisen but which was not then at all before them. I add that I cannot get additional authority for so doing from the use of the words " and applying " in the final sentence of the second of the two passages which I have quoted above from the judgment of DEVLIN, J.

Is there then some other compelling reason for so interpreting and limiting the sub-section? Counsel for the tenants raised a formidable point before us on Sch. 4 to the Rent Act, 1957. That schedule contains (expressly) transitional provisions taking effect by virtue of s. 11 (7) of the Act in cases of decontrol under the earlier terms of that section—provisions designed to give a measure of temporary protection to the tenant whose premises become decontrolled. Paragraph 2 (6) provides that this transitional protection is inapplicable to a tenancy to which, immediately after the decontrol, Part 2 of the Act of 1954 is applicable. Paragraph 11 of the same schedule is referable to the case where a formerly controlled contractual tenancy under the Rent Restrictions Acts has been determined so that the tenant was a " statutory tenant " on decontrol, but where his tenancy is a business tenancy to which the Act of 1954 would, apart from the rent restriction legislation, have been applicable. In this case, too, the tenant is treated as having the protection of the Act of 1954 from the moment of decontrol, and he is, therefore, excluded from the operation of the transitional provisions in Sch. 4 to the Act of 1957. Counsel for the tenants pointed out, therefore, that the " business tenant " formerly protected by the rent restriction legislation is entitled to the benefit of the Act of 1954 on decontrol if his contractual tenancy is still subsisting at that date (and not the subject of a pending notice to quit) and, also, if his contract had been determined prior to the date of decontrol. The anomalous case is that of a tenant whose contractual tenancy was subject to a notice to quit pending at the date of decontrol; since (as counsel for the tenants contends) if his argument is not accepted, that tenant, and that

A tenant alone, would be deprived of any protection, on decontrol, equally under the Act of 1954 and the Act of 1957. And the anomaly is made all the more striking by the provision, in s. 27 (2) of the Act of 1957, that it should come into force at the expiration of one month beginning with the date of its passing—a period sufficient to enable any landlord, sufficiently astute to notice the anomaly, to serve on his tenant a notice to quit expiring after the month.

B It was the submission of counsel for the tenants that Parliament, in enacting the Act of 1957 and, in particular, its Sch. 4, must be taken to have proceeded on the view that the decision in *Orman's* case (1) avoided the anomaly. There is no doubt authority for the view that Parliament must be treated as being acquainted with the state of the law as established by the courts' decisions. Thus, if a particular formula has been interpreted by the courts, Parliament C may be assumed, if it re-enacts that formula, to have intended its interpretation to be that previously given to it by the courts. (See Maxwell on Interpretation of Statutes (10th Edn.), p. 313, and cases there cited.) But counsel for the tenants' submission in the present case seems to me to go far beyond the warrant of any such authority; for it involves that Parliament in enacting Sch. 4 to the Act of 1957 deliberately omitted any provision relative to the case D of a tenancy becoming decontrolled in respect of which a notice to quit was pending at the date of decontrol, in reliance on a decision in a case in which that set of facts did not arise. I am, therefore, unable to accept the contention that the Act of 1957 involves legislative recognition of the view of the *Orman* decision (1) for which counsel for the tenants has argued. The question was E also raised whether s. 24 (3) (b) could be interpreted as meaning that the notice to quit was effective only to determine the contractual tenancy (in such a case as the present) so as to leave the tenants in the position of " statutory business tenants " entitled to receive a further notice to quit in accordance with the Act of 1954 and regulations before their right of occupation was put an end to. But if this point were correct, it would apply equally, so far as I can see, in what F I have called the " obvious " case taken by Devlin, J., of a residential tenant adopting a business user after the receipt of the notice to quit. This attempted solution of the difficulty equally, therefore, in my judgment, fails.

Certain other cases were referred to in the argument, and in the judgment of the learned judge; but I do not further refer to them since none of them, in my G view, assists in the determination of the present appeal. The sole question, therefore, that remains is the question earlier posed—What is in truth the effect of the decision in *Orman's* case (1) ? There is beyond doubt a strong case on grounds of common sense and common justice for avoiding the anomaly of which, if the argument of counsel for the landlord prevails, the landlord is here entitled to take advantage. It may well be supposed that the legislature, H if the point had been present to its mind, would not have intended such anomaly. But it is not the function of the court to improve on the parliamentary performance. If, on the true construction of the relevant Acts, the anomaly is there, the courts cannot legislate to make good the omission.

I have already indicated my reasons for being unable myself to accept the view of the *Orman* decision (1) for which counsel for the tenants contends. I I add one further consideration. If the argument of counsel for the tenants is to prevail, then, so far as I can see, Devlin, J., must be taken to have based his conclusion on two distinct and independent grounds, viz., (i) that the words in the sub-section " tenancy is not one to which . . . this Act applies " means a tenancy that is not a " business tenancy ", and (ii), that the words " at a time when . . ." carry the implication that at the relevant time the Act of 1954 is already in force. The two suggested grounds are, as I have said, wholly independent, for the one in no sense follows from the other. Each, of itself, would have

been sufficient to dispose of *Orman's* case (1); only the first has a decisive effect in the present case.

I can see no trace in his judgment that DEVLIN, J., thought that he was founding himself on two distinct lines of reasoning. As I read his judgment the learned judge was rather expounding a single answer to the argument of the landlord's counsel; and if the first suggested ground is treated (as I have earlier indicated) as illustrative of the second, then the two become complementary and coherent. If the first suggested ground was intended as distinct and independent, then it seems to me surprising that (as I have said) there should have been such extremely slender reference made to the actual user of the premises. What I have said applies with equal force, in my judgment, to the judgment of LORD GODDARD, C.J.

For these reasons I have myself felt, after much hesitation and with some feelings of regret, forced to the conclusion that *Orman's* case (1) does not now bind us to accept the conclusion of the county court judge. It follows that, construing s. 24 (3) (b) unaided by authority, I would hold that it means what it says, and would allow this appeal.

LORD COHEN: This is an appeal from an order of His Honour JUDGE COHEN made in the Stockton-on-Tees County Court on June 16, 1958, whereby the learned judge refused to make an order for possession of premises known as Park Lane Stores, Yarm Road, Stockton, in favour of the appellant landlord. The respondents had become tenants of the premises under an agreement made on May 5, 1944, at a rent of 25s. per week, but the agreement contained a special provision requiring twelve months' notice on either side to determine the tenancy. The rateable value of the property at all material times has been £40 per annum. On Nov. 14, 1956, the tenants received a notice to quit to take effect on Nov. 16, 1957. This notice was a valid notice at common law but did not comply with the requirements of the regulations made under the Landlord and Tenant Act, 1954. The property consisted of two shop rooms and two living rooms downstairs and four living rooms and a bathroom upstairs, and it is common ground that throughout the tenancy the tenants, either themselves or by one of their children, had carried on business on the premises. The premises were therefore business premises which would have been within the ambit of Part 2 of the Landlord and Tenant Act, 1954, when the Act came into force, had it not been for the provisions of s. 43 (1) (c) of the Act, which excluded any tenancy

> ". . . where the property comprised therein is let under a letting to which the restrictions on the obtaining of possession by the landlord imposed by s. 3 of the Rent and Mortgage Restrictions (Amendment) Act, 1933, apply in relation to the tenant, or would apply but for s. 12 (7) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920."

It is admitted that the premises fell within this exception and it follows that when giving the notice to quit of Nov. 14, 1956, the landlord did not have to comply with the requirements of the Landlord and Tenant Act, 1954. On July 6, 1957, however, the Rent Act, 1957, came into force, and under s. 11 (1) of that Act the tenants ceased to be entitled to the protection of the Rent Restrictions Acts and would accordingly have been bound to give up possession on Nov. 16, 1957, unless they could claim protection either under Part 2 of the Landlord and Tenant Act, 1954, or under the transitory provisions of the Rent Act, 1957, which are to be found in Sch. 4 to that Act. They did not give up possession, and on Mar. 26, 1958, the landlord commenced these proceedings. On June 16 of this year the learned county court judge dismissed the claim on the ground that, although the contractual tenancy between the parties had come to an end, the tenants were still entitled to retain possession until their

right was determined by a notice to quit which complied with the provisions of the regulations made under the Landlord and Tenant Act, 1954.

In order to make clear the issues between the parties I must now refer to the relevant provisions of the Landlord and Tenant Act, 1954, Part 2. Section 23 (1) provides:

> " Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes."

The other two sub-sections that are material are sub-s. (1) and sub-s. (3) (b) of s. 24. Those have already been read by my Lord, and I need not repeat them.

I pause here to observe that sub-s. (3) (b) is the one on which the determination of the issues between the parties mainly depends. I must, however, refer briefly to one or two other provisions. Section 25 (1) provides for the method of determination of tenancies to which Part 2 of the Act applies. Section 43, which I have already mentioned, provides that the Act is not to apply to certain classes of tenancy, including a tenancy of an agricultural holding, a tenancy created by a mining lease, and, as I have already said, a tenancy protected by s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.

Returning to s. 24 (3) (b), the landlord's argument is short and, at first sight, very attractive. He says the language of the section is plain and unambiguous. The notice to quit was given at a time when the tenants held under a tenancy which was not one to which Part 2 of the Landlord and Tenant Act, 1954, applied; the operation of the notice was, therefore, not affected by the fact that on the coming into force of the Rent Act, 1957, the tenancy became one to which Part 2 of the Landlord and Tenant Act, 1954, applied; effect can only be given to this provision by holding that on the expiry of the notice the relation between the parties was brought to an end.

Had the matter been free from authority I should, I think, have been inclined to accept this argument, but the matter is not free from authority, and counsel for the tenants submits that the section only assists a landlord where the tenancy has become a tenancy to which Part 2 applies not as the result of an alteration in the law but by reason of some change in physical circumstances such as a change of the user of the premises. This was the argument accepted by the county court judge, and it is based mainly on the decision of Devlin, J., in *Orman Bros., Ltd.* v. *Greenbaum* (1) ([1954] 3 All E.R. 731). That decision was affirmed by this court ([1955] 1 All E.R. 610) but, as Lord Goddard, C.J., delivering the leading judgment, said that he agreed completely with the judgment of Devlin, J., it will be sufficient if I refer to the decision in the lower court. In that case the premises were business premises which were clearly within the ambit of Part 2 of the Landlord and Tenant Act, 1954. At the time when the notice to quit was given, that Act did not apply to the premises, not because of s. 43 of the Act, but because the Landlord and Tenant Act, 1954, had not come into force. The plaintiff contended that s. 24 (3) (b) applied, but the learned judge rejected this submission. The material portion of his judgment is reported ([1954] 3 All E.R. at p. 734 and p. 735). The first passage to which I desire to refer is on p. 734. It has already been read by my Lord, and I need not repeat it. That passage seems to me to be the judge's exposition of the section. In describing (ibid., at p. 735) his use of the term " business tenancy " as not precise, the learned judge had in mind, I think, the reference in s. 23 (1) to premises (and I quote from the sub-section) " occupied for the purposes of a business carried on by him or for those and other purposes ". The learned judge then sets out the argument of counsel for the landlords to the contrary. That was not read by my Lord, and I now read it (ibid.):

> " Counsel for the landlords argues that whatever the object of the sub-section may be, the language is wide enough for his purposes and he can

use it as, so to speak, a transitional provision. He seeks to apply it in this way: Sub-section (3) (b) begins 'where, at a time when a tenancy is not one to which this Part of this Act applies, the landlord gives notice to quit'. He says the landlord gave notice to quit on Aug. 31, 1954 and the tenancy, although a business tenancy, was not then one to which this Part of the Act applied, because the Act did not apply to any tenancy at all, not having come into force until Oct. 1, 1954. Accordingly, he comes within that sub-section, and he then says [as to the second part of the paragraph] 'The operation of the notice shall not be affected by reason that the tenancy becomes one to which this Part of the Act applies after the giving of the notice', the 'becoming' being in his case coincident with the coming into force of the Act which affects the tenancy."

The learned judge then proceeds to explain why he rejects the landlord's argument. I need not read the passage in which he does so, as the material portions of it were read by my Lord. In it, as I read his judgment, the learned judge no doubt emphasises that the words "at a time when the tenancy is not one to which this Part of the Act applies" carry with them the implication that at the time when one is considering the matter the Act of 1954 is in force, but he is doing so not, I think, in order to make this the basis of his decision, but rather to reinforce the conclusion he had stated in the first passage I have cited from his judgment.

Counsel for the landlord does not dispute that the object of s. 24 (3) (b) may have been to deal with the situation in which there is a change of user between the serving of the notice and its taking effect, a change of user which might bring the tenancy within the Act. He argues, however, that to deal with this situation Parliament has used language which plainly covers other situations, such as the one which has arisen in the case now before this court, and that there is no justification for cutting down the natural meaning of the language used. Reading the judgment of DEVLIN, J., as a whole, I am unable to accept this argument. I think that by emphasising that the sub-section is not intended as a transitional provision and by restating (ibid.) the section as meaning

"where at a time when a tenancy is not a business tenancy the landlord gives notice to quit, the operation of the notice shall not be affected by reason that the tenancy becomes a business tenancy after the giving of the notice",

the learned judge was indicating his ratio decidendi to be as follows: (i) the plain policy of Part 2 of the Act was to protect tenants of business premises; (ii) this policy would be defeated unless some limitation is placed on the apparently wide meaning of the language used in s. 24 (3) (b); (iii) the appropriate limitation is that indicated in his (the learned judge's) rewriting of the section. That ratio decidendi was approved in this court, and I think we are bound, as was the learned county court judge, to hold that the tenancy envisaged by the Act of 1954 has not come to an end.

The learned county court judge also referred to the decisions of SELLERS, J., in *Castle Laundry (London), Ltd.* v. *Read* (2) ([1955] 2 All E.R. 154) and of HARMAN, J., in *Re Bleachers' Assocn., Ltd.'s Leases, Weinbergs Weatherproofs, Ltd.* v. *Radcliffe Paper Mill Co., Ltd.* (3) ([1957] 3 All E.R. 663). The facts of those cases are different from those in the present case and I cannot derive much assistance from them, but it is perhaps worth observing that SELLERS, J., recognised in the *Castle Laundry* case (2) ([1955] 2 All E.R. at p. 156) the possibility that a contractual tenancy of premises might be terminated, but the business tenancy under the Act might continue until determined in accordance with the regulations made thereunder.

Counsel for the tenants sought to reinforce his argument by indicating the

anomalous position that would arise if the appeal were to succeed. He called our attention to the following provisions of the Rent Act, 1957, s. 11 (4) and (7) and Sch. 4, para. 2 (1), (6) and para. 11. Section 11 (4) provides that "Nothing in the foregoing provisions of this section"—which is the section releasing from control under the Rent Acts a large number of properties—"shall affect the operation of Part 1 of the Landlord and Tenant Act, 1954". Section 11 (7) refers to the transitional provisions set out in Sch. 4 to the Act. I need not refer in detail to the provisions of para. 2 of that schedule. It is sufficient to say that para. 2 (1) deals with the case of dwelling-houses and sub-para. (6) provides:

> "This paragraph shall not apply to a tenancy to which, immediately after the time of decontrol, Part 2 of the Landlord and Tenant Act, 1954, applies."

Paragraph 11 deals with statutory tenancies and gives some measure of protection to statutory tenants. The effect of these provisions is to show an intention not to interfere with the operation of the Landlord and Tenant Act, 1954, and to ensure a measure of protection during a transitional period to all tenants of decontrolled dwelling-houses and to tenants of decontrolled business premises where the tenancy was still in force and no notice of determination had been given or where the tenant was a statutory tenant. As counsel for the tenants said, it would indeed be anomalous if a tenant whose tenancy of business premises had been the subject of a notice to quit which had not expired should be in a worse position than a statutory tenant of similar premises. He submitted that the language of s. 24 (3) is ambiguous and that Parliament must be taken to have known of the decision of this court in *Orman Bros., Ltd.* v. *Greenbaum* (1) and to have enacted the Rent Act, 1957, on the basis of that decision, as counsel for the tenants interpreted its ratio decidendi. He relied on the observations of DENNING, L.J., in *Royal Crown Derby Porcelain Co., Ltd.* v. *Russell* (4) ([1949] 1 All E.R. 749), which read as follows (ibid., at p. 755):

> "The true view is that the court will be slow to overrule a previous decision on the interpretation of a statute when it has long been acted on, and it will be more than usually slow to do so when Parliament has, since the decision, re-enacted the statute in the same terms . . ."

I am unable, however, to derive help from these observations in deciding the present case, since I cannot find that the decision in *Orman's* case (1), based on different facts, has long been acted on; nor can I agree that the language of s. 24 (3) (b) is ambiguous.

I return, therefore, to s. 24 (3) unassisted by any inference from the passing of the Rent Act, 1957. The language of the sub-section is, as I have said, unambiguous, and it is indeed couched in such wide terms that read literally the decision in *Orman's* case (1) should have been the other way. I am compelled, however, by that decision to place some limitation on it. LORD EVERSHED, M.R., has suggested that the only limitation necessary is that the Act of 1954 should have been in force at all relevant times. I agree that that is a possible construction, but I am unable to agree that it was the ratio decidendi adopted by DEVLIN, J., and the Court of Appeal in *Orman's* case (1). On the contrary, I think that their ratio decidendi was, to adopt the language of the Master of the Rolls, that "notwithstanding the generality of its language" the sub-section "must be treated as limited in its operation to cases where the application of the Act of 1954 is exclusively attributable to a change of user of the premises since that date or at any rate to matters of fact as distinct from the mere operation of legislation as respects the premises concerned."

Sitting in this court, I am bound by the ratio decidendi in *Orman's* case (1), a position that I welcome as it enables me to avoid the anomaly which, as LORD

EVERSHED, M.R., has so clearly pointed out, would arise from allowing the appeal in the present case. I would dismiss the appeal. A

SELLERS, L.J.: The Landlord and Tenant Act, 1954, by s. 24 (1) provides that a tenancy to which Part 2 of the Act applies (which is a business tenancy within the meaning ascribed by the Act) shall not come to an end unless terminated in accordance with the provisions of the Act. B

It has been held by this court in *Orman Bros., Ltd.* v. *Greenbaum* (1), accepting the judgment of DEVLIN, J., that that provision has to be interpreted literally. It was put this way by the trial judge in that case ([1954] 3 All E.R. 731 at p. 732):

> "If one applies that literally, the position is this: One has to ask oneself whether, on Oct. 4, 1954, this tenancy came to an end. The Act is then unquestionably in force. It is then a tenancy to which this Part of the Act applies, because it is a business tenancy. Has it come to an end? It does not come to an end unless notice to quit has been given in accordance with the provisions of the Act and notice to quit has not been given in accordance with the provisions of the Act and, therefore, the tenancy does not come to an end. That is the literal interpretation of the section." C D

In the present case, after the Rent Act, 1957, became law, but not before, the premises the subject-matter of this action were released from the exclusion from the operation of the Landlord and Tenant Act, 1954, up till then given by s. 43 (1) (c) of that Act and they were then business premises within the Act's definition and fell within s. 24 (1). But s. 24 (3) (b) provides that, notwithstanding anything in s. 24 (1) E

> "where, at a time when a tenancy is not one to which this Part of this Act applies, the landlord gives notice to quit, the operation of the notice shall not be affected by reason that the tenancy becomes one to which this Part of this Act applies after the giving of the notice." F

The facts of this case seem to me to fall entirely under that sub-section if it is read literally. On that view when the landlord gave the notice to quit on Nov. 14, 1956, the tenancy was not one to which Part 2 of the Act applied; the operation of the notice was not affected, therefore, by reason that before it expired on Nov. 16, 1957, the tenancy had become one to which Part 2 of the Act had come to apply after the giving of the notice. That is the view urged on us by the argument for the landlord and it is a view to which I think the language of the sub-section commits one unless such a literal construction is not open to this court by reason of the previous decision of *Orman's* case (1). G

As both my Lords have pointed out a literal construction may lead to anomalous and perhaps unintended results, but when a statute does produce clear and unambiguous language it scarcely seems open or desirable to endeavour to hold that it does not mean what it says. The difficulty in the case is to decide whether the construction of sub-s. (3) (b) for which the landlord contends can now be accepted and held by this court. It may be that DEVLIN, J., was restricting sub-s. (3) (b) to what he calls a division in character of the premises. But, although LORD GODDARD, C.J., accepted that judgment he appears, when himself referring shortly to s. 24 (3) (b), to treat the learned judge's view as an illustration only of the sub-section's application. H I

I have felt real difficulty in arriving at a conclusion on this matter, particularly as the noble Lord, LORD COHEN, takes a different view from LORD EVERSHED, M.R., but on the facts of this case, differing as they do from those in *Orman's* case (1), and on the careful analysis of the reasoning in that case which LORD EVERSHED, M.R., has made, I think that this court is free to express its own construction of the sub-section. If free I would apply a literal construction to

both s. 24 (1) (as was done in *Orman's* case (1)) and s. 24 (3) (b), and so doing I would hold that the landlord's notice to quit was effective to terminate the tenancy. I would therefore allow the appeal.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Johnson, Wetherall & Sturt*, agents for *Barugh & Wilkinson*, Middlesbrough (for the landlord); *Cohen, Jackson & Scott*, Stockton-on-Tees (for the tenants).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

SCHLESINGER *v.* SCHLESINGER (NYSTROM and SWANSON intervening) (HALL cited).

[COURT OF APPEAL (Hodson, Morris and Ormerod, L.JJ.), October 31, November 3, December 18, 1958.]

Divorce—Judicial separation—Decree—Form—Inclusion of findings on which judge has adjudicated—Naming of woman found guilty of adultery.
Divorce—Collusion—Abandonment of charges without consideration.
Counsel—Judge—Right to see judge privately in matrimonial cause—Right to be exercised sparingly.

A decree of judicial separation obtained by the wife should give effect to the judge's findings and may embody the name of a woman who has been served with the petition and found guilty of adultery, and it will be amended on appeal for the purpose of bringing it into accord with findings on which the judge adjudicated, e.g., so as to show that the husband committed adultery before and not merely after the wife.

Miller v. *Kozubowski* ([1956] 1 All E.R. 177, n.) adopted and applied.

It is not incumbent on parties to a suit for judicial separation to proceed with allegations made in the suit to the bitter end, and the proceedings are not necessarily collusive because charges are abandoned or left unproved without consideration for reasons which seem good to the parties.

Butler v. *Butler* ((1890), 15 P.D. 66) distinguished.

The right of counsel to seek the assistance of the court where questions of honour or professional conduct are concerned should be sparingly exercised in proceedings for divorce and judicial separation for there can be no compromise and nothing should be done to impair public confidence by giving room for suspicion that any part of the trial is being conducted behind closed doors and not in open court.

[As to the forms of decree in matrimonial proceedings, see 12 HALSBURY'S LAWS (3rd Edn.) 391, para. 865.

As to collusion in matrimonial proceedings, see 12 HALSBURY'S LAWS (3rd Edn.) 300, para. 594; and for cases on the subject, see 27 DIGEST (Repl.) 388-395, *3206-3253*.

As to counsel's conduct of cases in the Divorce Court, see 3 HALSBURY'S LAWS (3rd Edn.) 14, para. 113.]

Cases referred to:

(1) *Miller* v. *Kozubowski*, [1956] 1 All E.R. 177, n.; 3rd Digest Supp.
(2) *Butler* v. *Butler*, *Butler* v. *Butler & Burnham*, (1890), 15 P.D. 66.

Appeal.

The wife appealed against an order of DAVIES, J., made on May 12, 1958, granting her a decree of judicial separation from her husband. By a petition dated Dec. 23, 1953, the wife had petitioned for a decree of judicial separation. Her petition, in addition to a charge of cruelty, contained charges of adultery by the husband. These included charges of adultery in October, 1949, with a woman whose name was unknown; charges of adultery on many occasions in 1952 with Charlotte Coleson; a charge of adultery with an intervener, Maureen Swanson, on more than one occasion, and charges of adultery in 1953 with the other intervener, Seignon Nystrom. A supplemental petition contained charges of adultery with Nystrom after the date of the original petition. The answer admitted adultery with Coleson, denied other adultery and charged the wife with adultery with Hall against whom damages were claimed. The answer contained a prayer for judicial separation. The wife admitted adultery with Hall and each party asked the court in its discretion to grant relief against the other. There were communications between the advisers of the parties before the hearing. The wife deposed that efforts were made by the husband to get her to drop the charges of adultery against the interveners Nystrom and Swanson, and to proceed on admitted allegations of adultery, abandoning allegations of cruelty. She refused to do this. Before the hearing counsel for the parties saw the judge in his private room. When the case was opened in court the wife's counsel, in his opening statement, after intimating that in view of developments over the last few days a majority of the matters would not trouble the court, continued:

> "... On the petition and supplemental petitions there are charges of adultery with an unknown woman in 1949 (that is not now contested); with the intervener, Seignon Nystrom in 1953 in London, in 1954, 1955 and 1956 in Capri—and that is not contested. There is an allegation of adultery by re-amendment of the petition with a woman called Charlotte Coleson in the year 1952 in Johannesburg and in Portuguese East Africa, Lourenço Marques and various other places in Africa, and this is admitted in the husband's answer. There remains a charge of adultery against the intervener, Maureen Swanson, in March, 1953, in Durban. That is not admitted; it is denied in the answer. The intervener has intervened but has not filed an answer; she does not require to. I understand from my learned friend [counsel for the intervener] that she denies that charge and, my Lord, in the circumstances I do not propose to proceed with the charge against Maureen Swanson. My Lord, there is one admitted charge and two (which are not contested) against other people. In those circumstances I do not think that it is necessary for my client to proceed with the charge against the intervener, Swanson. In addition there are charges of cruelty over a long period of the married life, from 1944 to 1945 onwards. It is not necessary for me to proceed with those charges today. I want to make it quite clear in open court that I am in no way abandoning or dropping those charges, but I am content in the circumstances to prove the adultery and to let those charges remain in abeyance."

Counsel for the wife at the end of the hearing observed "I want to make it quite clear that I am not proceeding on the cruelty". In addition the conclusion of his statement was as follows:

> "Those are the issues in this case as they now stand. I propose, after my learned friend has said what he wants to say, to proceed to prove the case of adultery against the unknown woman, Charlotte Coleson (which is admitted in the answer) and the woman Nystrom."

Counsel for the husband then made a statement to the court and a statement was made on behalf of the intervener, Miss Swanson, who denied adultery.

The wife filed an affidavit on the appeal which included an account of the course that matters had taken before the hearing of this petition. She applied to have the decree set aside and a re-hearing of the suit on the following grounds: (i) the court was in error inasmuch as evidence of the facts alleged by the wife as to the cruelty of the husband was excluded and that the wife and her witnesses were not called thereon, and that by reason thereof the court did not inquire so far as it reasonably could into the facts alleged by the wife; (ii) the wife's discretion statement contained matters which it was necessary for the court to know for the purpose of the exercise of its discretion, but through the exclusion of the evidence as to cruelty and through the court's omission to inquire into the facts alleged by the wife, the court had insufficient knowledge of the matters contained in the discretion statement to enable it to exercise its discretion and to grant a decree of judicial separation to the wife; (iii) by reason of these matters, the decree of judicial separation was given without disclosure of the evidence of the facts referred to, which it was necessary for the court to know and adjudicate on before granting the decree and exercising its discretion in favour of the wife; (iv) the court wrongly accepted the oral evidence of the intervener, Maureen Swanson, and dismissed her from the suit; (v) the court accepted the admissions of the husband that he had committed misconduct with an unknown woman and with a Charlotte Coleson but did not decree a judicial separation on the ground of such adultery and the adultery was excluded from the decree; and (vi) it was proper in all the circumstances that the court should hear the charges of cruelty proved and should pronounce judgment thereon.

In connexion with the argument with regard to the form of decree, the following letter from the secretary of the Divorce Registry to the solicitors for the husband and the intervener Nystrom, dated Oct. 29, 1958, was read:

> " I am directed by the Senior Registrar to reply to your letter of Oct. 24, 1958.
>
> " The practice of the registry on these matters is clear and of very long standing. From 1857 onwards the woman named in divorce proceedings seems to have enjoyed a privileged status. She is if possible served with the proceedings, but she is not made a co-respondent as a male adulterer is: unless she herself intervenes or she is made a respondent by direction of the court (in practice under r. 5 (1)), her name never appears in the title of the suit or in the decree. (The review of this subject in *Leach* v. *Leach* ([1958] 1 All E.R. 320) may be of interest in this connexion.) The only public mention of her name is therefore in evidence at the hearing. It is not the practice to differentiate between divorce decrees and judicial separations in this respect. If the woman named does become an intervener or respondent and thereby appears in the title of the suit, she is treated for the purposes of the decree in the same way as a co-respondent. A co-respondent is named in the body of the decree only if (a) there is an order for costs against him or (b) if there is a specific finding of adultery against him (see *Miller* v. *Kozubowski*, [1956] 1 All E.R. 177, n.).
>
> " The official notes indicate that the judge did find adultery with the unknown woman and Coleson and Nystrom; but of these three only Nystrom had by intervening acquired the status equivalent to that of a co-respondent which resulted in her being named in the decree.
>
> " The decree is therefore drawn up in accordance with the practice which is so well established that the registry must clearly follow it unless formally directed to do otherwise. It is interesting to note that although the Royal Commission on Marriage and Divorce recommended abolishing the distinction between women named and co-respondents (see para. 946 of their report) this is not among the suggestions which have so far been implemented."

The wife appeared in person.

H. J. Phillimore, Q.C., and *Victor Williams* for the husband.

Joseph Jackson for the intervener Nystrom.

S. H. Noakes for the intervener Swanson.

R. F. Hannay for the party cited, Hall.

Cur. adv. vult.

Dec. 18. **HODSON, L.J.**, read the following judgment: The judgment that I am about to deliver is the judgment of the court. This is an appeal by a petitioner who has secured a decree of judicial separation in her favour from DAVIES, J., bearing date May 12, 1958. Although the decree is in her favour, the petitioner seeks to appeal, not against the reasons for the decision, which would not be permitted, but against the failure, as she says, of the court to adjudicate on issues raised by her. She maintains that this failure to adjudicate will or may prejudice her in any application she may make here or elsewhere for divorce, or for ancillary relief by way of alimony or maintenance, and she seeks a re-hearing of the suit.

She says first that the gravamen of her complaint against her husband has always been his misconduct towards her amounting to cruelty, that she has never abandoned the charge or assented to its being allowed to remain in abeyance. In the second place, she maintains that she proved a series of adulteries on the part of her husband which the learned judge found to have been established, but that only one of these found place in the formal decree of the court. In the third place, she says that the charges of cruelty were not put before the court because her counsel and solicitors without her instructions entered into a collusive agreement with their opposite numbers acting for her husband and agreed that, in consideration of her abandoning the cruelty charges and one adultery charge, he would not proceed against a man with whom she had committed adultery, and would pay the costs of the woman concerned in a charge to be abandoned, and also would pay her solicitor-and-client costs. This agreement, she says, was carried out at the hearing with the exception that nothing was done about solicitor-and-client costs. In this connexion she complains that, without her knowledge that such a thing was going to occur, her counsel and her husband's counsel saw the learned judge in his private room before the public hearing of the case.

The proceedings were avowedly instituted with the object of obtaining an order of the court for the wife's support. She had received in the past a substantial allowance from her husband which had been reduced, and her intention was to obtain an order for alimony at a rate fixed by the court. A claim for alimony pendente lite and permanent alimony were included in the petition, and there were negotiations between the parties with a view to settling the rate of alimony which never came to fruition. According to her affidavit sworn in certain custody proceedings, the husband was endeavouring directly and through a go-between to persuade her to take proceedings for divorce against him in consideration of a substantial money payment amounting to £100,000. The wife never accepted this offer, and no such proceedings were instituted in collusion with the husband.

[HIS LORDSHIP, after referring to the proceedings and after reading from the statements made by counsel for the wife and for the husband at the opening of the hearing, continued:] Both these statements were made in the presence and hearing of the wife, and she recognises that, in allowing these statements to be made apparently, so far as her counsel was concerned, on her authority, she was permitting the court to believe that she was not seeking at that time any adjudication on the cruelty charges. She seeks to explain the situation by saying that she was expressly told to keep quiet in court, and that during the hearing and before the hearing commenced she was in such a condition that

she was not capable of giving, and did not give, any instruction to her counsel to proceed on the lines stated by him at any rate so far as the charges of cruelty were concerned. So far as the intervener Swanson is concerned, the wife does not now seek to re-open this matter, and, as we understand her, does not now maintain that the charges against this woman were abandoned without instructions. The wife's contention is that the charges of cruelty should have been proceeded with.

[HIS LORDSHIP read passages from the wife's affidavit and continued:] In our opinion the wife cannot escape from the position that the charge of cruelty was left in abeyance on her instructions albeit reluctantly given. She herself in a passage from the affidavit which has been read shows that she told counsel to do the best that he could for her after she had been told that she would have to abandon the charges of cruelty and the charge of adultery against Swanson. At the same time she made it plain that she was not going to drop the charges against Nystrom. This was done in emphatic language by which she told her solicitor to tell the husband's solicitors to drop dead. It would seem, therefore, that she was then in command of the situation. There is no question but that the cruelty charges were not abandoned notwithstanding one sentence of her counsel's statement which we think was not intended to be inconsistent with what he had previously said. In these circumstances there is no question of any judgment against the wife involving the cruelty allegations.

[HIS LORDSHIP referred to the wife's evidence of cruelty at the hearing, to her discretion statement and to a letter from her solicitor to her exhibited to her affidavit and continued:] In our opinion the wife has not succeeded in showing that the court was in error in not pronouncing on the cruelty charges or that they were left in abeyance without her instructions.

On the second matter raised on this appeal as to the form of the decree, the husband agrees that the form of the decree does not set out the findings of the learned judge. The wife justly points out that a reference to the record including the final order and pleadings in the case reveals only that she had committed adultery, and that her husband had subsequently committed adultery with Nystrom which, on an application for alimony, might well lead the court to infer that she was disentitled to any alimony except possibly by way of compassionate allowance. In *Miller* v. *Kozubowski* (1) ([1956] 1 All E.R. 177, n.), Mr. Commissioner LATEY, Q.C., acceded to an application to have embodied in the decree of judicial separation the name of a man who had been served with proceedings and who had been found by the court to be guilty of adultery. We see no reason in principle why this practice should not be followed in the case of a woman who has been served with a petition and found guilty of adultery. The decree should, we think, be amended to give effect to the judge's findings on the issues on which he was asked to adjudicate and did adjudicate. The record will then show that the husband had embarked on his adulterous career before the wife.

On the third matter, we have already said that the wife gave authority to her counsel to proceed with the suit in accordance with the statement made by counsel. She cannot, therefore, be heard on appeal to this court to say that there was a collusive agreement between herself and the husband in the prosecution of the suit. Since, however, she has maintained that she was not a party to any agreement, it is right to say that, on the statements made by counsel to the court, the learned judge was not in error in finding, as he impliedly did, that there was no collusion and pronouncing a decree accordingly. There is nothing in those statements which indicates that the parties were acting in collusion. It cannot be incumbent on the parties to proceed with any allegations made in the suit to the bitter end once those charges have been made, and it does not seem to us that, if, for reasons which seem good to the parties, charges are abandoned or left unproved without consideration, the court must regard

the proceedings as collusive and dismiss the petition. This is not a case where the parties by agreement between them have prevented material matters from being brought before the court. *Butler* v. *Butler* (2) ((1890), 15 P.D. 66), was a wholly different case, in that it was found on the facts that there was a concluded agreement between the parties which involved the suppression of a charge, and the decision of the court turned on whether or not that could not be collusive because there was doubt as to the truth of the allegation. A B

There remains the complaint that the judge wrongfully saw counsel in his room before the hearing. The court was not informed, neither did it inquire, as to the purpose of the visit of counsel to the judge. It remains the fact that the learned judge was satisfied as to the absence of collusion at the conclusion of the hearing. We are, however, bound to say that, although, as history shows, the right of counsel to seek the assistance of the court has always been retained where questions of honour or professional conduct are concerned, it seems that this right should be sparingly exercised, for the responsibility of presentation of cases to the court is the responsibility of counsel. We do, of course, not seek by giving an example to close the list of cases where audience may be properly sought. C D

In cases such as the present, the right should but rarely be exercised, for there can be no compromise, and the judge is himself to be asked to hear the case in which the application is made, and in so doing to determine not only questions of law but also issues of fact. Suits for divorce and judicial separation are heard in open court notwithstanding the restrictions on newspaper reporting imposed by Parliament, and nothing should be done to impair public confidence by even giving room for suspicion that any part of a public trial is being conducted behind closed doors. These considerations were no doubt present to the mind of the learned judge when he allowed counsel to see him, and we see no reason for holding that, because in fact the judge did see counsel, the proceedings were defective. E F

The appeal will be allowed, therefore, to the extent necessary to correct the record and no further.

Appeal allowed only to the extent necessary to correct the record.

Solicitors: *G. & G. Keith* (for the husband and for the intervener Nystrom); *Summer & Co.* (for the intervener Swanson); *Withers & Co.* (for the party cited, Hall).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

BILAINKIN *v.* BILAINKIN.

[COURT OF APPEAL (Hodson and Ormerod, L.JJ.), December 16, 17, 1958.]

Divorce—Custody—Custody order—Restriction on taking child out of jurisdiction—Exception conditional on respondent's consent.

In a custody order containing a restriction on taking the child out of the jurisdiction, with an exception where the petitioner gives a written undertaking to return the child, the exception should be qualified (in accordance with the direction of the President of the Probate, Divorce and Admiralty Division given on May 8, 1953, and amended on Mar. 8, 1955*) so as to require the written consent of the respondent to the child's being taken out of the jurisdiction.

Appeal dismissed.

[As to custody orders providing for the child to be taken out of the jurisdiction, see 12 HALSBURY'S LAWS (3rd Edn.) 392, para. 869.]

Appeal.

The parties had a child, Lynne, who was born on June 12, 1948. In December, 1949, they were divorced and thereafter the child was in the custody of the mother. Following a hearing lasting several days, PEARCE, J., on July 17, 1952, gave judgment in proceedings with respect to the child in favour of the wife and held that there was no substance in accusations of cruelty made by the husband against her. He found that the father had an honest belief in the cruelty, but held that, so long as the situation existed in which the father held the belief and was giving utterance to it, he should not have access to the child because such access would not be in her best interests. In 1954 WILLMER, J., again refused the father access to the child so long as he would not withdraw the allegations made, but on appeal on Apr. 12, 1954, the Court of Appeal made an order allowing access on terms in the form of a written undertaking by the father not to take the child to see a medical practitioner for her physical or mental condition to be examined, not to talk to or before the child of her treatment by her mother or others, not to complain to others of that treatment and not to make inquiries about that treatment. On July 31, 1956, WALLINGTON, J., suspended the right of access on the ground of the father's failure to adhere to his undertaking. There was no appeal against that decision and leave to appeal out of time was refused later by the Court of Appeal. On Nov. 3, 1958, WALLINGTON, J., again refused to grant the father a right of access to the child. The father appealed to the Court of Appeal.

The husband appeared in person.

Roger Gray for the wife.

HODSON, L.J., having stated the facts, and referred to the welfare officer's report, held that there was no reason to interfere with the refusal of WALLINGTON, J., to interfere with the existing position, and continued: There is only one other matter which has to be considered, and that is the form of the order. The girl was taken away from this country in the summer, in June, during term time, by leave of the court. Although the father does not approve or did not approve of that interruption of the education of his daughter, nevertheless the leave was given, and no complaint can be made of that. But it appears that the order for custody, which contains a limitation on the taking of the child out of the jurisdiction, was altered by the registrar in purported compliance with the direction given by LORD MERRIMAN, P., which appears as para. 16 at p. 1185 of RAYDEN ON DIVORCE (7th Edn.) in this form:

" The President has approved the following new wording for the restriction against taking out of the jurisdiction a child the subject of a custody order:—

* The Practice Direction is No. 16, printed in RAYDEN ON DIVORCE (7th Edn.) 1185.

. . . And it is directed that the said child be not removed from the jurisdiction until he or she attains the age of eighteen years without leave but provided that if the petitioner do give a general written undertaking to the court to return the said child to the jurisdiction when called upon to do so, the petitioner may with the written consent of the respondent* remove the said child from the jurisdiction during the school holidays for any period specified in such written consent."

Some of those words were in brackets, for reasons which do not apply to this case. But, for some reason or other, which has not been explained to us, the registrar before whom this matter came for leave removed the reference to the written consent of the respondent which the direction of the President would seem plainly to require. No doubt the question of custody can be reviewed from time to time, but I see no reason why that direction was not complied with; and I think that those words " with the written consent of the respondent " should in future appear in the custody order. So there will be that variation.

This matter became of some practical importance because, relying on that variation of the order, the mother took the child abroad to Belgium for a week in the summer holidays, not by herself but sending somebody else in her place, and for some reason the father was not told who was accompanying the child. He not unnaturally complained that he did not know, and maintained that in a case of a child of this age and sex it was desirable that, if not accompanied by her mother, she should be accompanied by some responsible person of whom he had at any rate the opportunity of disapproving. That difficulty, however, I hope will not occur again if the order is amended so as to comply with the direction of the learned President.

ORMEROD, L.J.: I am in full agreement with the reasons which have been given by my Lord, and there is nothing that I wish to add. [His Lordship referred to the husband's obsession that the wife was ill-treating the child, held that until he rid himself of it or could restrain himself from bringing it to the notice of the child, it was not in the child's best interests that he should have access to her and agreed that the appeal should be dismissed.]

Appeal dismissed.

Solicitors: *Goodman, Derrick & Co.* (for the wife).

[*Reported by* F. A. Amies, Esq., *Barrister-at-Law.*]

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* The words " with the written consent of the respondent ", which were placed between square brackets in the form of the restriction laid down, were required by the direction to be omitted " if the decree is on the ground of incurable unsoundness of mind."

A

O'MAHONEY *v.* O'MAHONEY.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), October 20. November 24, 1958.]

Divorce—Maintenance—Committal order against husband—Suspended committal order made on judgment summons for arrears of maintenance pending suit—Committal order not applicable to debt due under order for maintenance made after decree absolute—Matrimonial Causes (Judgment Summons) Rules, 1952 (S.I. 1952 No. 2209), r. 6 (3).

B

On Apr. 2, 1957, pending the hearing of divorce proceedings between the husband and wife, the wife obtained an order for alimony pending suit and for maintenance pending suit for the two children of the marriage. On Nov. 11, 1957, on the hearing of a judgment summons against the husband in respect of default in payments under the order of Apr. 2, a committal order was made against him, under s. 6 of the Matrimonial Causes (Judgment Summons) Rules, 1952, and execution of the order was directed to be suspended so long as he paid the sum of 2s. 6d. a week in addition to any sums accruing under the order of Apr. 2. On Nov. 29, 1957, the wife was granted a decree nisi of divorce, and the decree was made absolute on Jan. 14, 1958. On Mar. 19, 1958, an order was made for the payment of maintenance to the wife as from the date of the decree absolute and during the joint lives of the husband and wife or until further order, and for the payment of maintenance for the two children. Between Jan. 14, 1958, and Mar. 19. 1958, the husband had made payments to the wife totalling £15 10s. On an application by the wife in September, 1958, to issue an order of committment against the husband,

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Held: leave to issue a committal order would be refused for the following reasons—

(i) the order of Apr. 2, 1957, on which the suspended committal order was made, automatically ceased to have effect on Jan. 14, 1958, when the decree was made absolute, and as from Jan. 14, 1958, until Mar. 19, 1958, when the maintenance order was made, the husband's only liability (on discharge of which commitment was suspended) was to pay 2s. 6d. weekly, and he had made the equivalent of 124 payments of that amount;

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(ii) any liability to pay maintenance under the order of Mar. 19, 1958, was a new liability under an order that was not in existence when the committal order was made, and was not a liability on which commitment under the committal order could be founded.

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[As to alimony pendente lite ending with the making of a final decree, see *Cavendish-Bentinck* v. *Cavendish-Bentinck* ([1948] 2 All E.R. 285).

As to suspended committal orders, see 12 HALSBURY'S LAWS (3rd Edn.) 500, para. 1102.

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For the Debtors Act, 1869, s. 5, see 2 HALSBURY'S STATUTES (2nd Edn.) 294.

For the Matrimonial Causes (Judgment Summons) Rules, 1952, r. 6, see 3 HALSBURY'S STATUTORY INSTRUMENTS (First Re-issue) 273 and pp. 164, 165, post.]

Adjourned Summons.

I

This was an application by the former wife of the judgment debtor for leave to issue an order of commitment against the debtor (referred to hereinafter as "the husband").

On Aug. 29, 1956, the husband filed a petition for dissolution of the marriage on the grounds of cruelty and adultery, and on Feb. 21, 1957, he was granted leave to file a supplementary petition alleging the same grounds. On Mar. 4, 1957, the wife filed an answer denying both charges, charging the husband with cruelty and adultery, and there was a cross-prayer for relief and for custody of the two children of the marriage. On Apr. 2, 1957, Mr. Registrar COMPTON MILLER made an order for alimony pending suit at the rate of £1 a week as from

Mar. 16, 1957, and for maintenance of the children pending suit, at the rate of £1 a week for the girl and 10s. a week for the boy, as from the same date. The husband did not proceed with the charge in his petition and supplemental petition, and on Aug. 9, 1957, the registrar ordered that proceedings arising from the prayer of the petition be stayed and that the cause should proceed on the prayer in the wife's answer. On Nov. 11, 1957, on the hearing of a judgment summons* in respect of default in payments amounting to £70, BARNARD, J., made a committal order under the Matrimonial Causes (Judgment Summons) Rules, 1952, r. 6, and, under r. 6 (2), directed execution of the order to be suspended so long as the husband paid, in addition to any sums accruing under the order of Apr. 2, the sum of 2s. 6d. a week.

On Nov. 29, 1957, the wife was granted a decree nisi on both grounds alleged in the answer. On Jan. 14, 1958, the decree was made absolute, and on Mar. 19, 1958, an order for maintenance was made by Mr. Registrar COMPTON MILLER, dating as from the date of the decree absolute, for payment to the wife during their joint lives or until further order at the rate of £1 weekly, and for maintenance of the elder child at the rate of £1 10s. a week and for the younger child at the rate of £1 a week.

By her summons, issued in September, 1958, the wife sought leave to issue an order for committal under the suspended committal order of Nov. 11, 1957, on the ground that the husband had been constantly in arrears in regard to payment and the total arrears under both orders then amounted to £191. The application was made ex parte to a registrar of the Probate Division, under the Debtors Act (Matrimonial Causes) Jurisdiction Order, 1932, and r. 8 (1) of the Matrimonial Causes (Judgment Summons) Rules, 1952, and came before Mr. Registrar WILKINSON. After consideration, the registrar considered that leave to issue a committal order should be refused and referred the matter to a judge. In the note of the reasons for his refusal the registrar said:

> "On Jan. 14, 1958, the [husband] ceased to have any further liability for sums accruing due under . . . the order on which the commitment was made—this having ceased on the decree absolute. He still had to pay 2s. 6d. a week in discharge of the arrears. Since the order ceased he has paid a total of about £40—not specifically allocated by him to any liability. This is far more than enough to cover the 2s. 6d. a week for which he remains due, though it would not satisfy the whole debt. He has been liable, under a maintenance order dated Mar. 19, 1958, and operative as from Jan. 14, 1958 (the date of the decree absolute) for maintenance at £3 10s. a week; but this is a subsequent order that is not connected with the judgment summons and commitment order. The payments since the decree absolute have been irregular in date and amount; and I am not prepared to say that they are not partly (or even wholly) allocated to the judgment debt. The fact that he is seriously in arrears in respect of the new maintenance order does not mean that all payments must be allocated to those arrears."

The matter then came before KARMINSKI, J., who took the view that the husband should be notified of the application. This having been done, the matter now came before COLLINGWOOD, J. Correspondence between the wife's solicitor and the husband, which correspondence was not before the registrar, was before the court. The husband's letters showed that, in making the payments, he intended only a small amount of each payment to be towards the arrears.

By r. 6 of the Matrimonial Causes (Judgment Summons) Rules, 1952:

> "(1) On the hearing of a judgment summons the judge may make an

* If an order for maintenance is not complied with, it is enforceable by judgment summons under s. 5 of the Debtors Act, 1869. Jurisdiction as to committal orders in matrimonial causes is assigned to the Probate Division by the Debtors Act (Matrimonial Causes) Jurisdiction Order, 1932.

order of commitment or may . . . make an order for payment, either at a specified time or by instalments, of the amount due under the judgment and the costs of the judgment summons.

" (2) If an order of commitment is made, the judge may direct execution of the order to be suspended on terms that the debtor pays the amount due, together with the costs of the judgment summons, either at a specified time or by instalments, in addition to any sums from time to time accruing due under the judgment.

" (3) If an order of commitment is suspended on such terms as are mentioned in the last foregoing paragraph, all payments thereafter made under the order shall be deemed to be made, first, in or towards the discharge of any sums from time to time accruing due under the judgment and secondly, in or towards the discharge of the debt in respect of which the judgment summons was issued and the costs of the summons."

A. B. Ewbank for the wife.

The husband appeared in person.

Cur. adv. vult.

Nov. 24. **COLLINGWOOD, J.,** read the following judgment: This is an application for leave to issue an order of commitment. It was made ex parte in the normal course to a registrar, Mr. Registrar WILKINSON, but after consideration he indicated that he considered leave should be refused and he referred the matter to a judge. The matter came before KARMINSKI, J., who took the view that the judgment debtor ought to be notified of the application. This has now been done and the matter comes before me.

[HIS LORDSHIP stated the facts, and continued:] In the first place it is to be noted that the order made on Apr. 2, 1957, by Mr. Registrar COMPTON MILLER (on which the committal order was made by BARNARD, J., on Nov. 11) was limited in regard to the children in exactly the same way as in regard to the wife, that is to say it was an order to pay " pending suit ". It was not, therefore, an order which continued until replaced by another order, although counsel described it as an interim order; it automatically ceased to have effect on Jan. 14, 1958, when the decree was made absolute. It follows, in my opinion, that as from Jan. 14, 1958, until Mar. 19, 1958, when the maintenance order was made, the husband's only liability was to continue the payment of 2s. 6d. weekly towards the arrears. The fact that subsequent to the decree absolute a maintenance order had been made on Mar. 19, 1958, directing him to pay £3 10s. a week as from the date of the decree absolute, has, in my opinion, no effect whatever on the order made on the judgment summons in November, 1957. Between Jan. 14, 1958, when his liability under the first order ceased (save as to 2s. 6d. weekly off arrears) and Mar. 19, when an entirely fresh liability was made on him, he made payments totalling £15 10s., which represents 124 payments of 2s. 6d.

It was contended on behalf of the wife that it was necessary only to look at the husband's intention as regards these payments, an intention to be derived from the letters accompanying them, and the amounts of the payments made. It is necessary, however, to have regard, not to his conception or misconception as to his liability during that period, but to what his liability in law really was. It was further urged that, irrespective of the husband's intention, both the orders, that for alimony and maintenance of children pendente lite, and that for permanent maintenance, are really one judgment under the Matrimonial Causes (Judgment Summons) Rules, 1952. With this submission I have already dealt. It is important to remember that the whole basis of committal under s. 5 of the Debtors Act, 1869, and the Rules of 1952 is deliberate contempt of court, arising from a failure to pay that which the court, after inquiry as to means, is satisfied

that the debtor is able to pay*. It seems to me impossible to apply a committal order to a debt due under an order for maintenance which was not in existence at the date of the making of the committal order. In my opinion, the learned registrar was right in the view which he took, and leave to issue an order for committal must be refused.

Application refused.

Solicitor: *J. A. H. Powell, The Law Society, Divorce Department* (for the wife).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

Re EICHHOLZ (*deceased*), *Ex parte* TRUSTEE OF THE PROPERTY OF THE DECEASED DEBTOR *v.* EICHHOLZ. EICHHOLZ'S TRUSTEE *v.* EICHHOLZ.

[CHANCERY DIVISION (Harman, J.), December 1, 2, 3, 4, 5, 16, 1958].

Bankruptcy—Administration in bankruptcy of the estate of a person dying insolvent—Voluntary conveyance with intent to defraud creditors—House, purchased by debtor with misappropriated money, conveyed by vendor to debtor's wife—Chattels given by debtor to wife—Whether conveyance in writing necessary—Whether there was a conveyance in writing by deceased debtor—Whether trustee under Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5 *c.* 59), *s.* 130, *could maintain claim under the Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5 *c.* 20), *s.* 172.

On Jan. 18, 1955, the deceased (a solicitor) and his wife (referred to hereinafter as "the widow") were married. About the time of the marriage the deceased opened a bank account in the joint names of himself and the widow on which either could draw. On Feb. 14, 1955, the deceased entered into an agreement in writing to purchase a freehold house for some £15,000, and he paid the deposit on the purchase price from his account with his firm. By a conveyance dated Mar. 15, 1955, which recited that there had been an agreement with the widow for the purchase, the property was conveyed by the vendor to her. The deceased was not a party to the conveyance nor did it recite that it was made by his direction. The balance of the purchase price was provided by a banker's draft on the joint account, which at that date was in debit, but to which some £18,000 misappropriated from the proceeds of sale of securities of clients of the deceased was credited shortly afterwards. The deceased was at all material times insolvent and heavily indebted in respect of clients' funds that he had misappropriated. He died on Nov. 17, 1957. His executors obtained an order for administration of his insolvent estate in bankruptcy under s. 130 of the Bankruptcy Act, 1914. The trustee in the administration brought an action to recover the house from the widow under s. 172† of the Law of Property Act, 1925, and a motion in bankruptcy to recover from her chattels which were at the house, also under s. 172. The court found that there was a gift of the house to the widow and that there was no consideration for the gift; and that some at any rate of the chattels appeared to have been voluntary gifts to her by the deceased.

Held: the trustee was entitled to recover the house and chattels (subject to an inquiry as to what chattels the widow might be entitled to retain,

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* See s. 5 (2) of the Debtors Act, 1869; 2 HALSBURY'S STATUTES (2nd Edn.) 295.

† The terms of s. 172 are printed at p. 173, letters C and D, post.

e.g., as wedding gifts) from the widow under s. 172 of the Law of Property Act, 1925, for the following reasons—

(i) the claims under s. 172 could be maintained by the trustee in the administration in bankruptcy under s. 130 of the Bankruptcy Act, 1914, but, if this were not so, a representative creditor by whom the claim would be maintainable would be added as plaintiff (see p. 175, letters C and I, and p. 179, letters F and G, post).

Re Gould, Ex p. Official Receiver ((1887), 19 Q.B.D. 92) does not extend to rights under s. 172 of the Law of Property Act, 1925.

(ii) though a conveyance within s. 172 of the Law of Property Act, 1925, need not, it seems, be a conveyance in writing (see p. 177, letter I, post), yet there was a conveyance of the house in writing within s. 172 in the present case, since the deceased had become beneficial owner of the house on his contracting to buy it, and the deed of conveyance thereof to the widow had transferred his equitable interest to her, notwithstanding that he was not a party thereto, and thus was a conveyance within s. 172 (see p. 178, letters D and E, post).

Barton v. *Vanheythuysen, Stone* v. *Vanheythuysen* ((1853), 11 Hare, 126) applied.

[As to the avoidance of dispositions in fraud of creditors, see 17 HALSBURY'S LAWS (3rd Edn.) 650, para. 1253, and as to the meaning of conveyance, see ibid., p. 652, para. 1256.

For the Bankruptcy Act, 1914, s. 130, see 2 HALSBURY'S STATUTES (2nd Edn.) 425.

For the Law of Property Act, 1925, s. 172, s. 205 (1) (ii), (xx), see 20 HALSBURY'S STATUTES (2nd Edn.) 785, 832, 838.]

Cases referred to:

(1) *Silver* v. *Silver*, [1958] 1 All E.R. 523.

(2) *Re Gould, Ex p. Official Receiver*, (1887), 19 Q.B.D. 92; 56 L.J.Q.B. 333; 56 L.T. 806; 4 Digest 504, *4541.*

(3) *Freeman* v. *Pope*, (1870), 5 Ch. App. 538; 39 L.J.Ch. 689; 23 L.T. 208; 34 J.P. 659; 25 Digest 191, *301.*

(4) *Re D'Epineuil* (*Count*) (*No. 1*), *Tadman* v. *D'Epineuil*, (1882), 20 Ch.D. 217; 51 L.J.Ch. 491; 46 L.T. 409; 7 Digest 107, *637.*

(5) *Re Mouat, Kingston Cotton Mills Co.* v. *Mouat*, [1899] 1 Ch. 831; 68 L.J.Ch. 390; 80 L.T. 406; 25 Digest 150, *20.*

(6) *Taylor* v. *Coenen*, (1876), 1 Ch.D. 636; 34 L.T. 18; 25 Digest 213, *471.*

(7) *Gilbert* v. *Gilbert & Boucher*, [1928] P. 1; 96 L.J.P. 137; 137 L.T. 619; 42 Digest 781, *2113.*

(8) *Mitchell* v. *Simpson*, (1890), 25 Q.B.D. 183; 59 L.J.Q.B. 355; 63 L.T. 405; 55 J.P. 36; 5 Digest 1042, *8511.*

(9) *MacConnell* v. *Prill* (*E.*) *& Co., Ltd.*, [1916] 2 Ch. 57; 85 L.J.Ch. 674; 115 L.T. 71; 42 Digest 780, *2103.*

(10) *Re Turner's Will Trusts, District Bank, Ltd.* v. *Turner*, [1936] 2 All E.R. 1435; [1937] Ch. 15; 106 L.J.Ch. 58; 155 L.T. 266; Digest Supp.

(11) *Westminster Bank, Ltd.* v. *Riches*, [1945] 2 All E.R. 111; [1945] Ch. 381; 114 L.J.Ch. 307; 173 L.T. 148; *affd.*, H.L. sub nom. *Riches* v. *Westminster Bank, Ltd.*, [1947] 1 All E.R. 469; [1947] A.C. 390; [1948] L.J.R. 573; 176 L.T. 405; 2nd Digest Supp.

(12) *Dilworth* v. *Stamps Comrs.*, *Dilworth* v. *Land & Income Tax Comrs.*, [1899] A.C. 99; 79 L.T. 473; sub nom. *Dilworth* v. *New Zealand Stamps Comrs.*, 68 L.J.P.C. 1; 19 Digest 586, *182.*

(13) *Barton* v. *Vanheythuysen, Stone* v. *Vanheythuysen*, (1853), 11 Hare, 126; 68 E.R. 1215; 25 Digest 149, *14.*

(14) *Re Crossley*, [1954] 3 All E.R. 296; 3rd Digest Supp.

Action and Motion in bankruptcy.

This action and the motion in bankruptcy were heard together, being between the same parties and arising out of the affairs of Robert Nathaniel Eichholz, who died on Nov. 17, 1957, and in respect of whose estate an administration order in bankruptcy was made on May 23, 1958. Both the proceedings were brought by the trustee of the property of the deceased debtor, and the widow of the debtor was the defendant and the respondent in the respective proceedings.

In the action the plaintiff, as trustee, claimed, among other relief, (i) a declaration that the freehold property now known as Peppermills, in the parish of Lamberhurst, Kent, which was conveyed by Sir Thomas Stuart Overy into the name of the defendant by deed dated Mar. 15, 1955, at the direction of the debtor and in consideration of certain payments by the debtor to Sir Thomas Overy, was at all material times held by the defendant as nominee for and in trust for the debtor and was now so held by her in trust for the plaintiff; alternatively, (ii) a declaration that the conveyance of the property was made with intent to defraud the debtor's creditors and was void under s. 172 of the Law of Property Act, 1925, and should be set aside; further, or in the further alternative, (iii) a declaration that the conveyance of the property into the name of the defendant did not constitute a settlement made in consideration of marriage or in favour of a purchaser in good faith and for valuable consideration, and was void as against the plaintiff under s. 42 of the Bankruptcy Act, 1914, and should be set aside.

On the motion in bankruptcy, the applicant, as trustee, applied for (among other relief) (i) a declaration that the contents of the freehold house, Peppermills, at the date of the death of the deceased debtor formed part of the assets vested in the applicant as trustee under the administration order made on May 23, 1958, and that the respondent had no title thereto; and (ii) a declaration that, if the debtor purchased any item comprised in the contents of the house in the name of the respondent or made a gift thereof to the respondent after he had purchased the same in his own name, to the intent that he transferred, or procured to be transferred, to the respondent the title thereto, the transfer was void against the applicant as trustee, and should be set aside (a) on the ground that it was made with intent to defraud the debtor's creditors within the meaning of s. 172 of the Law of Property Act, 1925, or (b) on the ground that it constituted a transfer otherwise than in good faith and for valuable consideration, within the meaning of s. 42 of the Bankruptcy Act, 1914. The claims based on s. 42 were not pursued.

Charles Russell, Q.C., and *Muir Hunter* for the trustee (the plaintiff in the action and the applicant on the motion).

Harold Christie, Q.C., *Andrew Martin* and *E. W. H. Christie* for the debtor's widow (the defendant in the action and the respondent on the motion).

Cur. adv. vult.

Dec. 16. **HARMAN, J.**, read the following judgment: These two cases both arise out of the affairs of one man, Robert Nathaniel Eichholz. The defendant in the action and the respondent to the motion is his widow (his second wife), he having married her on Jan. 18, 1955. When he died on Nov. 17, 1957, Mr. Eichholz was to all appearances a substantial man. He was a partner in an old-established firm of solicitors. He left a will under which his widow and his brother were appointed executors and they proved it on Apr. 28, 1958. It was, however, by that time apparent that Mr. Eichholz was hopelessly insolvent. When the executors swore the Inland Revenue affidavit in January, 1958, this was already well known to them, for they swore his assets at some £45,000 and his estimated liabilities at £74,500. This affidavit is in other respects a revealing document. It showed, first, that the deceased had a lease of a flat, 47, Lowndes Square, and owned its contents, valued by the executors at £2,000.

A It also showed that since his marriage to his widow the deceased had made gifts to her valued at £44,000. The affidavit stated as follows:

> "On Mar. 15, 1955, the deceased provided the purchase money for the property known as Peppermills, Lamberhurst, Kent, which was conveyed to his wife. Price—£15,000. During the period Mar. 15, 1955, to the date
B of death the deceased purchased for his wife various fixtures, fittings, furnishings and pictures for use in the above property. Value estimated at £24,000. Since January, 1955, the date of the deceased's second marriage, he purchased various personal chattels for his wife as presents. Value estimated at £5,000."

C It is said that the last item represents furs and jewellery valued at a much higher figure. The affidavit continues: "Total estimated value of gifts inter vivos £44,000." That is signed by the two executors. The affidavit also shows that the deceased took out policies on his life in favour of the widow under the Married Women's Property Acts to the tune of some £20,000.

It soon appeared that the extent of the claims likely to be made against the
D estate far exceeded those mentioned in the Inland Revenue affidavit. Numerous clients entered claims against the Law Society to be indemnified against misappropriations by the deceased of moneys entrusted to him as a solicitor, and the Law Society employed a chartered accountant, a Mr. Ridsdale, to investigate these. He gave evidence before me and swore that, though the investigations were by no means complete, the misappropriations amount to something like
E half a million pounds. He further stated that at the end of 1954, that is to say before the second marriage, the minimum of the claims was £171,000; that the assets were then about £21,000; and that misappropriations had since proceeded on an ever-increasing scale. He said, moreover, that there was no chance of solvency, however much may be recovered on the present claims and on any other claims there may be (so far as now known) to recover property in the hands
F of third parties.

In these circumstances it is not surprising that on May 23, 1958, the executors petitioned the Bankruptcy Court to have the assets administered in bankruptcy. That was an ex parte application, acceded to on the same day*. On June 26 a Mr. Wilson, partner of Mr. Ridsdale, was appointed trustee. As one would expect, the trustee claimed the return by the widow of the property
G Peppermills and all its contents sworn by the Inland Revenue affidavit to have been given to her. Both these requests were refused: indeed, the widow enlarged her claims by laying claim to the contents of the flat, which she had sworn to belong to the estate. These contents she has removed to Peppermills, where they still are, at any rate for the most part. The results of these refusals were the present proceedings, the first being an action against her in the Chancery
H Division begun by writ dated July 25, 1958, and the second a motion in bankruptcy by the trustee dated Aug. 15, 1958. The first concerns Peppermills and the second the chattels. The trustee's first contention in both cases is that there were no valid gifts by the deceased and that the widow holds both house and chattels as trustee and not beneficially. By way of alternative, the trustee claims first to recover both land and furniture under s. 172 of the Law of Property
I Act, 1925, and, by way of further alternative, to recover the property under s. 42 of the Bankruptcy Act, 1914. This last claim was not pursued in this court for reasons which will appear.

I shall consider the facts leading up to the purchase of the house. The widow, a young woman of Italian nationality, formerly known as Cesira Buran, came to this country from her native Udine in 1952 to act as cook in a house in Flood

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* The petition and administration order were presented and made by virtue of s. 130 of the Bankruptcy Act, 1914; this is relevant to the point discussed at p. 175, letters D and E, post.

Street, Chelsea, then apparently the property of a Mrs. Murray and the place where the deceased was living. There was, according to the widow, a second house in the country where a similar establishment was maintained. The widow gave evidence before me. She has a fair command of English and gave her testimony with great candour. She is not a person of high education. She said that she first got to know the deceased in the middle of 1953, and that he first spoke to her of marriage towards the end of 1954 when he proposed to her and she accepted him. They then removed themselves from Flood Street and went to live in a flat at Park West, and two or three weeks later were married. Before this, but after she had become engaged to him, the deceased, she said, spoke of a house, saying that he would like to buy a house for her, but the only thing settled was that it should be a country house. He apparently took her about looking at houses and in December, 1954, first saw a house then known as Lamberhurst Manor. After the marriage they decided to buy it. She knew no more about it until the purchase was an accomplished fact, when he said: "This is a house for you". As to money, she was a young woman without means and was first drawn into the deceased's financial orbit when he authorised her in October, 1954, to sign cheques on what he called a household account with Barclays Bank, Sevenoaks. In instructing the bank he described her as his housekeeper. She drew a number of small cheques on this account during October and November, 1954. Immediately before the marriage the deceased closed two joint accounts at the same bank in the names of himself and Mrs. Murray and opened two fresh accounts in the joint names of himself and the widow, on which either could sign. One was styled the household account and on this the widow drew cheques occasionally. On the other she only drew one cheque for £200 for the purchase of some shares. This was made out for her by the deceased and signed at his request. The deceased made her no allowance but supplied her with cash when she wanted it and gave her lavish presents of furs and jewellery from time to time. She said that she was free to draw on both accounts at her wish.

Soon after the marriage the purchase of Lamberhurst Manor was decided on and the contract was signed on Feb. 14, 1955. This is a contract between Sir Thomas Overy, the vendor, and the deceased, who agreed to buy the property for £15,500 and, in addition, certain fitted carpets and so forth at a valuation. The deposit of £1,550 was drawn by the deceased from his account with his firm. On the same day he wrote to the bank in these terms:

> "Under a contract of marriage with Mrs. Eichholz I am providing a house for her and am buying Lamberhurst Manor from Sir Thomas Overy. The cost is £15,500. I should like to borrow £7,500 from Barclays repayable at call, but on the understanding that in ordinary circumstances I pay it off at the rate of £1,500 per annum. At the same time it is relevant to say that as a result of a redistribution of certain interests I should be able within two months to add to the securities normally lying with you additional ones to a total of some £9,000-£12,000. I expect to arrange for the completion of the house purchase about Mar. 31. I should be glad to hear that my proposal for a loan on the security of the house without any specific additional collateral is acceptable."

The deceased did not, however, complete the transaction as here proposed, but, instead, instructed the bank to sell certain bearer securities, which have since turned out to be the property of clients of his, and to credit the joint account with the proceeds. The purchase was completed on Mar. 15, 1955, by a conveyance by which, after reciting, contrary to the fact as it would seem, that there had been an agreement with the widow for the purchase, the property was conveyed to her in fee simple. As appears from this document the deceased had by this time decided to call the house Peppermills, that being, according

A to the widow, its old name which he said he preferred. He did not ask her opinion about it. There is no documentary evidence to indicate why the conveyance was made in this way. The deceased was not a party to it, nor is there any recital that it was made by his direction. His partner, a Mr. Marmorstein, who acted for him in the matter, had no recollection of his instructions nor any written document, and Messrs. Allen & Overy, who acted B for the vendor, could throw no light on the subject. In the circumstances, I must infer that the deceased orally instructed his partner to draw the conveyance in this way and that the vendor raised no objection. The balance of the purchase money, which amounted to some £15,000, was provided by a banker's draft debited to the joint account. It appears that the bearer securities of which I have spoken had already been sold, but owing to settling dates on C the Stock Exchange, the proceeds amounting to some £18,000, were not credited to the joint account until Mar. 23, 1955. At the date of the conveyance the joint account was already some £3,000 overdrawn. The overdraft was reduced to some £500 on Mar. 23 and thereafter until the deceased's death was sometimes in credit and sometimes overdrawn. At his death it was in credit and was afterwards drawn on by the widow for her own purposes until Mar. 25, 1958, D when she reimbursed her drawings since the deceased's death, and the balance has passed to the trustee. This would appear to be an acknowledgment by her that she had no beneficial interest in the moneys in this account.

From the time of the marriage onwards the deceased and the widow from time to time purchased, at his expense, furniture and so forth for the house, and they went into occupation in June, 1956, and so remained until his death. E The widow was the rated occupier and the bills for services were addressed to her, but she told me that she had nothing to do with these and that the deceased attended to all such matters and paid the servants and the household bills himself, sometimes, no doubt, out of the joint account. The property was insured in her name, but he paid the premiums.

F So far as the chattels are concerned, I have heard no detailed evidence and propose to say at present no more than this, that I have heard enough to show that as to some of the chattels there is a prima facie case that they were given by the deceased to the widow, while as to others, notably pictures and works of art, the evidence points the other way. The house has now been sold under an arrangement between the parties, and some few of the chattels have been sold by or are in the possession of Messrs. Christie, Manson & Woods, while the rest will G be sold by auction on the premises shortly before completion and the proceeds paid into a joint account to await the result of these proceedings.

The first question to be considered in the circumstances which I have related is whether in connexion with the house there was a gift by the deceased to the widow. This was argued on the footing that the house was conveyed by the H vendor to her on an orally given direction by the deceased. An alternative possibility is that the recital in the conveyance is correct, that the deceased entered into the contract as the widow's agent, and provided her with both the deposit and the balance of the purchase price. I propose to consider the first alternative. Here, the parties being husband and wife and the conveyance being in her favour, there is a presumption, in the absence of evidence to the I contrary, that this was an advancement by him to her, rebutting the ordinary presumption of a resulting trust which arises when property is bought in the name of B. and the purchase money provided by A. It is true that this presumption of advancement in the case of a family asset, like a house, is nowadays not considered a very strong one and may be easily rebutted—see per PARKER, L.J., in *Silver* v. *Silver* (1) ([1958] 1 All E.R. 523 at p. 528). There must, nevertheless, be some evidence to contradict it. Here there is considerable evidence of an intention to make a gift. First, that of the widow herself, which, no doubt, must be jealously scrutinised, but is not inadmissible. Next there is

the deceased's letter of Feb. 14, 1955, which I have already read* and which states explicitly that he is providing her with a house. Thirdly, the purchase money was paid out of the joint account in which she had, on the face of it, a joint interest. Nor must it be forgotten that he must have been well aware at the time that he was hopelessly insolvent; which makes it the more likely that he should wish to put the joint home beyond his creditors' reach. On the other side, there is no direct evidence beyond the fact that he treated the house as his and paid all the rates, taxes, and expenses such as electricity and the gardeners and servants. This seems to me quite consistent with a gift. There was also a cottage bought in the widow's name after the marriage, which the deceased later resold without asking her leave, and without accounting to her for the proceeds. She admitted that she knew this and made no protest, and it was argued that I ought to infer from this that the same thing would have happened if he had wished to re-sell Peppermills. I decline to draw this inference. There may well have been no advancement as regards the cottage, or she may have been unwilling to insist on her rights against a husband who was treating her with lavish generosity. Lastly, it was argued that he was, in fact, being generous not at his own expense, but at that of his defrauded clients, and that no presumption ought to be relied on which involved a fraud. No authority was cited for this proposition and I feel bound to reject it. Whether the true owners of the securities sold to provide the purchase money could follow it into the widow's hands is not a question which arises here. Moreover, it appears that they have all put in proofs against the trustee. I hold that this was a gift of the house to the widow. If the second alternative were to be accepted, the position seems to me to turn out exactly the same.

The next question is whether the gift was voluntary or made for good consideration. It was not suggested that the widow did not act in good faith or that any knowledge or notice of the deceased's insolvency ought to be imputed to her. It was argued for the widow that the gift was made in consideration of marriage. No such suggestion was made before the hearing, but I then allowed an amendment of the defence to raise it. The assertion of gift has been consistently made on oath by the widow, from the Inland Revenue affidavit onwards through several affidavits in these proceedings and on her examination in the bankruptcy proceedings: nowhere is it suggested that consideration was given. The claim, therefore, must be jealously scrutinised. In the witness-box the widow said that no mention of a house was made before she had agreed to marry the deceased, and that she did not marry him on the strength of a promise to give her one. The highest at which she put it was that when they were engaged he said that they would have a house in the country which would be hers. No decision to buy Peppermills was made until after the marriage. She said, moreover, that, when the deceased told her that the house was hers, it was a surprise to her. She would speak of it, she said, as " our house ", but he corrected her saying, " your house ". So far from proving that the gift was made in consideration of the marriage this testimony points the other way. The only serious evidence in support is in the already twice quoted letter of the deceased of Feb. 14, 1955, which begins: " Under a contract of marriage with Mrs. Eichholz I am providing a house for her . . ." The letter does not say when the contract was made: it may have been after marriage, and, indeed, it must have been if it was a contract to provide Peppermills, for that purchase was not decided on until February, 1955. This letter is altogether too ambiguous to support a contract in consideration of marriage. It was rather faintly suggested that consideration was given because the purchase money was raised by a loan on a joint account for which the widow was liable, but the facts are that the securities which provided the purchase money were already sold on the deceased's order when the loan was made and the widow never was at risk. This point, moreover, is

* See p. 170, letters G and H, ante.

not open on the pleadings. Accordingly, I reject the argument that there was any consideration for the gift.

The next question is whether the trustee can set the transaction aside. It was admitted that in this court he could not rely on s. 42 of the Bankruptcy Act, 1914, because of the decision of the Court of Appeal in *Re Gould, Ex p. Official Receiver* (2) ((1887), 19 Q.B.D. 92). I will read the headnote:

> " Section 47 of the Bankruptcy Act, 1883*, which avoids certain voluntary settlements executed by a bankrupt, does not apply to the administration of the estate of a deceased insolvent by the Court of Bankruptcy under s. 125* of the Act."

It was so held by the Court of Appeal, affirming CAVE, J.

The trustee then relied on the Law of Property Act, 1925, s. 172, which is in these terms:

> " (1) Save as provided in this section, every conveyance of property, made whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.
>
> " (2) This section does not affect the operation of a disentailing assurance, or the law of bankruptcy for the time being in force.
>
> " (3) This section does not extend to any estate or interest in property conveyed for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the conveyance, notice of the intent to defraud creditors."

This section replaced 13 Eliz. 1 c. 5 (1571), which was repealed by the Act of 1925. The Elizabethan statute is, as one would expect, couched in very different terms. It is styled as " An Act against Fraudulent Deeds, Alienations, etc.", and the long title is:

> " For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore: which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued."

The statute goes on:

> " Be it therefore declared . . . That all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment and execution, at any time had or made sithence the beginning of the Queen's Majesty's reign that now is, or at any time hereafter to be had or made, to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against

* Section 47 and s. 125 of the Act of 1883 correspond, respectively, to s. 42 and s. 130 of the Act of 1914.

that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous or fraudulent devices and practices, as is aforesaid, are, shall or might be in any wise disturbed, hindred, delayed or defrauded) to be clearly and utterly void, frustrate and of none effect; any pre-ence, colour, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding."

There is no doubt that the Statute of Elizabeth was available after a man's death to his creditors to recover from a volunteer property of whatever kind, including, after the passing of the Judgments Act, 1838 (1 & 2 Vict. c. 110), cash. This sufficiently appears from the orders cited in SETON'S JUDGMENTS AND ORDERS (7th Edn.) (1912) (Vol. 3) at p. 2280. The action had to be brought by a creditor in a representative capacity and was not available to executors. See KERR ON FRAUD AND MISTAKE (7th Edn.) (1952) at p. 305, and the cases cited on that page. It was not necessary to prove a fraudulent intent: the mere fact of insolvency was enough by itself. See the judgment of LORD HATHERLEY, L.C., in *Freeman* v. *Pope* (3) ((1870), 5 Ch. App. 538). The headnote reads thus:

" When a settlement is not founded upon valuable consideration, it may be set aside without proof of actual intention to defeat or delay creditors, if the circumstances are such that the settlement necessarily would have that effect; but, semble, the mere fact that it has, in the event, prevented a creditor, who was such when it was made, from obtaining payment of his debt, is not of itself sufficient to enable him to set it aside."

LORD HATHERLEY, L.C., says this (ibid., at p. 540):

" The principle on which the statute of 13 Eliz. c. 5 proceeds is this, that persons must be just before they are generous, and that debts must be paid before gifts can be made. The difficulty the Vice-Chancellor [JAMES, V.-C.] seems to have felt in this case was, that if he, as a special juryman, had been asked whether there was actually any intention on the part of the settlor in this case to defeat, hinder, or delay his creditors, he should have come to the conclusion that he had no such intention. With great deference to the view of the Vice-Chancellor . . . it appears to me that this does not put the question exactly on the right ground; for it would never be left to a special jury to find, simpliciter, whether the settlor intended to defeat, hinder, or delay his creditors, without a direction from the judge that if the necessary effect of the instrument was to defeat, hinder, or delay the creditors, that necessary effect was to be considered as evidencing an intention to do so. A jury would undoubtedly be so directed, lest they should fall into the error of speculating as to what was actually passing in the mind of the settlor, which can hardly ever be satisfactorily ascertained, instead of judging of his intention by the necessary consequences of his act, which consequences can always be estimated from the facts of the case."

Moreover, if the assets were considered to remain as part of the estate of the insolvent, then the person holding them is treated as executor de son tort. See MAY ON FRAUDULENT AND VOLUNTARY DISPOSITIONS OF PROPERTY (3rd Edn.) (1908) at p. 18. That says:

" Where a man makes a gift of goods which is fraudulent and void against his creditors, and dies, he is considered to have died in full possession, with respect to the claims of the creditors; and the goods are therefore assets in the hands of his personal representative, as to creditors. And as such a transfer is void at law, the property becomes, at the death of the transferror, legal—and not merely equitable—assets for creditors; for, the deed being treated, as respects the creditors, as if it had never existed, the property

A comes to the executor virtute officii. As any intermeddling with a deceased person's effects, by one who is not his duly constituted personal representative, makes the latter an executor de son tort, and as goods fraudulently alienated by a deceased person in his lifetime remain part of his estate at his death, possession taken by the fraudulent grantee will make him executor de son tort."

B In my judgment all this continues to be good law under s. 172 of the Law of Property Act, 1925, and it was at a late stage in the hearing admitted, although it was earlier strenuously contested, that the death of the fraudulent person makes no difference to his creditors' rights.

The defence ultimately rested on two points. First, by an extension of the doctrine of *Re Gould, Ex p. Official Receiver* (2), it was argued that no such C action lay after an order had been made under s. 130 of the Bankruptcy Act, 1914 (which, for this purpose, may be taken to be equivalent to s. 125 of the Bankruptcy Act, 1883). Secondly, it is said that here there was no conveyance which could be set aside in the absence of any available written document.

The first point is a strange one if good, for it means that the widow, by making an application in bankruptcy ex parte and without notice to the D deceased's creditors, can put the property which she acquired in fraud of them out of their reach. I can see no good reason why the doctrine in *Re Gould* (2) should be applied to s. 172 of the Law of Property Act, 1925. The headnote in that case is correct in stating, in effect, that the decision was merely that the rights of a trustee in bankruptcy under s. 42 of the Bankruptcy Act, 1914, are not conferred on a trustee appointed under s. 130. In other words, that E part of the bankruptcy law is not imported by s. 130 so as to be available where a man dies without being declared a bankrupt. It was said that some of the reasons expressed in the judgment in *Re Gould* (2) are equally applicable to s. 172 of the Law of Property Act, 1925. The effect of s. 130 of the Bankruptcy Act, 1914, was said to be, not to enlarge the assets, but only to vary the creditors' rights, and so CAVE, J., said in *Re Gould* (2). That was a motion F in proceedings similar to the present, and CAVE, J., was quoting from the judgment of FRY, J., in *Re Count D'Epineuil (No. 1), Tadman* v. *D'Epineuil* (4) ((1882), 20 Ch.D. 217 at p. 218). CAVE, J., said (19 Q.B.D. at p. 94):

> "But, said FRY, J., 'the words of the section are, that the rules of bankruptcy are to be applied in the administration of the assets; the G assets in this case include only the equity of redemption of the goods comprised in the bill of sale; that may be administered as part of his estate; what belonged to other persons cannot be so administered . . . I grant this application on the ground that the section is not intended to enlarge the assets to be administered, but only to vary the rights of the persons entitled to the assets '."

H One reason for the decision was that no such right existed in an administration by the Court of Chancery and that it would be anomalous to import it into an administration in bankruptcy. This reason, at any rate, does not apply to proceedings under s. 172 of the Law of Property Act, 1925, and, in fact, that section has nothing to do with bankruptcy. A person whose estate is being administered under s. 130 of the Bankruptcy Act, 1914, cannot properly be I described as a bankrupt. It would, indeed, be anomalous if proceedings under s. 172 of the Law of Property Act, 1925, would lie while a chancery administration was proceeding (as *Freeman* v. *Pope* (3) clearly shows that it does, and as, indeed, is also shown by *Re Mouat, Kingston Cotton Mills Co.* v. *Mouat* (5), [1899] 1 Ch. 831, and *Taylor* v. *Coenen* (6) (1876), 1 Ch.D. 636), but should cease to lie because the aid of s. 130 of the Bankruptcy Act, 1914, was called in to regulate the creditors' rights. I reject this argument.

For the second point, reliance was placed on the difference in language between the Statute 13 Eliz. 1 c. 5 and s. 172 of the Law of Property Act, 1925. This

has given me more difficulty. The former statute expressly speaks of " by writing or otherwise ", whereas the word " conveyance " in the modern statute no doubt suggests writing. It is to be remembered, however, that s. 172 is dealing with property of all kinds, real as well as personal. That is shown in the definition clause, s. 205 (1) (xx): " ' Property ' includes any thing in action, and any interest in real or personal property ". Therefore, " conveyance " cannot be confined to real estate or chattels real, but must apply to many kinds of property passing by delivery. Moreover the Law of Property Act, 1925, is a consolidating Act and is not to be taken as making an alteration in the law unless the words admit of no other interpretation—see per SCRUTTON, L.J., in *Gilbert* v. *Gilbert & Boucher* (7) ([1928] P. 1), quoting SARGANT, J. SCRUTTON, L.J., said (ibid., at p. 8):

" The question is whether words in an Act consolidating the law have the effect of amending the law. The presumption with which one starts is that a consolidating Act is not intended to alter the law. An example of that rule is to be found in *Mitchell* v. *Simpson* (8) ((1890), 25 Q.B.D. 183), in which FRY, L.J., said (ibid., at p. 190): ' The Sheriffs Act, 1887, is a consolidating Act, and does not profess to amend or alter the provisions of the Acts consolidated. Prima facie, therefore, the same effect ought to be given to its provisions as was given to those of the Act for which it was substituted.' It may be, however, that the language of the Act is so clearly different from that of the previous statute as to bring about an alteration in the law, as in *MacConnell* v. *E. Prill & Co., Ltd.* (9) ([1916] 2 Ch. 57), where SARGANT, J., said (ibid., at p. 63): ' No doubt the prima facie presumption in the case of a consolidating Act, such as the present Act of 1908 [Companies (Consolidation) Act, 1908], is that the legislature intended to reproduce the existing position, and my first inclination would be to hold that, as under s. 129 (3) of the Act of 1862 [Companies Act, 1862], any notice is sufficient which sufficiently informs shareholders of the intention to act by way of extraordinary resolution. But this prima facie view must yield to plain words to the contrary.' "

To the like effect is the view of ROMER, L.J., in *Re Turner's Will Trusts, District Bank, Ltd.* v. *Turner* (10) ([1936] 2 All E.R. 1435) who says this (ibid., at p. 1445):

" For this purpose it is of importance to observe that the Trustee Act, 1925, is a consolidation Act. It is intituled ' An Act to consolidate certain enactments relating to trustees in England and Wales '. It is therefore extremely unlikely, to say the least of it, that it effected any substantial change in the pre-existing law."

The language of the two provisions (namely, 13 Eliz. 1 c. 5 and s. 172 of the Act of 1925) is, of course, strikingly different. Counsel for the widow drew my attention to the judgment of DU PARCQ, L.J., in *Westminster Bank, Ltd.* v. *Riches* (11) ([1945] 2 All E.R. 111). His Lordship was considering the Law Reform (Miscellaneous Provisions) Act, 1934, which repealed part of the Civil Procedure Act, 1833, and he said this (ibid., at p. 114):

" Citations from cases referring to the Civil Procedure Act, 1833, s. 28, s. 29, are, in my opinion, of doubtful assistance. Indeed, I am of opinion that when the legislature has repealed a statute and has not re-enacted it, but replaced it with a new enactment in different terms, it is in general a salutary rule that such case law as has accumulated round the repealed statute should be regarded as having expired with it."

That, however, was not a case about a consolidating Act. It might have been quite different if s. 172 of the Law of Property Act, 1925, had been part of

the Law of Property Act, 1922*, which made revolutionary changes in the law. It would, indeed, be a revolution in law if the effect of s. 172 of the Act of 1925 were to enable a man to convert the property which he wished to dispose of in fraud of his creditors into (say) bearer bonds, and to hand those to volunteers with impunity. There is, however, a further stumbling block in s. 205 of the Act of 1925, the definition section, which reads in this way:

> "(1) In this Act unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say . . . (ii) 'Conveyance' includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will . . ."

Reliance was placed on this to show that "conveyance" of necessity implies writing. It is possible to confine the allusions to instruments to the latter part of the phrase, though the word "other" is against this. Some of the words in the earlier part do not necessarily import writing, for instance "charge", "lease" (three years), "assent" (as applied to chattels). Apart from this the clause is not truly one of definition. It will operate only where the context allows. It uses the word "includes" and this implies "inter alia" and is a word apt to extend the normal meaning of the word "conveyance". See per LORD WATSON, delivering the judgment of the Privy Council in *Dilworth* v. *Stamps Comrs.*, *Dilworth* v. *Land & Income Tax Comrs.* (12) ([1899] A.C. 99). He was there considering the Charitable Gifts Duties Exemption Act, 1883, s. 2, which had this term "includes", in it. The words of the section were:

> "In this Act, the term 'charitable purposes' includes devises, bequests, and legacies of real or personal property . . ."

LORD WATSON said ([1899] A.C. at p. 105):

> "Section 2 is, beyond all question, an interpretation clause, and must have been intended by the legislature to be taken into account in construing the expression 'charitable devise or bequest', as it occurs in s. 3. It is not said in terms that 'charitable bequest' shall mean one or other of the things which are enumerated, but that it shall 'include' them. The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include', and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions."

In my judgment, the first meaning ought to be attached here to the word "include". On the whole, I am of opinion that in a consolidating Act I should be entitled to say that writing is not a sine qua non for the word "conveyance" as it appears in s. 172 of the Law of Property Act, 1925, though I do not pretend that the wording of the section is happy if so construed.

I was reminded that dispositions void under s. 172 have for many years been commonly described as "fraudulent conveyances", whether the disposition in question be oral or in writing. For example, the title of the text-book by MAY,

* Much of the Act of 1922 was repealed in 1925; see 4 HALSBURY'S STATUTES (2nd Edn.) 720.

the leading book, reads on the spine MAY ON FRAUDULENT AND VOLUNTARY DISPOSITIONS OF PROPERTY, but when one turns to the title page one finds "The Law of Fraudulent and Voluntary Conveyances; being a Treatise on the Statutes of Elizabeth . . ." In a modern text-book, KERR ON FRAUD AND MISTAKE (7th Edn.) at p. 304, a view is expressed on this subject in these terms:

> "The section [s. 172 of the Act of 1925] applies to every conveyance of property. 13 Eliz. c. 5 employed several words more or less synonymous with conveyance and several words more or less synonymous with property. There is no reason to suppose that the new section is in any respect narrower or wider than the old statute. Early decisions under the statute limited its application to property which could be taken to satisfy debts and the long historical development by which almost all property can now be taken in satisfaction of its owner's debts is traced in the preceding edition of this book. It is now safe to say that the section applies to any property."

Being the writer of a text-book, the author, no doubt, felt a little more confident than those who have to come into court to argue the point, but that was his opinion.

In the end, however, I have come to the conclusion that the point is a false one. There is no want of writing; it exists in the assurance to the widow of Mar. 15, 1955. It is true that, quoad the vendor, this was made for valuable consideration, that the deceased was not a party, and that no direction by him is recited in it. It fact, however, the vendor having contracted with the deceased for the sale of the property to him, was no more than a trustee with a vendor's lien, the equitable interest was in the deceased under the contract. The assurance passed to the widow, not only the vendor's legal estate, but the deceased's equitable interest, and it is this which can be recovered by the creditors. The deed should be set aside quoad the creditors. This proposition has the authority of a decision of SIR WILLIAM PAGE WOOD, V.-C., in *Barton* v. *Vanheythuysen*, *Stone* v. *Vanheythuysen* (13) ((1853), 11 Hare, 126), a case under 13 Eliz. 1 c. 5, where that course was taken. I quote from the headnote:

> "A debtor, having contracted to purchase an estate, caused the conveyance to be made to trustees, and trusts to be declared by deeds, dated in March, 1850, which recited the agreement of the debtor for the purchase, and that the conveyance to the trustees was by his direction, and declared the trusts to be for the sale of the property, and retaining the proceeds for the benefit of the wife and children of the debtor. By one of the deeds of March, 1850, the debtor also assigned to the same trustees all the furniture in certain houses (one of which was on the purchased estate), upon the same trusts, for his wife and children."

There are other matters in the case, but it does not appear that the purchaser of the property, Richard Edward Vanheythuysen, was a party to the deed. The report merely states (ibid., at p. 127):

> ". . . by a deed, dated Mar. 25, 1850, reciting that he had contracted to purchase such estate, the premises were 'by the direction of the said R. E. Vanheythuysen' conveyed, by the vendor, unto and to the use of [the defendant trustees]."

SIR WILLIAM PAGE WOOD, V.-C., deals with it in this way (ibid., at p. 129):

> "Two objections have been raised to the claim of Messrs. Stone under the deed of Nov. 29, 1851*, and by force of the statute 27 Eliz. c. 4 [the corresponding statute about subsequent encumbrances]. It was first said that the conveyance of Mar. 25, 1850, did not vest any property in Vanheythuysen, and that it was not a grant or settlement of real estate by

* A mortgage deed whereby the debtor, Vanheythuysen, assigned all his real and personal estate to a creditor.

him, so as to bring the case within the provisions of the stat. 27 Elizabeth, by which such a conveyance would be subsequently avoided. It was argued that the purchase of an estate by a payment in the name of a child was not within the statute, and that Vanheythuysen did not, in this case, actually acquire the estate, but that it was in effect nothing more than giving the money to the wife and children, who by that means bought the estate; and text-writers have questioned whether such a purchase would be within the statute. But, in the present case, the conveyance recites that Vanheythuysen had agreed to purchase the estate from the vendor, and thereby acquired the equitable interest in the estate; and the conveyance is, therefore, clearly a conveyance of his equitable interest in this estate to volunteers."

The decree in that case was in these terms (ibid., at p. 134):

> "This court doth declare that the deed of conveyance of Mar. 25, 1850 (so far as the same relates to the equitable fee-simple . . . of Richard Edward Vanheythuysen, deceased, in the freehold . . . lands and premises therein comprised) . . . are void as against [then the creditors are named] in the second-mentioned clause, claiming under the deed or mortgage security of Nov. 29, 1851 . . ."

It seems to me that with a little adaptation a declaration in those terms would exactly fit the present circumstances.

There remains the question whether the trustee under s. 130 of the Bankruptcy Act, 1914, can maintain the action which, as I have said, was, under the old statute, an action brought by a creditor in a representative capacity, and, if after a decree for administration in chancery, brought with the leave of the court. It was argued that the judgment in *Re Gould, Ex p. Official Receiver* (2) shows that the trustee under s. 130 is merely appointed to administer the assets already included in the estate, and not to enlarge those assets by getting in property in other hands. It seems doubtful whether those statements, which were not necessary for the decision, are consistent with the other passages which I have read, which show that property fraudulently conveyed is not considered to remain part of the estate of the deceased, and that those in whose hands it was were treated as executors de son tort. It was also said that in bankruptcy only the trustee may bring proceedings. See a decision of UPJOHN, J., in *Re Crossley* (14) ([1954] 3 All E.R. 296). This is, no doubt, true, but this is not a bankruptcy in the ordinary sense of the word, and if, contrary to my view, the trustee is not the proper party to bring the action, I see no reason why this defect should not be remedied by adding a representative creditor as plaintiff. This objection, in my view, is nothing more than an objection as to parties and can, if necessary, be remedied with the leave of the court which I should be prepared to give. In my judgment, however, it is not necessary and the action will lie as it stands. It follows from what I have said that the trustee succeeds in both action and motion. There is no need to distinguish between the chattels given to the widow and the chattels which remained the husband's property. There may be some which were wedding presents or the like which the respondent can retain, and I propose to give liberty to apply for an inquiry on this question if there are differences which cannot be composed. There will be two orders, one in bankruptcy and one in chancery.

Orders accordingly.

Solicitors: *Sidney Pearlman* (for the trustee); *Robin Howard & Co.* (for the debtor's widow).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Jenkins, Romer and Willmer, L.JJ.), November 5, 6, December 18, 1958.]

Estate Duty—Passing of property—Settled property—Derivative settlement—Income arising under settlement for limited period subjected by deed and order of the court to same trusts as would arise on termination of the limited interest—Whether capital of trust fund or income for remainder of limited interest passed on death of beneficiary during the limited period—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 1, *s.* 2 (1) (*b*).

A trust fund was held on trusts under which W.H. and certain companies were the only persons beneficially interested in the income of the fund for a period of twenty-one years from the death, in 1937, of the testator whose codicil established the trusts of the fund. By virtue of an order of the court sanctioning an arrangement and by virtue of a deed (to which all the before-mentioned beneficiaries and the trustees of the trust fund were parties), made in 1941, it was declared that the income, during the twenty-one year period or until W.H. died within that period, should be held, until the expiration of that period, on the same trusts as were declared by the codicil in respect of the income after the expiration of the twenty-one year period. These trusts, so far as relevant, were as to three-fifths for the benefit of such children of F.J.H. and A.H. as they should direct in writing from time to time. By such a direction three-fifths of the income was to be applied equally between three children of F.J.H. and A.H., of whom G. was one. G. died in 1955, that is, during the twenty-one year period. W.H. survived the twenty-one year period. Estate duty was claimed on the death of G. on the capital of one-fifth of the trust fund under s. 1* or s. 2 (1) (b)* of the Finance Act, 1894.

Held: the settled property that passed on the death of G. was one-fifth of that settled by the deed of 1941, which disposed of the income of the trust fund for the period of twenty-one years from the testator's death (or until W.H.'s death before then, which did not happen); accordingly estate duty was payable under s. 1 of the Finance Act, 1894, on the capital value of that settled income, actuarially ascertained at the death of G., not on the capital value of one-fifth of the trust fund.

Per JENKINS, L.J., after giving examples of derivative dispositions or settlements (see p. 188, letter F, et seq., post) within the principle of the present decision: where in such cases and all comparable cases a limited interest conferred by a settlement has been disposed of by the beneficiary as a distinct item of property in right of his or her beneficial interest in it, any subsidiary limited interests carved out of the limited interest disposed of are to be regarded as taking effect exclusively out of and to the extent of the limited interest and not otherwise (see p. 189, letter C, post).

Dictum of LORD PARKER OF WADDINGTON in *A.-G.* v. *Milne* ([1914] A.C. at pp. 779, 780) explained.

Christie v. *Lord Advocate* ([1936] 1 All E.R. 443) considered.

Appeal allowed.

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* The Finance Act, 1894, s. 1, provides:—"In the case of every person dying . . . there shall . . . be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty' . . ."

Section 2 (1) (b) so far as relevant provides—"Property passing on the death of the deceased shall be deemed to include the property following . . . (b) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest . . ."

Will—Acceleration—Derivative settlement—Income for twenty-one year period subjected by deed and order of the court to the same trusts as would arise on the expiration of that period—Intervening trust for accumulation which did not arise as events happened—Whether interests arising on the expiration of the twenty-one year period were accelerated.

Under a codicil the income of a trust fund was held, during the period of twenty-one years from the death in 1937 of the testator whose codicil established the trust or until W.H. should die, on trusts under which W.H. and certain companies were the only persons beneficially interested. If W.H. died within the twenty-one year period, an event which did not happen, a trust for accumulation during the residue of the period would arise. At the expiration of the twenty-one year period three-fifths of the income (and any accumulations) were to be held during the lives of A.H. and her husband and the survivor of them on trust to apply the income for the benefit of such of their children in such shares as they should direct in writing. In 1941 the court sanctioned an arrangement whereby, subject to the interests of the companies and W.H. in the income of the trust fund during the period of twenty-one years from the testator's death being assigned to the trustees of the codicil, the trustees were authorised to deal with the income during the twenty-one year period on the footing applicable thereto after that period expired. Thus the order empowered, but did not oblige, the trustees to disregard the trust for accumulation that might have arisen if W.H. had died during the twenty-one year period. In 1941, by deed made between the companies, W.H. and the trustees, it was declared that as from the testator's death the income should until the expiration of the twenty-one years from his death be held "on the same trusts as are by the said codicil declared in respect of the income . . . after the expiration of twenty-one years from . . . the testator's death". G., one of the children of A.H. and her husband, died in 1955. At his death one-fifth of the income of the trust fund was applicable for his benefit by virtue of a written direction of A.H. and her husband. The twenty-one year period expired in 1958. On the question whether G.'s interests under the codicil after the expiration of the twenty-one year period had been accelerated by the order and deed of 1941,

Held: the order and deed of 1941 had not accelerated the interests in the income of the trust fund which, by the codicil, were to come into operation on the expiration of twenty-one years from the testator's death, but the deed created new and separate trusts of the income accruing before the expiration of that period, because the deed disposed of that income as a distinct item of property, declared the referential trusts only for the twenty-one year period, and was not in the nature of a surrender or release; moreover the interposition of the trust for accumulation in the event of W.H.'s dying within the twenty-one year period also effectively prevented acceleration (see p. 191, letter I, to p. 192, letter B, post).

[As to the passing of property on death and as to what property passes for the purposes of estate duty, see 15 HALSBURY'S LAWS (3rd Edn.) 10, paras. 14, 15; and for cases on the subject, see 21 DIGEST 7, *21* et seq., and 9, *34* et seq.

As to the acceleration of subsequent interests given by will, see 34 HALSBURY'S LAWS (2nd Edn.) 132, 133, para. 171; and for cases on the subject, see 44 DIGEST 429-431, *2584-2591*.

For the Finance Act, 1894, s. 1, s. 2, see 9 HALSBURY'S STATUTES (2nd Edn.) 348, 350.]

Cases referred to:

(1) *Re Harrison's Settlement*, (1956), 35 A.T.C. 144.

(2) *A.-G.* v. *Milne*, [1914] A.C. 765; 83 L.J.K.B. 1083; 111 L.T. 343; 21 Digest 46, *296*.

(3) *Christie* v. *Lord Advocate*, [1936] 1 All E.R. 443; [1936] A.C. 569; 105 L.J.P.C. 65; 154 L.T. 441; Digest Supp.

(4) *Cowley (Earl)* v. *Inland Revenue Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 21 Digest 7, *27*.

Appeal.

The trustees of a settled fund, " the retained shares ", settled by the codicil, dated June 19, 1935, to the will of the testator, Charles Willis Harrison, who died on July 20, 1937, appealed from an order of DANCKWERTS, J., dated Feb. 28, 1958, declaring that in the events which had happened estate duty had become payable in respect of one equal fifth share of the capital of the settled fund. The trustees asked that this order might be reversed and for a declaration that, in the events which had happened, (i) no estate duty became payable on the death of one Geoffrey Ainsworth Harrison in respect of any property being a share of the settled fund or an interest in any such share; alternatively (ii) the only estate duty so payable was estate duty in respect of a one equal fifth share of the income of the settled fund during a period terminating on the death of one Jeannette Adeline Wightman-Harrison, referred to in the said codicil, or at the expiration of twenty-one years from the death of the testator (whichever should first happen); or (iii) the only estate duty so payable was estate duty in respect of a one equal fifth share of the said income during the joint lives of Francis Joseph Harrison and his wife Anne Harrison and the life of the survivor of them. The grounds of the appeal were as follows. (A) That both before and after the death of Geoffrey Ainsworth Harrison three-fifths of the income of the settled fund were held on a continuing discretionary trust the objects of which before his death were himself and his two sisters and after his death were the two sisters; so that no part of the said three-fifths passed or could be deemed to have passed on his death within the meaning of s. 1 or s. 2 of the Finance Act, 1894. (B) Alternatively, that the only property being an interest in the settled fund which passed or could be deemed to have passed on the death of Geoffrey Ainsworth Harrison was a one-fifth share of the property assigned and settled by a deed dated Oct. 25, 1941, viz., a one equal fifth share of the income of the settled fund until the death of Jeannette Adeline Wightman-Harrison or until the expiration of twenty-one years after the death of the testator (whichever should first happen). (C) Alternatively, that the only property being an interest in the settled fund which so passed or could be deemed to have so passed was a one-fifth share of the income of the settled fund during the period of the joint lives of Francis Joseph Harrison and his wife Anne Harrison and the life of the survivor of them.

The facts and the relevant documents, which are summarised in the headnote, are set out in the judgment of JENKINS, L.J.

John Pennycuick, Q.C., and *K. J. T. Elphinstone* for the trustees.

Milner Holland, Q.C., and *E. Blanshard Stamp* for the Commissioners of Inland Revenue.

Cur. adv. vult.

Dec. 18. The following judgments were read.

JENKINS, L.J.: This is an appeal by the present trustees of the will and codicil dated respectively June 4 and June 19, 1935, of Charles Willis Harrison (hereinafter called " the testator "), who died on July 20, 1937, from an order of DANCKWERTS, J., dated Feb. 28, 1958, whereby it was declared that in the events which had happened estate duty became payable under s. 1 of the Finance Act, 1894, on the death of Geoffrey Ainsworth Harrison (hereinafter called " the deceased ") in respect of a one equal fifth share of the capital of the " retained shares " referred to in the said codicil.

It is unnecessary for the present purpose to refer to any of the provisions of the testator's will. By the codicil thereto the testator (by cl. 1) bequeathed to his

A trustees ten thousand of the ordinary shares held by him in Harrison Trust, Ltd. and ten thousand of the ordinary shares held by him in the Atherton Investment Corporation, Ltd. and directed that his trustees should hold such shares, hereinafter called "the retained shares", on the trusts thereinafter declared concerning the same.

By cl. 2 of the codicil the testator declared the following trusts concerning the B retained shares:

> "My trustees shall until the expiration of a period of twenty-one years from my death or until my daughter Jeannette Adeline Wightman-Harrison shall die whichever shall first happen apply the income of the retained shares in making such grants to the shipping companies mentioned in cl. 5 of my said will or to any two or more of them as for a period of twenty-one C years from my death my trustees are directed to make under cl. 6 of my said will and upon the undertaking in that clause mentioned, and at the expiration of such period or at the death of my said daughter whichever shall first happen my trustees shall hold the retained shares upon trust if my said daughter shall die before the expiration of the said period of twenty-one years to accumulate the income thereof until the expiration of the said period D by investing the same and the resulting income from such investments in any mode of investment authorised by my said will and from and after the expiration of such period of twenty-one years my trustees shall hold two fifths of the income of the retained shares and such accumulations aforesaid if any upon protective trusts as declared by s. 33 of the Trustee Act, 1925, for the benefit of Anne Harrison wife of my nephew Francis Joseph Harrison E for the period of her life Subject thereto my trustees shall during the lives of my said nephew Francis Joseph Harrison and his said wife and the survivor of them apply the residue of the income of the retained shares and such accumulations as aforesaid if any for the benefit of such child or children of my said nephew and his said wife as shall for the time being be living and if more than one in such manner and in such shares as during the life of my F said nephew and his said wife my said nephew and his said wife shall jointly and during the life of the survivor of my said nephew and his said wife the survivor of them shall in writing from time to time direct."

By cl. 3 of the codicil the testator directed that from and after the death of the survivor of his said nephew and his said wife his trustees should hold the retained G shares and such accumulations if any in trust (to put it shortly) for the children or remoter issue of his said nephew and his said wife as they or the survivor of them should appoint with a trust in default of appointment for their children who should attain the age of twenty-one years or being daughters marry under that age.

The testator was survived by his daughter, Jeannette Adeline Wightman-Harrison H (hereinafter called "the daughter") by his nephew, Francis Joseph Harrison (hereinafter called "the nephew") and by the nephew's wife, Anne Harrison (hereinafter called "the nephew's wife"). The nephew died on Dec. 11, 1957. The nephew's wife is still living. They had two daughters who are still living and have attained the age of twenty-one years and one son, namely, the deceased, Geoffrey Ainsworth Harrison, who attained the age of I twenty-one years and who died on Oct. 7, 1955, and on whose death the present claim to estate duty arose. The period of twenty-one years from the death of the testator expired on July 19, 1958, in the lifetime of the daughter, so that the trust under cl. 2 of the codicil for accumulation of the income of the retained shares in the event of her dying before the expiration of such period in fact never became operative.

It will be seen that if the matter had been left to depend on the codicil alone, there could have been no question of any liability to estate duty on the death of the deceased in respect of any share or interest in the retained shares, as on that

footing his only interests would have been an interest in expectancy in the income of the retained shares under the trusts limited to take effect after the expiration of the period of twenty-one years from the testator's death, which by reason of the death of the deceased would have failed or determined before it became an interest in possession (see Finance Act, 1894, s. 5 (3)), and the possibility of an interest under the trusts in default of appointment contained in cl. 3, which could only constitute property for estate duty purposes in the event of both his parents dying without fully appointing the fund. But after the death of the testator an arrangement was carried out by means of the documents and order of the court, to which I am about to refer, and the Commissioners of Inland Revenue claim that what was then done had the effect either (a) of bringing about a passing on the death of the deceased under s. 1 of the Finance Act, 1894, of a one-fifth share in the capital of the trust fund (the view which commended itself to the learned judge); or alternatively (b) of conferring on the deceased an interest ceasing on his death in a like proportion of the trust fund under s. 2 (1) (b), which having regard to s. 7 (7) (b) would have the same result as the primary claim under s. 1.

By an agreement dated July 15, 1940, the parties to which included amongst others the two companies named in cl. 1 of the codicil, the four shipping companies named in cl. 5 of the will, and the daughter, provision was made for the reconstruction of the two companies named in cl. 1 of the codicil, which involved the exchange of the retained shares for shares in two new companies formed to take the place of the two companies named in cl. 1 of the codicil: and it was a term of this agreement that the further agreement to which I am about to refer should be entered into. By a further agreement, also dated July 15, 1940, and made between the four shipping companies of the one part and the daughter of the other part, it was agreed and declared as follows:

> " (1) Mrs. Wightman-Harrison and the shipping companies shall upon the reconstruction agreement becoming absolute execute an instrument in the form of the draft instrument annexed hereto marked VIII or in such other form as may be agreed between Mrs. Wightman-Harrison and the shipping companies and approved by the Chancery Division of the High Court of Justice. This agreement is conditional on: (a) an order being obtained from the Chancery Division of the High Court of Justice sanctioning the exchange provided for by the reconstruction agreement as respects the ten thousand shares in Harrison Trust Ltd. and the ten thousand shares in the Atherton Investment Corporation Ltd. specifically bequeathed by the codicil dated June 19, 1935, of Charles Willis Harrison and (b) the reconstruction agreement becoming absolute and (c) unless Mrs. Wightman-Harrison and the shipping companies otherwise agree an order being obtained from the Chancery Division of the High Court of Justice providing in substance that the income of the said shares and of the investments for the time being representing the same accruing between the date of the death of Mrs. Wightman-Harrison and the expiration of twenty-one years from the date of the death of the testator shall be held upon the trusts which are applicable under the said codicil of the testator to the same income after the expiration of the said twenty-one years."

A deed in the terms of the draft annexed to the last mentioned agreement was in fact executed by the four shipping companies, the daughter and the trustees on Oct. 25, 1941, and as I will in due course be referring to the terms of the deed itself I need not recite those of the draft.

By an order made by SIMONDS, J., on Nov. 1, 1940 (*Re Harrison (decd.)*, (unreported 1940 H. No. 2453) approval was given to the acceptance and retention by the trustees of the will and codicil of the shares to be taken in exchange for the retained shares under the reconstruction agreement, and it was ordered (inter alia):

A "That (subject to the interests of the plaintiff Jeannette Adeline Wightman-Harrison and the defendants the Willis Steamship Co., Ltd. National Steamship Co. Ltd. the Gowland Steamship Co. Ltd. and J. & C. Harrison Ltd. in the income to arise from the said shares settled by the codicil and the investments for the time being representing the same during the period of twenty-one years from the date of the testator's death being assured to the B trustees of the said will) the plaintiffs as such trustees may be authorised to deal with all income so arising during the said period whether or not the plaintiff Jeannette Adeline Wightman-Harrison be living on the footing applicable under the said codicil to income to arise after the expiration of the said period."

By a deed dated Oct. 25, 1941, and made between the four shipping companies C of the first part, the daughter of the second part and the trustees of the third part and expressed to be supplemental to the will and codicil, it was agreed and declared (so far as material for the present purpose) as follows:

"(1) Each of the shipping companies and Mrs. Wightman-Harrison according to their respective rights and interests hereby declare that as from D the date of the testator's death the income of the ten thousand shares in Harrison Trust Ltd. and the ten thousand shares in the Atherton Investment Corporation Ltd. which were bequeathed by the said codicil of the testator and the investments for the time being representing the same shall until the expiration of the period of twenty-one years from the death of the testator or the death of Mrs. Wightman-Harrison whichever shall E first happen be held upon the same trusts as are by the said codicil declared in respect of the income of the said shares after the expiration of twenty-one years from the death of the said testator."

It is not in dispute that the testator made no disposition of any income arising from the retained shares during the period until the expiration of twenty-one F years from the death of the testator or the previous death of the daughter which might not be applied in making the grants to the four shipping companies in accordance with cl. 2 of the codicil, and accordingly that any such unapplied income would belong to the daughter as the only person interested in any property as to which he died intestate. Accordingly the daughter and the four shipping companies were between them entitled to the whole of the income G arising during the period until the expiration of twenty-one years from the death of the testator or the previous death of the daughter, and were thus able to make the disposition of such income effected by the deed of Oct. 25, 1941.

The position from and after Oct. 25, 1941, therefore was that by virtue of the deed of that date the respective interests of the four shipping companies under cl. 2 of the codicil and of the daughter under any intestacy in the income to H arise from the retained shares during the period until the expiration of twenty-one years from the death of the testator or the previous death of the daughter were as from the death of the testator held by the trustees as to two-fifths thereof upon protective trusts for the benefit of the nephew's wife during her life and as to the remaining three-fifths thereof in trust during the lives of the nephew and the nephew's wife and the survivor of them to apply the same for the benefit I of such child or children of the nephew and the nephew's wife as should for the time being be living and if more than one in such shares as the nephew and the nephew's wife or the survivor of them should in writing from time to time direct. It should be added that the deed of Oct. 25, 1941, did not and could not touch the trust for accumulation during the residue of the twenty-one year period imposed by cl. 2 of the codicil in the event of the daughter dying during that period, and that while the order of SIMONDS, J., authorised the trustees to deal with all income arising during the twenty-one year period whether the daughter should be living or not on the footing applicable under the codicil to income

arising after the expiration of such period, so that they could, if they chose, ignore the trust for accumulation, it did not oblige them to do so. A

By a direction in writing dated Feb. 22, 1954, the nephew and the nephew's wife directed that the three-fifths share of income of the retained shares should be paid to their three children in equal shares. By a further direction in writing dated Apr. 27, 1955, the nephew and the nephew's wife directed that the share of income hitherto paid to the deceased should be paid to Messrs. T. Turketine & Co., Ltd. to be utilised by them for the benefit of the deceased. By a further direction in writing dated Apr. 9, 1956, given in consequence of the death of the deceased on Oct. 7, 1955, the nephew and the nephew's wife directed that as from that date the three-fifths share of the income of the retained shares should be paid to their two daughters in equal shares. B

The Commissioners of Inland Revenue claim that inasmuch as the second of the above-mentioned directions was still in force at the time of the death of the deceased he was entitled in possession at the time of his death to one-fifth of the income of the retained shares and consequently that the corresponding proportion of the capital of the retained shares passed on his death under s. 1, the fact that his interest in such income was liable to be terminated at any time by a further direction being immaterial, inasmuch as in the events which happened it was in fact terminated by his death. C D

On the part of the trustees, counsel argued, albeit somewhat faintly, that the deceased was merely one of the objects of a discretionary trust whose death merely put an end to his chance of participating in the income to some unpredictable extent through the exercise of the discretion in his favour, and enhanced the respective chances of the two daughters of so participating by reducing the number of objects of the discretion. If the trust could properly be regarded as a discretionary trust it appears to me that counsel's argument on this part of the case would be unanswerable; but I agree with the learned judge that this is not a discretionary trust in any relevant sense. The nephew and the nephew's wife no doubt had a discretion as to the directions to be given from time to time but it appears to me that their power of giving directions was in the nature of power of appointment and that each direction given was in the nature of a revocable appointment under that power, conferring on each object of the direction (or, in other words, each appointee) a definite interest in the share of income assigned to him or her continuing until revoked by some subsequent direction or until the previous death of the appointee. Counsel for the trustees did not dispute that if this view was right, this branch of his argument could not be supported. I therefore reject the contention that no estate duty at all became payable on the death of the deceased because he was merely an object of a discretionary trust. E F G

It remains to consider the more difficult question in the case, which may be put in this way: granted that some property passed on the death of the deceased within the meaning of s. 1 of the Act, what was the property which then passed and on which duty then became exigible? H

To this question the Commissioners of Inland Revenue propound the short and simple answer that inasmuch as the deceased was at the time of his death in receipt beneficially of one-fifth of the income of the retained shares under the direction then in force, and on his death that share of income ceased to be payable to him and became applicable for the benefit of his two sisters in such shares and manner as the nephew and the nephew's wife or the survivor of them should from time to time direct, the share of capital required to produce that income passed, that is to say changed hands, on his death, with the result that duty became payable on one-fifth of the corpus of the retained shares, the nature of the dispositions by which this actual passing of one-fifth of the capital was brought about being immaterial. It is also argued on the commissioners' side that the combined effect of the deed of Oct. 25, 1941, and of the order of SIMONDS, J., was to accelerate the interests in income limited by the codicil to I

A take effect after the expiration of twenty-one years from the death of the testator and that the deceased should accordingly be regarded as having been at the time of his death beneficially entitled in possession to one-fifth of the income of the retained shares under the trusts of the codicil as so accelerated. Consideration of this branch of the commissioners' argument may conveniently be deferred until a later stage in this judgment.

B On the other hand, it is urged on the part of the trustees that all that passed on the death of the deceased was the principal value, actuarially ascertained as at the date of his death, of a one-fifth share of the income of the retained shares for the period until the expiration of twenty-one years from the death of the testator or until the previous death of the daughter, to which there should, I think, be added the principal value (if any) attributable at the date of the death C of the deceased of one-fifth of any income which in the event of the death of the daughter before the expiration of the twenty-one year period the trustees might think fit to distribute during the residue of that period under the authority conferred by the order of SIMONDS, J., in lieu of accumulating it in accordance with the trusts of the codicil. The principles relied on by the trustees in support of this submission, and their application to the present case, may be thus stated:

D (1) Under s. 1 of the Act duty is leviable

> "upon the principal value ascertained as hereinafter provided of all property . . . settled or not settled, which passes on the death . . ."

of every person dying after the commencement of Part 1 of the Act; and under s. 22 (1) (h) of the Act "settled property" means property comprised in a E settlement.

(2) In this case the claim is clearly concerned with a passing of settled property. In order to make good a claim to duty in respect of the passing on a death of settled property it is necessary (a) to identify the settlement comprising the property which or part of which is alleged to have passed; (b) to identify the property comprised in that settlement; and (c) to show that under the trusts F of that settlement that property, or some part thereof, passed on the death in question.

(3) The relevant settlement in the present case must be either (i) the settlement constituted by the codicil or (ii) the settlement constituted by the deed of Oct. 25, 1941, in conjunction with the order of SIMONDS, J., of Nov. 1, 1940, or (iii) the settlement constituted by the combined effect of the codicil, the deed G and the order.

(4) The property comprised in the settlement constituted by the codicil was clearly the fund of capital represented by the retained shares together with the income arising from that fund. But admittedly there was no dutiable passing of any part of that fund on the death of the deceased under the trusts of the settlement constituted by the codicil taken alone. It is therefore necessary to H look further in order to make good the claim to duty.

(5) If the settlement constituted by the deed and the order is regarded as the relevant settlement, then the property comprised in that settlement, or in other words the property of which it disposed, was (quoad the deed) the income arising from the retained shares during the period until the expiration of twenty-one years from the death of the testator or the previous death of the daughter, and I also (quoad the order) in the event of her death before the expiration of such period, so much of the income arising from the retained shares during the residue of such period as the trustees might think fit to deal with in the manner authorised by the order in lieu of accumulating it in accordance with the trusts of the codicil.

(6) If the settlement constituted by the combined effect of the codicil, the deed and the order is regarded as the relevant settlement the same result follows. The only property disposed of by the joint effect of these instruments was (quoad the codicil and the deed) the income arising from the retained shares during the

period until the expiration of twenty-one years from the death of the testator or the previous death of the daughter and (quoad the order), in the event of her death during the twenty-one year period, so much of the income arising from the retained shares during the residue of such period as the trustees might think fit to deal with as aforesaid. A

(7) The only part played by the codicil was to provide for the benefit of the four shipping companies (and to the extent of any intestacy) for the benefit of the daughter the limited interest in income subsequently disposed of by the deed, and to impose in the event of the daughter dying within the twenty-one year period the trust for accumulation during the residue of that period; and the only part played by the order was to authorise, not direct, the trustees, in that event, to apply the income arising during the residue of that period as if that period had in fact expired, in lieu of accumulating it as directed by the codicil. No trusts giving rise to any passing on the death of the deceased subsisted at his death by virtue of any instrument other than the deed, and the only property on which the deed could operate, or on which it could impose trusts, was the interest of the disposing parties, viz. the interest of the four shipping companies and the daughter in the income arising from the retained shares during the period until the expiration of twenty-one years from the death of the testator or the previous death of the daughter. B C D

The somewhat complicated and unusual nature of the trusts declared by the codicil and the circumstance that the trusts declared by the deed are in favour of the same persons as those entitled under the trusts limited by the codicil to take effect after the expiration of the twenty-one year period, and are actually declared by reference to those trusts, tend to some extent to obscure the point at issue. However, it is in fact a question of considerable general importance, which so far as I can see enters into every case in which there has been a derivative disposition or settlement of a limited interest created by a previous settlement. I will attempt some examples. E

A settles property on B for life with remainder to B's children. B assigns his life interest to C, who dies in the lifetime of B. On the death of C what duty is payable? On the trustees' view of the matter there would pass on the death of C as part of his free estate, property consisting of the residue of B's life interest, the value of which would be actuarially ascertained as at the death of C, and no liability to duty on the corpus of the fund would arise until the death of B, the cesser of whose life interest would attract duty in the ordinary way. On the view contended for by the Commissioners of Inland Revenue, as I understand it, the capital of the entire settled fund would pass on C's death and attract duty accordingly, on the ground that the whole of it then changed hands, besides which duty on the capital of the entire settled fund would become payable in the ordinary way on the death of B, by virtue of the cesser of his life interest under the settlement. It seems to me that this cannot be right. F G

As a further example one may take the case of a settlement of property by A on B for life with remainder to B's children, followed by a settlement by B of his life interest on X for life with remainder to X's children. X dies in the lifetime of B. According to the trustees' contention the property passing on the death of X would be the property in which X's life interest subsisted, i.e., the life interest of B, and the passing on the death of X would be limited to that property the principal value of which would be actuarially ascertained as at the death of X. According to the commissioners' contention, duty would be exigible on the death of X on the capital of the entire settled fund as in the first example, besides being exigible in the ordinary way on the subsequent cesser of B's life interest. Again, it seems to me that this cannot be right. H I

As a third and final example, one may take the case of a settlement by the will of a testator A of his residuary estate in trust for X during the period of twenty-one years from A's death or until the previous death of Y, with a trust for accumulation from the death of Y until the expiration of the twenty-one year

A period in the event of Y dying before such expiration, followed by a life interest to Z with remainder as to capital and income in trust for Z's children at twenty-one or on marriage. X executes a declaration of trust of his limited interest above described under which that limited interest is to be held in trust for Z for life with remainder to Z's children as above. Z dies before the expiration of the twenty-one year period and in the lifetime of Y. In this simplified version of B the present case the commissioners' contention involves the conclusion that on the death of Z there would be a passing not merely of the property comprised in the declaration of trust made in Z's favour by X, i.e., the income to arise from the residuary estate during the period until the expiration of twenty-one years from the death of the testator or the previous death of Y, which was all X had to dispose of, but of the capital of the entire residuary estate. Again, it seems C to me that this cannot be right.

In all three examples and in all comparable cases it appears to me that the true position in fact and in law is that a limited interest conferred on a person by a settlement has been disposed of by the beneficiary as a distinct item of property in right of his or her beneficial interest in it, and that any subsidiary limited interests carved out of the limited interest disposed of are to be regarded as D taking effect exclusively out of and to the extent of the limited interest disposed of and not otherwise. I see no sufficient reason for regarding them in any other way for estate duty purposes.

The commissioners' view would seem to produce somewhat remarkable results. For instance, it would mean that a life tenant could by an appropriate disposition of his life interest in a settled fund subject the capital of the fund, E in which he had no interest whatever, to a claim for duty on the death of any person on whom he might choose to confer a life interest carved out of, and necessarily limited in its duration to the duration of his own life interest. This seems to me absurd.

There is a remarkable dearth of authority on this question, which must have arisen time and again since 1894. The authors and editors of three well-known F works on death duties appear on the whole to favour the trustees' view (see DYMOND (12th Edn.), pp. 52, 88; HANSON (10th Edn.), p. 178; GREEN (4th Edn.), p. 53), though it is right to add that some doubt is expressed in DYMOND (at p. 88). All three works state the practice of the office to be in accordance with the trustees' view; but the question must depend on the true construction of the relevant legislation which is a matter for the court. The point was touched on in *Re* G *Harrison's Settlement* (1) ((1956), 35 A.T.C. 144 at p. 145) by UPJOHN, J., who was disposed to favour the view of the trustees in the present case.

Counsel for the trustees founded one of his arguments on the provisions as to settlement estate duty in s. 5 (1) and (2) of the Finance Act, 1894, which though repealed (with an immaterial saving in favour of the parties to a marriage) by s. 14 and s. 18 of the Finance Act, 1914, may properly be looked at for any aid H that they can give to the construction of s. 1 of the Act of 1894. As I understood this argument, it was to the effect that if s. 5 (1) and (2) of the Act had remained in force the Crown could not have claimed settlement estate duty on the death of the deceased on the ground that the property, in the shape of the capital of the retained shares, passed on the death of the deceased under the disposition constituted by the deed of Oct. 25, 1941, because that deed plainly effected no I disposition of such capital, and that such a claim could only have been made good on the footing that the property which passed under that disposition was the limited interest in income to which it related. I may have misapprehended this argument, but it seems to me to come perilously near to begging the question, and I prefer to found myself on the more general considerations advanced by counsel for the trustees.

On the commissioners' side reference was made to s. 15 (1) and (2) of the Finance Act, 1896, as mitigating the hardship alleged by counsel for the trustees to ensue from the method of assessment contended for by them. This is an

argument to which I can attach little weight. The exemptions afforded by the two sub-sections referred to are restricted in scope and would cover only a small proportion of the possible types of derivative settlements.

We were referred to the well-known case of *A.-G.* v. *Milne* (2) ([1914] A.C. 765) for the observations made by LORD PARKER OF WADDINGTON (ibid., at pp. 779, 780). This case was introduced into the discussion by counsel for the trustees in connexion with his argument concerning s. 5 of the Act of 1894; but I refer to it for LORD PARKER'S general statement as to the effect of s. 1 (ibid., at p. 779). It is in these terms:

> "The first section of the Finance Act, 1894, imposes in the case of every person dying after Aug. 1, 1894, a duty, called 'estate duty', leviable on the capital value of all property which passes on the death of such person. The expression 'property passing on the death' includes, according to the definition contained in s. 22 of the Act, property passing either immediately on the death or after any interval either contingently or certainly, and either originally or by way of substitutive limitation, and the expression 'on the death' includes 'at a period ascertainable only by reference to death'. The expression 'passing on the death' is not further defined, but is evidently used to denote some actual change in the title or possession of the property as a whole which takes place at the death. For the purpose of this section it is absolutely immaterial to whom or by virtue of what disposition the property passes."

I cannot regard this general statement as meaning that where duty is claimed under s. 1 on property comprised in a settlement on the death of a deceased person, on the ground that "some actual change in the title or possession of the property as a whole" took place on his death under the trusts of the settlement, it is not necessary to ascertain what property was comprised in the settlement, and what was the nature of the trust relied on as bringing about the dutiable change in title or possession on the death in question.

We were also referred to *Christie* v. *Lord Advocate* (3) ([1936] 1 All E.R. 443), where the daughter of the testator was entitled under his will to one-tenth of the income of the trust fund thereby constituted reducible to a maximun of £600 per annum on the death of her mother. The daughter having died in the life-time of her mother, it was held that there was a passing on the death of the daughter of the one-tenth of the capital of the trust fund corresponding to the one-tenth share of income to which she was entitled at the time of her death and an argument that what should be valued for estate duty purposes was the right to one-tenth of the income during the life of the widow, reducible on her death to an annual sum not exceeding £600, was rejected. That case gives effect to a well-established principle which I would not challenge for a moment; but it does not appear to me to touch the question as to the property comprised in the settlement which is the substantial point at issue here.

I would, however, quote this passage from the speech of LORD RUSSELL OF KILLOWEN in *Christie* v. *Lord Advocate* (3) (ibid., at p. 447) as having some bearing on the present case:

> "As LORD MACNAGHTEN stated in *Earl Cowley* v. *Inland Revenue Comrs.* (4) ([1899] A.C. 198), the Finance Act, 1894, has no regard to the destination of the property which passes, or to the interest of the deceased, which, if it be a limited interest, can never pass. It was held in that case that on the death of the first equitable tenant for life under a settlement of real estate, the property which passed on his death was neither the interest of the first tenant for life, nor the interest of the second tenant for life who succeeded him, but the settled property. That case in my opinion is conclusive, and establishes that on the death of Mrs. Norman the life-renter of one-tenth, the settled property (which for this purpose is the capital fund which

produced the income to which she was entitled) passed on her death within the meaning of s. 1 of the Act."

That passage appears to me to be wholly consistent with the trustees' contention in the present case. That which passed on the death of the deceased was the settled property, and the settled property was (quoad the deed) the income arising from the retained shares during the twenty-one year period or until the previous death of the daughter, and (quoad the order), in the event of the daughter's death during that period, so much (if any) of the income arising during the residue of that period as the trustees might think fit to distribute under the authority given by the order in lieu of accumulating it under the trusts of the codicil.

I now turn to counsel for the commissioners' argument that the combined effect of the order and the deed was to accelerate the interests in the income of the retained shares which according to the trusts of the codicil were only to come into operation after the expiration of the twenty-one year period. For the purposes of this part of his argument, counsel, while not admitting, was not concerned to dispute the general principles regarding derivative settlements propounded by the trustees. He said (in effect) that whatever the position might be in other cases, in the present case the result of the deed and the order was to put the deceased in immediate possession of the income interest to which, under the terms of the codicil, he was only to become entitled at the expiration of the twenty-one year period and in the event of his being alive at such expiration. Under the deed (so the argument proceeded) the deceased by virtue of the referential trust thereby declared became entitled in possession to such share of the income of the retained shares during the twenty-one year period or until the previous death of the daughter as should from time to time be directed to be applied for his benefit. Under the codicil he was already entitled in expectancy to a like interest in the income of the retained shares after the expiration of the twenty-one year period, provided he should then be living. It is true that under the codicil there was interposed between these two interests a trust for accumulation of the income from the death of the daughter until the expiration of the twenty-one year period in the event of her death during that period. But this trust was virtually abrogated by the order which authorised the trustees in lieu of accumulating the income to deal with it on the footing applicable to income to arise after the expiration of the twenty-one year period. In the result, therefore, the deceased was at the time of his death entitled in possession to a share (fixed by the current direction at one-fifth) of the income of the retained shares during the lives and life of the nephew and the nephew's wife and the survivor of them, defeasible on his death in the lifetime of such survivor and liable also in the event of the death of the daughter during the twenty-one year period to be temporarily defeated during the residue of that period if and to the extent to which the trustees might in that event decide to accumulate the income during the residue of that period notwithstanding that the order authorised them not to do so. The risks of defeasance or interruption attending the deceased's income interest as above described do not affect the claim to duty on a share in the capital of the trust fund corresponding to the share of income to which (no matter for what period) the deceased was entitled in possession at the time of his death (see *Christie* v. *Lord Advocate* (3)).

I cannot accept this argument. There was nothing here in the nature of a surrender or release. The deed as it appears to me disposed of the income of the retained shares during the twenty-one year period or until the previous death of the daughter as a distinct item of property, and on the footing that during the twenty-one year period or until the previous death of the daughter and no longer the referential trust was to take effect with respect to that property by virtue of that deed. It is in my view quite wrong to disregard the trust for accumulation or to invert the true position in regard to it by treating it as a trust for accumulation of so much (if any) of the income as the trustees might decide. It remained (in the contingency of the daughter's death during the

twenty-one year period) a trust for accumulation save in so far as it might be displaced by any decision of the trustees to distribute without regard to it in reliance on the authority given by the order. It appears to me that the interposition of the trust for accumulation effectively prevented the transaction from bringing about the suggested acceleration and precluded any merger or coalescence of the trusts declared by the codicil after the expiration of the twenty-one year period and the trusts declared by the deed in respect of the income arising during the twenty-one year period or until the previous death of the daughter. Some colour is lent to this part of counsel for the commissioners' argument by the circumstance that the trustees of the deed were the same persons as the trustees of the testator's will and codicil; but this cannot, in my view, affect the legal position.

For the reasons which I have endeavoured to state, I accept the trustees' contention as to the property comprised in the settlement and passing on the death of the deceased, and reject the commissioners' contention as to acceleration.

As to the commissioners' alternative claim under s. 2 (1) (b), no such claim can arise on the footing that s. 1 is applicable, and in any case a claim on that basis, if it could be entertained, could only produce the same result on the footing that the trustees' contention as to the property comprised in the settlement is accepted, as I think it should be.

For these reasons I would allow this appeal.

ROMER, L.J.: I agree. I am quite unable to accept the trustees' contention that Geoffrey Harrison (" the deceased ") was a member of a discretionary class consisting of himself and his two sisters and that accordingly no income passed or could be deemed to have passed on his death within the meaning of s. 1 or s. 2 of the Finance Act, 1894. I agree with the reasons stated by JENKINS, L.J., in his judgment, which I have had the advantage of reading, for rejecting this submission and have nothing to add with regard to it.

On the principal question it is, I think, clear that on the death of the deceased on Oct. 7, 1955, estate duty became payable under s. 1 of the Act. The reason for this is that the share of income from the retained shares which he was enjoying at his death became payable thereafter to other persons, viz. his sisters or one of them. As a result there was a passing of property on his death and the only question is—of what did that property consist? The learned judge held that the property was one-fifth of the capital of the retained shares settled by the testator's codicil; the trustees contend in effect that it was one-fifth of the property settled by the deed of Oct. 25, 1941.

The terms of this deed were not precisely in accord with the order made by SIMONDS, J., on Nov. 1, 1940. That order required that the interests of Mrs. Wightman-Harrison (" the daughter ") and the steamship companies in the income to arise from the shares settled by the codicil and the investments for the time being representing the same during the period of twenty-one years from the date of the testator's death should be " assured " to the trustees of his will. The deed of Oct. 25, 1941, did not assure these interests to the trustees but took the form of a declaration by the daughter and the companies that the interests should be held by the trustees on the referential trusts therein mentioned, which were in fact the trusts authorised by the order. It seems to me, however, that this discrepancy between the order and the deed is immaterial.

The " interests " dealt with by the order and the deed were the beneficial interests of the companies in the income of the retained shares during a period of twenty-one years from the testator's death or until the daughter's earlier death and such interest as the daughter herself might have in the same income, and for the same period, as the testator's sole next of kin. This income was the only relevant property which the companies and the daughter possessed and they settled it by the 1941 deed. Immediately prior to the execution of this deed the deceased had no beneficial interest whatever in this property of the daughter and

A the shipping companies. The property was certainly income, payable for an uncertain but limited period, of the retained shares but (apart from the "authority" conferred on the trustees by the 1940 order) the deceased's only beneficial interest in any income of the retained shares was expectant on his surviving the testator by twenty-one years. It seems to me that the effect of the deed of Oct. 25, 1941, was not to accelerate the deceased's interest in the retained shares under B the codicil trusts but to create new interests under a separate trust, which had not existed previously, of segregated property. The fact that the limitations of the income declared by that trust were, by reference, the same as those of the codicil trusts under which the deceased would have become entitled had he lived long enough does not prevent the limitations from constituting a separate and independent trust, and I think that they did. If that view be right it follows, C as it seems to me, that the beneficial interest which the deceased was enjoying at the time of his death was an interest arising under the deed and not an interest arising under the codicil. What then was the "property" in which that interest subsisted? The answer to that question must surely be the property settled by the deed, namely, the income of the retained shares of which the daughter and the shipping companies were the beneficial owners. This answer would perhaps D have been still clearer if the "assurance" envisaged by the 1940 order had been effected and if such assurance had been made in favour of trustees other than the trustees of the testator's will and codicil; but in my opinion the transaction, even in the form which it took, sufficiently established a sub-settlement of "property" which, although deriving in a sense from the codicil settlement, had an independent existence of its own.

E Counsel for the trustees submitted in effect that the expression "settled property" in s. 1 of the Finance Act, 1894, is referable to property which is settled by a disposition and which passes under that disposition; and that the section should in this regard be confined to property passing under a disposition on the death of a person entitled under that disposition. It appears to me that, at all events in general, this contention is well founded and that, applying it to F the present case, the disposition under which the deceased was entitled at his death to one-fifth of the income of the retained shares was the deed of 1941 and not the testator's codicil. The fact that but for the provisions of the codicil the deed could have had no effective operation has, as it seems to me, no relevant materiality. On these grounds it appears to me that the trustees are entitled to a declaration in the terms of para. (ii) of the notice of appeal*, subject to the point, G to which my Lord has referred, that regard should also be had to the benefit which might have accrued to the deceased during the twenty-one year period under the authority conferred on the trustees by the order of Nov. 1, 1940.

The considerations which, if correct, defeat a claim to duty under s. 1 of the Act on the value of one-fifth of the corpus of the retained shares also, by parity of reasoning, are an answer to the Crown's alternative claim based on s. 2 (1) (b).

H **JENKINS, L.J.:** I am authorised by WILLMER, L.J., to say that he concurs in the judgments which have just been delivered.

Appeal allowed. Leave to appeal to the House of Lords granted.

Solicitors: *Gerrish & Co.* (for the trustees); *Solicitor of Inland Revenue.*

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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* The terms of this paragraph are at p. 182, letter C, ante.

STONE *v.* STONE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Collingwood, J.), October 31, November 7, 1958.]

Divorce—Domicil—Domicil of choice—Serving soldier—American married in England—Posted abroad, but spending all periods of leave in England—Intention to settle in England permanently.

The parties were married in England in November, 1950, and there was one child of the marriage. The husband's domicil of origin was the United States of America and he was a soldier in the United States Army. The husband and wife lived together in Durham until October, 1951, when the husband was posted to Korea and then to Japan. The wife remained in Durham, though not at the matrimonial home. In 1955 the husband had been posted in Paris, where he was still serving. In November, 1957, he came to England on leave and stayed at premises in Mitcham. Since then he had spent all his periods of leave there, having a key to the premises and a room there, where he kept his possessions. While he was in England on leave in 1957, he decided to remain in England for the rest of his life, to purchase a house in England when he was able to do so, and not to return to the United States. He had retained that intention ever since 1957. The husband now petitioned for divorce on the ground of the wife's desertion. On the question whether he was domiciled in England at the time when the suit was instituted, so that the court would have jurisdiction to entertain the suit,

Held: the husband could acquire a domicil of choice in England although he was in the military service of the United States and stationed in France (*Donaldson* (*or Nichols*) v. *Donaldson* ([1949] P. 363) and *Baker* v. *Baker* (S.A.L.R. [1945] A.D. 708) applied), and, though he was a soldier on leave in England when he first formed the final intention to abandon his domicil of origin and establish a new one in England, he had nevertheless established such an intention (dictum of LORD CHELMSFORD in *Bell* v. *Kennedy* (1868), L.R. 1 Sc. & Div. at p. 319, applied) and had acquired a domicil of choice in England.

[Editorial Note. The decision in the present case may be considered with that in *Cruickshanks* v. *Cruickshanks* ([1957] 1 All E.R. 889) as regards proving that a soldier has acquired a domicil of choice in the country where he is stationed.

As to change of domicil by persons in military service, see 7 HALSBURY'S LAWS (3rd Edn.) 22, para. 41, note (g); and for cases on the subject, see 11 DIGEST (Repl.) 341, 342, *122-129*.**]**

Cases referred to:

(1) *Donaldson* (*or Nichols*) v. *Donaldson*, [1949] P. 363; [1949] L.J.R. 762; 11 Digest (Repl.) 342, *130*.

(2) *Baker* v. *Baker*, S.A.L.R. [1945] A.D. 708.

(3) *Bell* v. *Kennedy*, (1868), L.R. 1 Sc. & Div. 307; 11 Digest (Repl.) 329, *39*.

Petition.

This was a petition by the husband for divorce on the ground of the wife's desertion. The suit was undefended. The first question for the court was whether the husband was domiciled in England at the time when the suit was instituted. The facts are stated in the judgment.

A. Richard Ellis for the husband.

Cur. adv. vult.

Nov. 7. **COLLINGWOOD, J.,** read the following judgment: This is a husband's petition for dissolution of marriage on the ground of his wife's desertion. The suit is undefended. The first question which arises is that of domicil.

The husband's domicil of origin was the United States of America. He first came to England in 1944, when he was in the Merchant Marine Service. In 1946 he joined the United States Army and on Nov. 11, 1950, he married the respondent at the parish church in Beamish in the county of Durham. At the time of the marriage the husband's domicil was that of his origin, namely Ohio in the United States of America. The parties cohabited at Stanley in Durham, and a child was born on Jan. 5, 1951. In October, 1951, the husband was posted to Korea, the wife remaining at Stanley, though not at the matrimonial home. The husband was subsequently posted to Japan, and in 1955 to Paris where he is still serving. In November, 1957, he was in England on leave from Paris and he stayed at an address at 17, Menship Road, Mitcham. Since then all his periods of leave have been spent there. His leave amounts to thirty days a year, plus an additional three days each month. He has a room at that address, a key to the premises, and he keeps his civilian clothing and possessions there. His evidence is that in November, 1957, he decided to remain in England for the rest of his life and not to return to the United States, and that he has ever since had that intention. He spoke of this determination to three witnesses who have been called, and he also expressed the intention of purchasing a house in England when he was able to do that.

It is now clear, though it was at one time doubted, that a member of the armed forces of one country can acquire a domicil of choice in the country in which he is stationed, that is, where he is compulsorily resident, and whence he is liable to be removed at any moment by superior orders, provided that he has established the necessary residence and formed the necessary intention to settle there when he becomes a free agent. The authority for that is to be found in *Donaldson (or Nichols)* v. *Donaldson* (1) ([1949] P. 363). The facts of that case were as follows. A Royal Air Force officer was divorced by his first wife in Florida while he was stationed there on active service. The wife later petitioned for divorce in the English courts, alleging by her petition that the respondent had committed adultery with a woman with whom he had gone through a ceremony of marriage subsequent to the American decree. The respondent by his answer denied adultery, alleging that his marriage with the petitioner had already been dissolved. At the hearing of the suit it was held that, although the respondent had been on active service, he had not been prevented thereby from acquiring a domicil of choice abroad; that he had acquired a domicil of choice in Florida at the time of the American decree; and that, as that decree was therefore valid, there was in consequence no subsisting marriage between the petitioner and the respondent. I refer to two passages from the judgment of ORMEROD, J. After referring to the circumstances leading to the American decree of divorce, he said ([1949] P. at p. 364):

> "The case resolves itself into a comparatively short point. If the parties were domiciled in Florida in June, 1944, the American decree was a valid decree and the marriage was dissolved then. If on the other hand the parties were not domiciled in Florida in June, 1944, it was not a valid decree, and the marriage still remains in being. The question, therefore, which I have to decide is whether or not the parties were domiciled in Florida at that time. The respondent gave evidence that he went to Florida in the course of his service duties, he took a great liking to the country, and arranged for his wife and children to join him there. He said that at that time he had no intention of leaving the service, to which he was devoted, and that he intended to remain in it. But he also told me that when it became clear that his marriage was breaking up and that there would in all probability be a divorce, he considered from his knowledge of service conditions in peacetime that although he would probably be allowed to remain in the service, he would have lost his chance of promotion. I am satisfied that view was genuinely formed by the respondent."

The second passage is where ORMEROD, J., went on to say ([1949] P. at p. 365): A

> "Counsel for the respondent must satisfy me that at the time of this divorce, which was in June, 1944, the respondent was not only residing in Florida but had made up his mind to reside there permanently and had thereby acquired a domicil of choice. The fact that his service duties would take him away from Florida for some considerable time—probably so long as he was serving—would not as I see it affect the matter so long as he was then living in Florida and had determined to continue to live there when he could; and I am satisfied having heard his evidence that this is what he did." B

In the present case I accept the husband's evidence that in 1957 he conceived the desire to remain in England and formed the intention to make this country his permanent home. I am satisfied that this intention has persisted ever since, and that but for the exigencies of his service he would be living here permanently. Owing to these exigencies his residence here is restricted to the periods of his leave. On these findings, in my opinion, the case is covered by the decision of ORMEROD, J., in *Donaldson* v. *Donaldson* (1), because it seems to me that, once it is held that a domicil of choice can be acquired in a country in which his residence is enforced, and from which he may be removed at any time, then, a fortiori, he can acquire such a domicil elsewhere. C D

I know of no authority on this point in the English courts, but there is a decision of the Appellate Division of the Supreme Court of South Africa, *Baker* v. *Baker* (2) (S.A.L.R. [1945] A.D. 708). In that case the trial judge found as a fact that an officer in the Indian Army had decided in 1939, when he was in England, that he would settle in South Africa, but before he could leave England he was recalled to India on active service. In 1943 he obtained leave and went to South Africa where he spent three weeks at Cape Town with his wife, who had gone there after her husband's departure from England. This was the husband's first visit to South Africa. In 1945 he spent another leave there, but at no time was he ever stationed in South Africa. The trial judge held that the husband had not proved that he was domiciled in the Cape Province, inasmuch as he was a soldier on active service. The Court of Appeal held that, as the evidence showed that the husband, when he arrived in Cape Town, came with the intention of making his home there, notwithstanding the fact that he knew that during the continuation of hostilities he would be generally absent therefrom, it had been proved that he had acquired a domicil in the Cape Province. It is to be noted that the question whether a soldier can acquire a domicil of choice in the country in which he is stationed was considered but was not decided. *Donaldson* v. *Donaldson* (1) had not then been decided. E F G

In the present case it is true that, at the time when the husband first formed the final and deliberate intention to abandon his domicil of origin and establish a new one in this country, he was here as a soldier on leave. That is, of course, an element to be taken into consideration in deciding whether he did, in fact, firmly decide to make his home here. But, accepting as I do that he then formed that intention, then the character and duration of his residence here becomes immaterial: see *Bell* v. *Kennedy* (3) ((1868), L.R. 1 Sc. & Div. 307 at p. 319, per LORD CHELMSFORD). For these reasons I find that the husband was at the institution of this suit domiciled in England. The desertion by the wife in 1952 having been proved, there will be a decree nisi with an order for reasonable access to the child of the marriage (who is with the wife), such access to be agreed between the parties and, in default of agreement, to be referred to chambers. H I

Decree nisi.

Solicitors: *Henry Pumfrey & Son* (for the husband).

[*Reported by* A. T. HOOLAHAN, ESQ., *Barrister-at-Law.*]

Re PARISH OF SOUTH CREAKE.

[Norwich Consistory Court (The Chancellor (J. H. Ellison, Esq.)), July 28, September 22, December 12, 1958.]

Ecclesiastical Law—Prayers for the dead—Proposal to erect memorial window in church, with inscription "Pray for the soul of" the deceased—Whether faculty would be granted.

The vicar of a parish wished to erect, to the memory of his mother, a stained glass three-light window in the south aisle of the parish church with the inscription "Pray for the soul of [E.S.]" (the mother) at the lower left-hand corner of the window. The form of the memorial was approved by the parochial church council and the diocesan advisory committee, and a petition for a faculty authorising the erection of the memorial was presented by the vicar and the churchwardens of the parish. The petition was not opposed. On the question whether the inscription "Pray for the soul of [E.S.]" was permissible,

Held: (i) prayers for the dead were not contrary to law unless they necessarily involved the doctrine of purgatory, which was forbidden by the Church of England (see p. 205, letter F, post); in the present case the inscription was intended as a prayer that the soul of the departed might rest in peace until the time of the resurrection, following the teaching of the early Church, and was lawful.

Breeks v. *Woolfrey* ((1838), 1 Curt. 880) applied.

(ii) the court had, therefore, a discretion and would exercise its discretion by granting a faculty absolutely in respect of the window and a faculty until further order in respect of the proposed inscription.

Principle of *Pearson* v. *Stead* ([1903] P. 66) followed.

Egerton v. *All of Odd Rode* ([1894] P. 15) not followed.

Dupuis v. *Ogbourne St. George Parishioners* ([1941] P. 119) distinguished.

[As to the practice of praying for the dead, see 13 Halsbury's Laws (3rd Edn.) 337, para. 769.]

Cases referred to:

(1) *Dupuis* v. *Ogbourne St. George Parishioners*, [1941] P. 119; 2nd Digest Supp.

(2) *Re St. Mark's Church, Lincoln*, [1956] 2 All E.R. 579; [1956] P. 336; 3rd Digest Supp.

(3) *St. John the Evangelist, Clevedon* (*Vicar & Churchwardens*) v. *All having Interest*, [1909] P. 6; 19 Digest 446, *2883*.

(4) *Breeks* v. *Woolfrey*, (1838), 1 Curt. 880; 163 E.R. 304; 19 Digest 331, *1400*.

(5) *Egerton* v. *All of Odd Rode*, [1894] P. 15; 19 Digest 450, *2945*.

(6) *Pearson* v. *Stead*, *Stead* v. *Pearson*, [1903] P. 66; 19 Digest 261, *435*.

(7) *Capel St. Mary, Suffolk* (*Rector & Churchwardens*) v. *Packard*, [1927] P. 289; *subsequent proceedings*, [1928] P. 69; Digest Supp.

(8) *Martin* v. *Mackonochie*, *Flamank* v. *Simpson*, (1868), L.R. 2 A. & E. 116; 37 L.J.Eccl. 17; 18 L.T. 245; 19 Digest 223, *6*; *varied*, P.C., sub nom. *Martin* v. *Mackonochie*, (1868), L.R. 2 P.C. 365; 5 Moo. P.C.C.N.S. 500; Bro. Ecc. Rep. 103; 38 L.J.Eccl. 1; 19 L.T. 503; 33 J.P. 35; 16 E.R. 603; 19 Digest 450, *2948*.

(9) *Martin* v. *Mackonochie* (*Second Suit*), (1874), L.R. 4 A. & E. 279; 32 L.T. 569; 39 J.P. 260; 19 Digest 440, *2815*.

(10) *Re Lapford*, [1954] 3 All E.R. 484; [1955] P. 205; 3rd Digest Supp.

(11) *Vincent* v. *St. Magnus the Martyr, etc.* (*Rector & Churchwardens*), [1925] P. 1; Digest Supp.

(12) *Re St. Peter, St. Helier, Morden, & Re St. Olave, Mitcham*, [1951] 2 All E.R. 53; [1951] P. 303; 2nd Digest Supp.

Petition.

By a petition dated Sept. 9, 1957, the vicar and churchwardens of the parish of South Creake, in the Diocese of Norwich, sought a faculty authorising them to erect in the south aisle of the parish church a stained glass window bearing the inscription " Pray for the soul of Elizabeth Smith " (the mother of the vicar). The petition was not opposed.

J. P. Winckworth, the petitioners' solicitor*.

H. S. Ruttle as amicus curiae.

Cur. adv. vult.

Dec. 12. **MR. CHANCELLOR ELLISON** read the following judgment: The promovents of this unopposed faculty suit are the Reverend Leonard Hugh Michael Smith, the vicar of the parish of South Creake, together with the churchwardens of the parish who, by their petition dated Sept. 9, 1957, pray the court to grant a licence and faculty authorising them to erect in the south aisle of the parish church a stained glass window bearing an inscription in terms " Pray for the soul of Elizabeth Smith ". Elizabeth Smith was the mother of the incumbent petitioner. The design of the proposed window is unexceptionable. It has the recommendation of the diocesan advisory committee, and on artistic grounds and aesthetically, it would be a memorial in every sense worthy of installation in what is a fine and beautiful parish church. The only questions which I have to decide are whether this particular inscription is permissible in law and, if so, whether in the exercise of my discretion it can be approved in this case, and, perhaps, more generally, whether similar words, which, in substance, constitute an exhortation to pray for the soul of a named deceased person, ought to be inscribed on a sacred edifice comprising part of the fabric and permanent structure of this church.

There must first be mentioned one or two matters of background. When the papers were brought into the registry I referred myself to the case law on this subject and my reaction at that stage was that the courts had held that such inscriptions were not necessarily unlawful, provided that no notion of the Romish doctrine of purgatory was implicit in the words or circumstances, but it was to be observed that in every reported case, for one or another variety of reasons, faculties had always been refused. I was much impressed by the strong views adverse to the user of such words expressed by SIR PHILIP BAKER-WILBRAHAM, Dean of the Arches, in *Dupuis* v. *Ogbourne St. George Parishioners* (1) ([1941] P. 119). At the same time I was aware that, more recently, faculties permitting such inscriptions had on a few occasions been granted by certain chancellors, and, indeed, during the hearing, the promovents produced originals or copies of four such examples (and referred to a fifth case pending) and relied on these as precedents. But they are unreported cases and I have no knowledge of the circumstances, if the cases were heard in open court, or whether the faculties were decreed in chambers.

As in this present age of church life it is not always desired or essential to pursue such legal questions to their utmost limits, the promovents were requested to consult the diocesan advisory committee in case there could be worked out some suitable alternative and unexceptionable words of inscription; but, although some were discussed, nothing resulted which was commendable or otherwise acceptable. Subsequently I offered to see the incumbent petitioner and members of his family in chambers but for reasons of their own that invitation was declined, and there the matter stood for several weeks until the promovents' solicitors applied for the case to be set down for hearing in the open court list. Thereupon citation duly issued, but no one entered appearance to oppose.

* Under s. 2 (1) (d) of the Solicitors Act, 1957 (re-enacting similar provisions of earlier Acts), solicitors are empowered to practise before the ecclesiastical courts.

The evidence was heard in Norwich on July 28, 1958, and the legal arguments were concluded on Sept. 22, 1958, on which occasion, for convenience and with the consent of the promovents, the court sat in the Royal Courts of Justice in London. Although this suit is unopposed, because questions of importance and difficulty were involved I invited Dr. H. S. Ruttle of counsel to attend as amicus curiae in order to assist the court on questions of both law and discretion. There is recent precedent for the ecclesiastical court taking this course in an unopposed case: see *Re St. Mark's Church, Lincoln* (2) ([1956] 2 All E.R. 579). I am much indebted to Dr. Ruttle for his valuable services. Both his lucid arguments and those of Mr. Winckworth, who appeared for the promovents, have enabled me to reach the conclusions at which I have arrived.

The facts proved in the case may be stated shortly. The Reverend Mr. Smith has been vicar of South Creake since 1944, and his mother, to whom the memorial is to be erected, lived and died there. Although the churchwardens are co-petitioners, the vicar is the moving spirit behind what is very much a family memorial. He is supported by his brother and three sisters, who do not actually live in this diocese, and he is finding the major part of the money to pay for the execution of the works. The proposed inscription will be quite small and the intention is to place this at the lower left-hand corner of what will be a three-light window in the south aisle of the church. During his evidence the vicar told me that an inscription in such terms as "In loving memory of . . ." or "Remember before God . . ." would not be unacceptable, but subsequently his advocate expressly withdrew any such alternative, for reasons which I do not know, but later conceded that the longer form "Pray for the repose of the soul of Elizabeth Smith" would be accepted if the court thought that preferable. The parochial church council are unanimous in their approval as also are the diocesan advisory committee who have recommended the proposals for faculty. The reaction in the parish is important on another aspect of the case to which I shall refer later. I have borne in mind the warning contained in *Dupuis* v. *Ogbourne St. George Parishioners* (1) that it is often difficult for the parochial church council of a small country parish to stand out on such a matter. That is also my own experience and a feature much in point where a vicar after some years' incumbency desires to install his own family memorial. One has to look deeper behind a bare resolution of assent and a lack of appearance to the citation. But this particular matter has been under consideration and common knowledge for a long while and no element of disquiet on the part of any parishioner has become manifest or reached my ears through the registry, the archdeacon, or from any other source. I have visited the church which is excellently cared for. The services of worship and the ornamentation appeared to follow what is commonly known as a strong anglo-catholic tradition.

Mr. Winckworth's first submission was designed to show that prayers for the souls of the departed are in conformity with the doctrines and constitutions of the Church of England and that, although they may be used in the Church of Rome, such prayers are not necessarily referable to the Roman Catholic doctrine of purgatory. I was referred to Bingham's Antiquities of the Christian Church, Book 15, ch. 3 (contained in vol. 5 of 1834 revised edition), where the subject is treated. In Chapter 3, which is concerned with the Oblation and Consecration Prayers, the author investigates, in s. 16, the various grounds on which the ancient Church offered prayers for the departed. I do not propose to lengthen this judgment by any detailed examination of that treatise. Suffice it to say that Bingham, an author recognised for his consummate learning, arrives at six conclusions and reasons, some of which are based on the content and tenor of the public offices of the Church where she prayed for saints, prophets, holy men and even the Virgin Mary herself, and some are based on the prayers and authorship of St. Ambrose, St. Cyprian, St. Crysostom, Dionysius and many others. He argues that they are general reasons for praying for the departed

without the least intimation of their souls being tormented in the temporary pains of purgatory. The emphasis is on the belief that the soul is in but an imperfect state of happiness until the resurrection, when man shall be established in an endless state of consummate happiness and glory, and the Church pays particular respect to praying that the soul shall rest in peace until there is attained that blessed estate of a glorious resurrection. Bearing in mind the facts of the present case, one is reminded of St. Augustine's discourse in respect of his mother Monicha and his prayer:

> "Let her therefore rest in peace with her husband; and do Thou, my Lord God, inspire all those thy servants that read this, to remember thy handmaid Monicha at thy altar . . . "

That prayer is quite inconsistent with any notion of purgatory and BINGHAM's conclusion seems, indeed, to overthrow that doctrine. This is a submission based on the theology. It is, of course, no part of this court's duty to examine the doctrine of purgatory from a theological aspect and say whether or no it is supported by Scripture, because article 22 of the Articles of Religion expressly states that the doctrine is not grounded on any warranty of Scripture but is repugnant to the word of God, and by that law I am bound to govern myself. In this, one of the Queen's courts, I have to decide the question before me in the light of the law applicable and not on the merits of what may be rival or controversial theological opinions. I must exclude from my mind personal views, or what may be my own churchmanship or that of the lord bishop of the diocese, and other irrelevant matters. It is salutary to remember those apt words of CHANCELLOR CHADWYCK-HEALEY in *St. John the Evangelist, Clevedon (Vicar & Churchwardens)* v. *All having Interest* (3) ([1909] P. 6, at p. 9):

> "... I wish it to be quite understood that I am not importing into the questions at issue any personal views or feelings of my own. I have no right at all to do that. I have simply to decide according to law, to interpret to the best of my ability the authorities that are binding upon me, and to consider the decisions of courts of co-ordinate jurisdiction which, though not binding upon me, are entitled to the respect which one court properly pays to the decisions of another. I say this because it is very frequently thought that the personal opinions of a chancellor of a diocese may to some extent be permitted to influence his decision. This is a great mistake. He who occupies the position of a judge is obliged to proceed judicially and to disregard any personal views."

The first leading case is *Breeks* v. *Woolfrey* (4) ((1838), 1 Curt. 880), where the words "Pray for the soul of J. Woolfrey", with the added reminder "It is a holy and wholesome thought to pray for the dead" (2 Maccabees XII, verse 46), were inscribed on a tombstone in the parish churchyard of Carisbrooke, the same being erected by the widow of Joseph Woolfrey who was a lady of the Roman Catholic faith. It was a criminal suit tried at first instance in the Court of Arches pursuant to letters of request from the chancellor of the diocese of Winchester. As such the onus of proof lay on the promotor, who was the incumbent, to prove the principle ingredient in the alleged offence cited, namely, that the widow had

> "... unlawfully ... caused to be erected, a certain tombstone ... and a certain inscription to be made thereon, contrary to the articles, canons and constitutions, or to the doctrine and discipline of the Church of England."

The whole question in the case, which was fully argued at Doctors' Commons by some of the most eminent learned counsel of the time, was whether it was proved that such words comprising a prayer for the departed were necessarily unlawful. In a lengthy reserved judgment the Dean of the Arches, SIR HERBERT JENNER,

dealt in turn with the three arguments put forward by the promotor. First, it was said that such prayers are so necessarily connected with the doctrine of purgatory as to form part of it and they must therefore violate the Articles of Religion, article 22, which expressly condemns that doctrine. But as to this the learned dean was satisfied that prayers for the departed were offered up by the primitive Church long antecedent to the doctrine of purgatory being received by the Church of Rome, even assuming, as some authors indicated, that the notion of purgatory was first introduced about the fifth or sixth century, although it does not appear to have been declared as doctrine until the general council of Florence in 1438. The primitive church prayed for the dead certainly from the third century and at a later period the Church of England had taken no different view of the subject than was held by the primitive church, and, accordingly, it was impossible to say that such prayers inextricably formed part of the Romish doctrine. Secondly, it was said that, because prayers for the departed had formerly been contained in the Primer of Henry 8, in the burial and Communion services, and also in the first Prayer Book of Edward 6, but were subsequently omitted from the revised second Prayer Book of Edward 6, it followed that by being so expunged they became inconsistent with the doctrines of the Reformed Church. The first of those Prayer Books was established by the first "Act for Uniformity of Service and Administration of the Sacraments throughout the Realm" (2 & 3 Edw. 6 c. 1*), the preamble to which obliged the appointed compilers to draw up one uniform convenient and meet order of common prayer, among other things, having respect "to pure Christian religion [and] to the usages in the primitive Church." The second and revised Prayer Book, which omitted such prayers, was established by the Second Act of Uniformity (the Act of Uniformity, 1551-2 (5 & 6 Edw. 6 c. 1)), and the learned dean held that the apparent changes in the liturgy then introduced were not because anything in the former Prayer Book offended against the doctrines of the Church of England, but by reason of those events which are referred to in the preamble to the second Act of Uniformity, which preamble, no doubt, reflected the experiences and sentiments of the legislature. It states that there had

> ". . . arisen in the use and exercise of the aforesaid common service in the Church heretofore set forth [that is to say, in the first Prayer Book] divers doubts for the fashion and manner of the ministration of the same, rather by the curiosity of the ministers and mistakers than of any other worthy cause; therefore, as well for the more plain and manifest explanation thereof, as for the more perfection of the said order of common service, in some places where it is necessary to make the same prayers and fashion of service more earnest and fit to stir Christian people to the true honouring of Almighty God . . ."

The second Prayer Book contained no express prohibition, nor any notion that such prayers implied a necessary belief in the doctrine of purgatory: it merely omitted prayers for the departed and was silent on the subject. Sir Herbert Jenner's opinion was that the purpose of the omission was simply to avoid confusion by reason of the Roman Catholic religion having come to use prayers for the dead in support of their doctrine of purgatory. A similar view is expressed in Palmer's Origines Liturgicae†, namely, that the probable reason for omission was in case such prayers might be abused, to the prejudice of the uneducated classes, to the support of the Roman Catholic doctrine of purgatory. The third contention was that such prayers for the dead were contrary to article 35 of the Articles of Religion, which article declares as follows:

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* The Act of Uniformity, 1548.

† See Palmer's Origines Liturgicae, ch. 4, s. 10, which deals with "Reasons for omitting prayers for the departed" (pp. 94-97 of Vol. 2 of the 3rd Edn. (1839)).

" The second Book of Homilies, the several titles whereof we have joined under this article, doth contain a godly and wholesome doctrine, and necessary for the times . . ." A

Among the titles is that " Of prayer," and the Third Part of the Homily Concerning Prayer contains these words*:

" Let these and such other places be sufficient to take away the gross error of purgatory out of our heads; neither let us dream any more, that the souls of the dead are any thing at all holpen by our prayers . . ." B

That homily does not state that praying for the dead is unlawful: it merely says that it is useless; that prayers for the departed could have no effect in altering their condition, and that in the word of God we have no commandment so to do. It discourages the practice. SIR HERBERT JENNER'S conclusion was that there is no prohibition against such prayers. Had it been the opinion of the framers of the articles and canons of the Church that such prayers were opposed to the Scriptures, they could have expressly declared their illegality. Certainly they had every opportunity but did not do so. The authorities went no further than to show that the Church discouraged the practice. Save in so far as the decision of SIR HERBERT JENNER in *Breeks* v. *Woolfrey* (4) may later have been explained or qualified by the Court of Arches, it is, of course, binding on me in this court and provides the legal basis on which I have to proceed. For the purposes of this judgment, it is not necessary for me to refer to the other several issues raised in that case. C D

Breeks v. *Woolfrey* (4) was considered nearly sixty years later in *Egerton* v. *All of Odd Rode* (5) ([1894] P. 15), an unopposed faculty suit promoted by an incumbent who desired to erect in the parish church a memorial window, coupled with a Latin inscription to this effect: " Of your charity pray for the soul of [H.F.] . . . deceased . . . and for the soul of [J.H.C.] . . . deceased." Nothing is said in the report as to the opinion of the vestry in regard to the proposal. The headnote reads: E F

" Held, that the Ordinary ought not in his discretion to sanction the introduction into the church of any inscription of which the above words would form part . . ."

In the first place, at the beginning of his judgment the learned Chancellor, the Reverend Dr. ESPINELL ESPIN, said ([1894] P. at p. 17) that the inscription seemed to go beyond the one in *Breeks* v. *Woolfrey* (4), but I am unable to see why he took that view. The only difference was the prefix " Of your charity ", but he did not make any reference to that in the rest of the judgment. He also pointed out that in *Breeks* v. *Woolfrey* (4) the court did not sanction the inscription but only refused to order the tombstone which bore it to be removed. That is, of course, quite true, but it is equally true that the reason was that such words were not unlawful but merely to be discouraged. CHANCELLOR ESPIN'S third point was that, not only had prayers for the dead not been restored in the second Prayer Book of Edward 6, but they had remained omitted from the further revisions in 1603 and 1661, and he was not prepared to sanction such prayers on an inscription when the formularies of the Church had not specifically authorised them and when they were so closely associated with the doctrine of purgatory. Because of what I have to say hereafter it is as well if I quote the latter part of the judgment verbatim. The learned chancellor said ([1894] P. at p. 21): G H I

" Some devout persons have earnestly hoped that such intercessions for the departed should be re-inserted in the Liturgy as are found in the Prayer Book

* These words appear at the bottom of p. 299 of the 1840 edition of HOMILIES, printed by the Oxford University Press.

of 1549 in the following words:—'We commend unto Thy Mercy, (O Lord), all other Thy servants which are departed hence from us with the sign of faith, and now do rest in the sleep of peace: grant unto them, we beseech Thee, Thy mercy and everlasting peace; and that at the day of the general resurrection we and all they which be of the mystical body of Thy Son may be altogether set on His right hand', etc. But this reinsertion has not yet taken place, and the reason for caution is clear. Out of the ancient prayers for the departed grew the notion that they need to be succoured by the prayers of the living; hence that they are undergoing sufferings and even torments, from which the prayers of survivors might assist to relieve them, and so by rapid steps we reach the Romish doctrine condemned by the Twenty-Second Article. Prayers for the dead are unquestionably associated in the popular mind with the later exaggerations referred to in that Article, and it may be added that a bequest made for such prayers being offered would be void by the common law of the realm as superstitious. And therefore, though in private such prayers may be offered, as conformable to the ways of the Primitive Church, certainly from the second century and downwards; and however deeply we may sympathise with sentiments of affectionate respect in the bereaved . . . it does not seem to belong to a court of first instance to do what the formularies of the Church have abstained from doing; it is not for me here to authorise directly the setting up in a place of public worship of an inscription demanding the prayers of the worshippers for the souls of certain persons who have departed this life."

It seems to me that Chancellor Espin was not exercising his discretion in the light of any particular facts and circumstances of the case, as the headnote of the report would lead one to believe, but was refusing a faculty for reasons of principle which would seemingly apply whenever such words of inscription were proposed. For my part, I do not find those principles easily reconcilable with the ratio decidendi in *Breeks* v. *Woolfrey* (4). To say that a faculty ought not to be granted because prayers for the dead had not been expressly authorised in the current liturgy imports a restraint much stronger than Sir Herbert Jenner was prepared to infer from the history of the compilation of those liturgies when he observed that Parliament had every opportunity to impose an absolute prohibition but had not done so. I take the view that the decision in *Egerton* v. *All of Odd Rode* (5) goes further than *Breeks* v. *Woolfrey* (4) requires. A decision of the Consistory Court of Chester is, of course, not binding on me in this court, but I must at least bear in mind that one eminent learned chancellor was prepared to take that strong line against the use of any such words of inscription to be placed within a church.

The next case to which I must refer is *Pearson* v. *Stead*, *Stead* v. *Pearson* (6) ([1903] P. 66), a decision of Dr. Tristram in the Consistory Court of Ripon. Before him were cross-petitions relating to a tombstone recently erected in the parish churchyard of Spofforth bearing an inscription "Of your charity pray for the repose of the souls of . . ." and then naming two sons of George and Ann Stead, followed by this sentence: "On whose souls sweet Jesus have mercy." Having reviewed the evidence and referred to both *Breeks* v. *Woolfrey* (4) and *Egerton* v. *All of Odd Rode* (5), the learned chancellor held that the rector had established that the tombstone had been placed in the churchyard without his previous consent and the inscription had not been submitted to him for his approval, and that, therefore, he had made out a good case for the granting of a faculty authorising him to remove the tombstone from the churchyard. Dr. Tristram said that the court would only be justified in granting a confirmatory faculty for the tombstone to remain if the court were satisfied that the inscription was in all respects unobjectionable, and that the burden of proof in faculty proceedings lay on the petitioner, Stead, to satisfy the court that this was so. The principle on which the learned chancellor approached

the question is stated ([1903] P. at p. 73), and I will again quote the passage verbatim because Dr. Ruttle urged on me that it is the correct approach in faculty proceedings and that which I ought to follow in the present case. DR. TRISTRAM said (ibid.):

> "The court before granting a . . . faculty should be satisfied upon the evidence before it that beyond all doubt the inscription was composed and placed on the tombstone with the sole intention (as was the practice amongst the early Christians long prior to the introduction of purgatory) of soliciting prayers that the souls of the deceased persons named on the tombstone might have rest and quiet in the interval between death and the resurrection, and that at the last day they might receive the perfect consummation of bliss, and that the inscription was so expressed and intended to be expressed as not to include or appear to include an invitation for prayers for the relief of the souls of the deceased persons named from the pains of purgatory . . ."

The learned chancellor, on the particular facts of the case, refused to grant a confirmatory faculty and ordered the tombstone to be removed from the churchyard. It was proved that the Stead family were all of the Roman Catholic faith; the inscription had been specially composed by Stead's mother; it was admitted that it was the usual inscription placed on tombstones erected to members of their faith and that they intended it as a Roman Catholic inscription. An added feature in the case was the existence of considerable differences of opinion in the parish. Indeed, at a special vestry meeting attended by twenty-three parishioners, twelve persons had voted for a resolution supporting the rector's application to secure the removal of the tombstone and eleven had voted against, nine of whom were Roman Catholics. Put shortly, it was a memorial which directly involved purgatory.

In 1927 the subject-matter came before the Court of Arches once again, this time under the faculty jurisdiction, in *Capel St. Mary, Suffolk* (*Rector & Churchwardens*) v. *Packard* (7) ([1927] P. 289), an appeal from the decision of CHANCELLOR NORTH in the Consistory Court of St. Edmundsbury and Ipswich. It was but one of the many questions which arose in that complicated case and concerned exhortations to pray for the souls of certain named departed, the exhortations being displayed on notices affixed in the church porch. The alleged illegality of these notices was very much part and parcel of another allegation that the rector taught the doctrine of purgatory. The Dean of the Arches, SIR LEWIS DIBDIN, decided that part of the case on the short ground that the question of the rector's teaching was a matter of disciplinary action by the bishop, if, indeed, the rector taught purgatory (and the rector strongly denied this), and, moreover that such notices were not an appropriate subject for faculty at all. His further observations ([1927] P. at p. 306), though not strictly necessary for his decision, are of interest in indicating a changing outlook and emphasis. Following *Breeks* v. *Woolfrey* (4), he pointed out that nowhere does the Church of England forbid prayers for the departed, although hitherto such prayers had not, of recent times, been included in the public services; but that even that would not be the case in future if the Revised Prayer Book —then in 1927 known as the Deposited Prayer Book—should receive the sanction of law. I shall have something more to say about that aspect.

The most recent of the reported decisions, *Dupuis* v. *Ogbourne St. George Parishioners* (1), was an appeal in an unopposed case from a decision of CHANCELLOR WEBB in the Consistory Court of Salisbury. The subject-matter comprised a memorial tablet which the widow, the promovent, desired to erect on the chancel wall of the parish church bearing an inscription "Of your charity pray for the soul of Charles George Dupuis, C.B.E. . . . sometime churchwarden of this parish." The learned chancellor's judgment is not in the reports but Mr. Winckworth referred me to a copy which he had obtained from the Salisbury

Diocesan Registry. The parochial church council had unanimously approved the erection of the tablet and so had the diocesan advisory committee in respect of the design, but they had questioned the wording of the inscription. Holding that prayers for the departed are not contrary to the doctrine and discipline of the Church of England, the learned chancellor nevertheless, in the exercise of his discretion, refused a faculty on the ground that such words of inscription were closely associated in the minds of many devout and intelligent members of the Anglican Communion with the doctrine of purgatory and might well convey to such persons a suggestion of that doctrine and thus be a cause of distress and offence. He appears to have adopted the same line of reasoning as did Chancellor Espin in *Egerton* v. *All of Odd Rode* (5). On appeal it is to be observed that counsel argued that *Egerton's* case (5) was wrongly decided and that the court should concern itself more with the views of the parishioners rather than with those of devout Christians generally. The Dean of the Arches, Sir Philip Baker-Wilbraham, treating the question as purely one of discretion and expressing his agreement with much of the arguments put forward, nevertheless declined to interfere, because the appellants in a discretion case had to show that the chancellor had erred in principle and had exercised his discretion on an entirely wrong basis before any appeal could succeed, and this they had failed to do. Regarding the facts of the case, the learned Dean of the Arches drew attention to a letter written by the then Archdeacon of Wilts saying:

> "This form [of words] will not be approved [by the diocesan advisory committee]. I think the reason is that such a form has long been out of use and is no longer natural to English folk."

But what the Dean of the Arches described as the governing consideration ([1941] P. at p. 121) was that the case involved the erection of a wall tablet, which was never a matter of right but always one of privilege, and a privilege which should be sparingly conceded because it behoved those who asked for such a privilege to be careful to see that there was nothing in what they proposed which might cause offence to others.

All these authorities clearly show that prayers for the departed are not contrary to law unless they necessarily involve the doctrine of purgatory, which doctrine is expressly prohibited by the Church of England. Such prayers may, therefore, have one of two objects. On the one hand, their purpose may be to relieve the souls of the departed from the pains of purgatory according to Romish teaching, in which event they are to be forbidden. On the other hand, they may comprise prayers that the souls of the departed may rest in peace until the time of resurrection, following the teaching of the early Church and primitive Christians. Which is the object in any case is a question of fact to be determined from the nature of the particular words themselves and the inferences to be drawn from all the surrounding circumstances relating to their proposed user. In the present case I am quite satisfied that those seven words "Pray for the soul of Elizabeth Smith" do not necessarily denote that her soul is suffering the torments of purgatory, and nor do any of the promovents have in mind notions of purgatory or intend to teach or publish directly or indirectly that Romish doctrine.

Having come to that first conclusion, it then follows that this court has a discretion in the matter, and the next question is whether I should exercise that discretion so as to enable this particular inscription to be used in present circumstances. The older authorities emphasise that, although no notion of purgatory may be involved, nevertheless such prayers ought to be discouraged, and certainly the courts seem to have actively discouraged their use in inscriptions both within the church itself and on tombstones situated in the churchyard. Mr. Winckworth submitted that the jurisdiction is to some extent pastoral and that discretion should be exercised in the light of two elements, first, the evidence in the particular case, and, secondly, the knowledge of the situation

as it exists in the Church of England at the time. In *Egerton's* case (5) it will be remembered that one of CHANCELLOR ESPIN'S reasons for not granting a faculty was that prayers for the souls of the departed were closely and unquestionably associated with the doctrine of purgatory in the popular mind. Similarly, in *Dupuis'* case (1) CHANCELLOR WEBB'S sole ground for refusing the faculty was that the words were, in his opinion, closely associated with that doctrine in the minds of many devout and intelligent members of the Anglican Communion and might well convey some notion of purgatory to such persons and cause them distress. It is further to be remembered that in neither case was there any opposition or difficulty raised in the parish and the promovents were, respectively, an incumbent of a parish and the widow of a former churchwarden. On the other hand, in *Pearson* v. *Stead* (6), DR. TRISTRAM does not appear to have concerned himself unduly with the popular mind or the possible reaction of either the so called uneducated classes or intelligent persons generally, and his test was simply whether the promovent could prove, and the onus of proof is not light, that the sole intention was to solicit prayers that the soul of the person named might rest in peace until resurrection, and that the prayer was expressed in words accordingly. In so far as there is a distinction between these two approaches, I unhesitatingly prefer to follow *Pearson* v. *Stead* (6). In my opinion, the argument that a certain form of prayer used by the ancient Church, and not unlawful in the eyes of the Church of England, should, nevertheless, not be permitted on an inscription solely because the same might possibly offend the feelings of some unascertained persons is one which requires some limitation, otherwise one might arrive by stages at the extreme position of the susceptibilities of a section of the populace determining what part of the Church's teaching and prayer is acceptable. If, as, I think, is apparent, the appeal in *Dupuis'* case (1) was dismissed on the short ground that the lower court had not erred in principle and the appellate court was not prepared to substitute its own discretion for that of the court of first instance, it would seem that some of the other observations of SIR PHILIP BAKER-WILBRAHAM were not strictly necessary for his decision. Be that as it may, I think that the present case is also distinguishable. There the diocesan advisory committee had indicated their disapproval of the inscription, but the present members of the Norwich Diocesan Advisory Committee have not tendered me any such advice; on the contrary, they have recommended the whole of what is proposed for faculty. Also, it is very true that different considerations apply to memorial tablets. Indeed, in the Diocese of Norwich, like that of Salisbury, restrictions in such cases are necessarily much more rigid than where an inscription is but ancillary to a gift such as a window, which is of lasting benefit to the Christian community and which beautifies the church.

The other aspect, namely, knowledge of the situation as it exists in the Church of England at the time, is closely linked with the question of discouragement against soliciting prayers for the departed. That is very much a matter of degree, and both the method and amount of discouragement which is considered desirable will inevitably vary according to the situation in any particular diocese, or in the church as a whole, at any one point of time. It is my belief that the average churchman today approaches the subject-matter under consideration with much less intensity than did his forebears. I think that that is not so much because of lack of interest as by reason of a shifting emphasis on what is really important in church life and worship and what is but of secondary importance. The Church's fundamental teaching and the Bible from which God's message flows stand firm throughout the ages, but the importance and emphasis to be placed on particular prayers or words will vary from one generation to another. It is quite understandable why, during a period closer to the Reformation and at the time of the sixteenth century revisions of the Prayer Book, controversy could range around prayers for the departed, or for that matter, over anything

which might inadvertently be confused with Romish doctrine. *Breeks* v. *Woolfrey* (4) preceded the passing of the Church Discipline Act, 1840, by two years, and between then and the decision in *Egerton's* case (5) further fervent controversy had occupied the time of the courts in connexion with the ornaments rubric and the precise methods and manners of celebration of the Holy Communion: see, for example, *Martin* v. *Mackonochie*, *Flamank* v. *Simpson* (8) ((1868), L.R. 2 A. & E. 116) and *Martin* v. *Mackonochie* (*Second Suit*) (9) ((1874), L.R. 4 A. & E. 279). It is equally understandable that in the second half of the twentieth century, churchmen should have a very different approach, standing as they do on the threshold of an atomic age with all its vast unknowns, and it is hardly surprising if inscriptions comprising prayers for the departed do not generate the same anxieties and disquiet in their minds as formerly was the case. The present is perhaps an age of greater toleration and liberalism in both thought and worship. I have referred* to the observations of Sir Lewis Dibdin in *Capel St. Mary, Suffolk* (*Rector & Churchwardens*) v. *Packard* (7), in connexion with the then Deposited Prayer Book, and it surprised me that during the course of this case so little reference was made to the Revised Prayer Book of 1928. Mr. Winckworth read one short passage, but, to my mind, much more pertinent is the intercession and prayer "for the whole state of Christ's Church" in the alternative Order of the Communion, which is comparable to the prayer "for the whole state of Christ's Church militant here in earth" contained in the established Prayer Book of 1662. In the prayer in the 1928 alternative Order of the Communion, one finds these words inserted:

> "And we commend to Thy gracious keeping, O Lord, all Thy servants departed this life in Thy faith and fear, beseeching Thee to grant them everlasting light and peace."

The history of the Prayer Book of 1928 and its approval by substantial majorities in the Convocations of Canterbury and York and in the House of Lords but its rejection by the House of Commons are too well known to need discourse here. It seems to me that, had that Prayer Book received the royal assent, the full circle would have been completed and a prayer similar to that originally contained in the first Prayer Book of Edward 6 of 1549 (and referred to by Chancellor Espin in *Egerton's* case (5)) but thereafter omitted would once again have been restored into an established liturgy. In *Re Lapford* (10) ([1954] 3 All E.R. 484), Sir Philip Baker-Wilbraham discussed the effect of the 1928 Prayer Book, although in connexion with quite a different matter, namely, the reservation of the Sacrament, a practice held to be illegal by reason of the terms of the rubrics of the established Prayer Book, but one which was made possible by the rubrics contained in the 1928 alternative Order for the Communion of the sick and which, subject to certain limitation, was to be permitted at the discretion of the diocesan bishop. Although the 1928 rubrics have never become strictly part of the law, the outlook of the clergy was quickly revealed by the resolution of the Convocations of 1929, since when reservation of the Sacrament has frequently been authorised by the bishops to meet present-day needs and is practised with impunity. I have digressed on to this topic purely as an example illustrative how the Prayer Book of 1928 throws the most valuable light on the existing situation in the Church of England and present-day outlook and thought directly relevant to the degree of discouragement which a court ought to apply in today's circumstances.

Furthermore, during the course of this case there was held the Lambeth Conference, the theme of whose message was reconciliation. A sub-committee, consisting of some thirty-four bishops of the Anglican Communion specially charged to consider the Book of Common Prayer, saw fit to include in their report a separate section relating to prayers for the departed. After pointing out that no Prayer Book, not even that of 1662, can be kept unchanged for ever

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* Ante, at p. 204, letter H.

as a safeguard of established doctrine, they drew attention to the two points of view. On the one hand, the more conservative Evangelical tradition was content to think of the faithful departed as having immediately entered into joy and felicity and viewed any idea of growth, purification or spiritual progress after death with misgiving. On the other hand, the vast majority of people in the Anglican Communion (and I draw special attention to their use of the adjective " vast "), while rejecting all conceptions of purgatory, are quite sure that the fact of death does not remove the need for and the appropriateness of praying for the departed that God will fulfil his perfect will in them, and that such prayer is both natural and right. For this reason the Church formularies deliberately left room for both points of view with varying degrees of emphasis and varying forms of expression, and they recommended that, in any future Prayer Book revision, it would be wise to provide that prayer for the departed should be made permissive. Such are the conclusions of the Lambeth Conference, representative of the whole Anglican Communion.

After examining this subject in much detail, I have come to the conclusion that I can approach the question of discretion here much more liberally in this part of the twentieth century than was considered desirable by some chancellors in times past. In my judgment, it is no longer necessary to apply the faculty jurisdiction in a way which actively discourages the use of an inscription advocating prayers for the soul of the departed to the same degree as was apparently thought fit formerly. Circumstances are very different now from then, and the courts were, no doubt, wise in their generation to move cautiously. The older decisions of the nineteenth century must be examined in the context of the conditions on which they were reached. Nowhere is that more clearly stated than by Sir Lewis Dibdin, the Dean of the Arches, in *Vincent* v. *St. Magnus the Martyr, etc.* (*Rector & Churchwardens*) (11) ([1925] P. 1), and Chancellor Garth Moore adopted and based his decision in *Re St. Peter, St. Helier, Morden & Re St. Olave, Mitcham* (12) ([1951] 2 All E.R. 53) on the same principles. I am by no means saying that in this court a faculty will always be granted permitting such words of inscription as those in the present case. Each case must be judged on its own particular merits in the light of all the circumstances, and the tradition of a particular church and parish has an important bearing. Moderation is as essential where this type of inscription is proposed, as in every sort of faculty matter. The faculty jurisdiction is the safeguard against any excesses.

Weighing everything up as best I can, I am satisfied that the present is a case where I am able to grant the faculty sought, and I think that the proper form of decree is for a faculty absolutely in respect of the window and a faculty until further order in respect of the inscription to be placed thereon. As regards the precise wording of that inscription, the promovents were prepared to accept as an alternative the longer form including the words " the repose of ", if I thought that that was desirable. I think that that longer form would, indeed, be preferable, as it makes it more apparent that the purpose is what is said, namely, that the soul of Elizabeth Smith may rest in peace. But I shall not insist on this and am prepared to leave it to the choice of the incumbent, and the faculty can pass the seal as soon as he has decided and informed the registry which of the two forms of words he would like the inscription to take.

Decree accordingly.

Solicitors: *Trollope & Winckworth* (for the petitioners).

[*Reported by* A. T. Hoolahan, Esq., *Barrister-at-Law.*]

FRANKLAND *v.* CAPSTICK.

[COURT OF APPEAL (Lord Evershed, M.R., Sellers, L.J., and Roxburgh, J.), November 19, 20, 1958.]

Agriculture—Agricultural holding—Tenancy—Termination of tenancy—Compensation claim—Notice—Validity—Name of landlord's son erroneously inserted for that of landlord in notice—Agricultural Holdings Act, 1948 (11 & 12 *Geo.* 6 *c.* 63), *s.* 70 (2).

At the request of the tenant of an agricultural holding, an agreement for the surrender of the tenancy was signed by the landlord (E.P.F.) and by the tenant, the date of the surrender being May 14, 1957. After the termination of the tenancy there were negotiations between the tenant and R.F., the landlord's son, in regard to a claim by the landlord for dilapidations. The tenant knew that the son was acting as the landlord's agent in the matter. The negotiations having been unsuccessful, a notice, dated July 12, 1957, signed by the solicitors who had acted for the landlord and purporting to be a notice under s. 70 (2)* of the Agricultural Holdings Act, 1948, was served on the tenant. The notice began with these words: "As solicitors for your landlord [R.F.] . . ." On the question whether the notice was bad because of the mistake in the landlord's name,

Held: the notice of July 12, 1957, was a valid notice under s. 70 (2) of the Agricultural Holdings Act, 1948, because, the description of the landlord being ambiguous, the ambiguity should be resolved in favour of the validity of the notice, as the mis-statement was only a technical error which had in no way affected the tenant's rights or her understanding of the proceedings.

Dictum of ROMER, L.J., in *Mountford* v. *Hodkinson* ([1956] 2 All E.R. at p. 20) applied.

Dictum of LORD GREENE, M.R., in *Hankey* v. *Clavering* ([1942] 2 All E.R. at p. 313) distinguished.

Appeal allowed.

[As to notice of claims on the termination of agricultural tenancies, see 1 HALSBURY'S LAWS (3rd Edn.) 324, para. 673.

As to the sufficiency of the signatures of agents to statutory notices, see 1 HALSBURY'S LAWS (3rd Edn.) 148, para. 352, note (u).

For the Agricultural Holdings Act, 1948, s. 70, see 28 HALSBURY'S STATUTES (2nd Edn.) 80.]

Cases referred to:

(1) *Mountford* v. *Hodkinson*, [1956] 2 All E.R. 17; 2 Digest (Repl.) 14, *62*.

(2) *Ward* v. *Scott*, (1950), 66 (pt. 1) T.L.R. 340; 2 Digest (Repl.) 14, *61*.

(3) *Doe d. Armstrong* v. *Wilkinson*, (1840), 12 Ad. & El. 743; Arn. & H. 39; 4 Per & Dav. 323; 5 J.P. 45; 113 E.R. 995; 2 Digest (Repl.) 9, *27*.

(4) *Hankey* v. *Clavering*, [1942] 2 All E.R. 311; [1942] 2 K.B. 326; 111 L.J.K.B. 711; 167 L.T. 193; 31 Digest (Repl.) 599, *7170*.

Appeal.

This was an appeal by the landlord, Dr. Edward Percy Frankland, from an order made by His Honour JUDGE FORBES at Appleby County Court on Apr. 22, 1958, on a Special Case stated by an arbitrator for the opinion of the court under the Agricultural Holdings Act, 1948. The question referred to the court was whether a notice, dated July 12, 1957, which was served on the tenant and which purported to be a notice under s. 70 (2) of the Act of 1948, was a valid notice under the sub-section. The notice, which was signed by solicitors who had acted for the landlord in previous matters, started with the words: "As solicitors for your landlord Raven Frankland . . ." Raven Frankland was the son of the landlord and had been acting as his father's agent in negotiations with the tenant

* The terms of s. 70 (2) are printed at p. 210, letter E, post.

prior to the service of the notice. The county court judge held that the notice was bad because in the notice the solicitors were informing the tenant that Raven Frankland was her landlord.

J. G. Shorrock for the landlord.

I. H. M. Jones for the tenant.

LORD EVERSHED, M.R.: I will ask SELLERS, L.J., to deliver the first judgment.

SELLERS, L.J.: The tenancy which gave rise to this dispute, existing between the landlord, Dr. Edward Percy Frankland, and Mrs. Clara Capstick, the widow of the original tenant, had been brought to an end by a surrender: the date of the surrender was May 14, 1957. Following that, negotiations had taken place relative to a question of dilapidations. Section 70 (1), (2) of the Agricultural Holdings Act, 1948, provides:

> "(1) Without prejudice to any other provision of this Act, any claim of whatever nature by the tenant or landlord of an agricultural holding against his landlord or tenant, being a claim which arises—(a) under this Act . . . and (b) on or out of the termination of the tenancy . . . shall . . . be determined by arbitration . . .
>
> "(2) No such claim as aforesaid shall be enforceable unless before the expiration of two months from the termination of the tenancy the claimant has served notice in writing on his landlord or tenant, as the case may be, of his intention to make the claim. A notice under this sub-section shall specify the nature of the claim, and it shall be a sufficient specification thereof if the notice refers to the statutory provision, custom or term of an agreement under which the claim is made."

As appears from the Case, a claim was made by the landlord in respect of dilapidations. Prior to that there had been negotiations to try to settle this matter after the termination of the tenancy, and the negotiations had been carried on on the side of the landlord by the landlord's son, who was throughout acting on behalf of his father. The negotiations did not result in an agreement, and a notice was served under s. 70 (2) of the Act of 1948. It was in these terms:

> "As solicitors for your landlord Raven Frankland of Bowberhead, Ravenstonedale in the county of Westmorland We hereby give you notice pursuant to s. 70 of the above Act of his intention to make against you certain claims arising out of the termination of the tenancy of the above holding."

Then there was a schedule setting out the details of dilapidations. The notice was dated and was signed by the solicitors on behalf of the landlord. The solicitors had likewise been acting for the landlord with regard to prior matters. When the widow (referred to hereinafter as "the tenant") took steps to have this question arbitrated and it came before the arbitrator, the point was taken that that notice was a bad notice, and the question was referred to the court by way of a Special Case. The short point for consideration was whether the notice which had been served under s. 70 was an invalid notice because of the wording which was used—"As solicitors for your landlord Raven Frankland of Bowberhead, Ravenstonedale in the county of Westmorland". That wording was a mistake, for Raven Frankland was the son of the landlord and the landlord was Dr. Edward Percy Frankland. The county court judge took the view that that was a bad notice. He construed the notice in this way—that the solicitors were saying that they were solicitors and gave the tenant the notice on behalf of Raven Frankland of Bowberhead and further that they were informing the tenant

A that Raven Frankland was her landlord. From that decision this appeal has been brought.

Counsel for the landlord submitted that the decision of the county court judge was erroneous and that the approach to the matter was to be derived from the decision of this court in *Mountford* v. *Hodkinson* (1) ([1956] 2 All E.R. 17). That was a decision under another section of the Agricultural Holdings Act, 1948,
B namely, s. 24 (1), and it was held that

> " although a document alleged to be a counter-notice under the Agricultural Holdings Act, 1948, s. 24 (1), was not to be construed with great strictness, yet it must be so expressed, if effect were to be given to it, as to indicate a clear intention to invoke the right which the Act gave . . ."

C We were particularly referred to the observations of ROMER, L.J. ([1956] 2 All E.R. at p. 20), where he said:

> " It is quite clear that although according to the actual language of s. 24 (1) a tenant who wants to serve a counter-notice at all must serve a counter-notice in writing requiring that the sub-section shall apply to the
D notice to quit, the tenant can plainly indicate his intention that he desires to take advantage of the sub-section without exactly following that language. The question is how far he can depart from it."

A little later, after referring to *Ward* v. *Scott* (2) ((1950), 66 (pt. 1) T.L.R. 340), ROMER, L.J., said ([1956] 2 All E.R. at p. 20):

E " It was objected on behalf of the landlord in that case that the notice was not a valid counter-notice. According to the judgment which DANCKWERTS, J., delivered in that case, Mr. Miles for the tenant had put the matter in this way. He said (66 (pt. 1) T.L.R. at p. 341): '. . . the court is indulgent in respect of a notice of this kind and does not, in effect, care for merely technical points, and if the meaning is so plain that the landlords cannot
F mistake what is meant, then effect should be given to the notice '. That proposition, I think, commended itself to DANCKWERTS, J., though he actually decided the case on another point. For my part I think that that is right, though perhaps subject to this, as counsel for the tenant pointed out, that one should add the word ' reasonably ' so as to make it read: ' and if the meaning is so plain that the landlord cannot reasonably mistake
G what is meant, then effect should be given to the notice '. It seems to me that is the proper test to apply to notices of this sort. The reason why the tenant has to make his intention reasonably clear is that the landlord has to take action on the counter-notice."

That is the position which arises under the section which is in question here, s. 70. A tenant has not necessarily to take action on the notice, but one of the
H matters submitted to us was that he might take action on the notice and might, indeed, wait to see whether the landlord was going to act before he himself acted at all.

The other authority which was referred to by learned counsel for the landlord was *Doe d. Armstrong* v. *Wilkinson* (3) ((1840), 12 Ad. & El. 743). The headnote
I in that case is:

> " Notice, to a yearly tenant, to quit ' that messuage, farm, etc., situated at D., in the county of York, which you now hold under me as tenant from year to year '. The premises were not situated at D. but at H. D. and H. were adjoining parishes."

It was held:

> " on motion for nonsuit, after verdict in an action of ejectment, not a material variance, the tenant not having shown that he held more than one

farm under the lessor of the plaintiff, or that he was misled by the notice, and not having desired to have any question on this last point submitted to the jury." A

That is the effect, I think, of the judgment of the court, delivered by LORD DENMAN, C.J. Approaching this matter in that way, counsel for the landlord submitted that the learned judge in the county court was wrong in his interpretation of this notice. B

The authority relied on by counsel for the tenant was a passage from the judgment of LORD GREENE, M.R., in *Hankey* v. *Clavering* (4) ([1942] 2 All E.R. 311), which was a case of a notice to quit. As LORD EVERSHED, M.R., pointed out in the course of the argument, the requirement of certainty of a notice to quit has always had judicial support. Two passages in LORD GREENE'S judgment are relied on. Referring to the notice, which had given a wrong date, LORD GREENE, M.R., said ([1942] 2 All E.R. at p. 313): C

> " The whole thing is quite obviously a slip on [the lessor's] part and there is a natural temptation to put a strained construction upon language in aid of people who have been unfortunate enough to make slips. That is a temptation which must be resisted because documents are not to be strained and principles of construction are not to be outraged in order to do what may appear to be a particular fairness in an individual case." D

The second passage quoted by counsel for the tenant was where LORD GREENE, M.R., said (ibid., at p. 314): E

> " It is perfectly true that in construing such a document, as in construing any other document, the court in case of ambiguity will lean in favour of reading the document in such a way as to give it validity as a document; but I dissent entirely from the proposition that, where a document is clear and specific on a particular matter, such as that of date, it is possible to ignore the inaccurate reference to a date and substitute a different date because it appears that the date was put in by a slip." F

The document in the present case is, I think, in the category of being one which is ambiguous. It clearly states that the notice is given on behalf of the landlord, and given by his solicitors; but it mis-states the name of the landlord. G Section 70 (2) itself, as was conceded by counsel for the tenant, has to be modified in some way. It is not submitted that the sub-section is to be read so strictly that the claimant himself, either landlord or tenant, has personally to give the notice. It has been conceded—and, I think, rightly conceded, because it clearly is so—that the notice can be given by an agent acting on behalf of either party, H and, therefore, there is already in that respect a departure from the strict wording of the sub-section. The question that has to be decided is whether, approaching the matter on the principles which I have read, this is an ambiguity which can be complained of by the tenant and which makes the notice invalid, as is alleged. I think, with respect, that the learned judge arrived at his conclusion by transposing the order of the words. He has, in the passage to which I have I referred*, and which, I think, is the substance of his judgment, treated this as if the notice itself read " As solicitors for Raven Frankland ", of a certain address, " your landlord ". I am not sure that that would have made any difference in my view as to the interpretation, but it would have been a little stronger in favour of the allegation of invalidity. The special case leaves it clear that the notice is one given on behalf of the landlord, and there is no indication in the

* See p. 210, letter I, ante, beginning " He construed the notice in this way . . ."

Case—I do not think that the arbitrator was asked to make any finding of fact about it—that the tenant was in any way deceived by this, or was under any misapprehension as to who the landlord was. It would have been very curious if it were otherwise, because the surrender only a short time before had quite clearly been made between the landlord himself, viz., the actual landlord, Edward P. Frankland, who had signed the surrender, and Mrs. Clara Capstick, the tenant, who had signed on her part. The intervening negotiations for the dilapidations arising out of the termination of the tenancy had taken place with the landlord's son, and the tenant knew that the son was the agent acting on behalf of the landlord and the solicitors who served the notice were the solicitors who had acted on behalf of the landlord throughout. There cannot have been any mistake about it. It is a technical error: it is, indeed, a slip which, I think, in no way affected the tenant, her rights, or her understanding of what the proceedings were and her obligations thereunder. For these reasons I think that the learned county court judge has misconstrued this document and that, on the principles which have been established, it was quite an adequate, although unfortunately an ambiguous, notice. I would allow this appeal.

ROXBURGH, J.: I agree, and I am going to travel so closely the ground which SELLERS, L.J., has just travelled that I must plead as my justification the fact that we are differing from the county court judge.

There are, as I see it, two clear pointers in favour of the landlord. The first one (which SELLERS, L.J., has already pointed out) is this: if the words of s. 70 (2) of the Agricultural Holdings Act, 1948, are read quite literally, the claimant landlord could not employ a solicitor to serve the notice: he must serve it himself. That is the absolutely literal construction of the words. That conclusion would be so nonsensical that nobody has had the temerity to argue that that is the right construction of the words. That shows that absolutely literal compliance with the sub-section could not possibly be called for. The second pointer is the decision of this court in *Mountford* v. *Hodkinson* (1) ([1956] 2 All E.R. 17), to which SELLERS, L.J., has also referred. He has also referred to the headnote, and I need not repeat that reference; but I would merely observe that, having regard to the similarity of the language in s. 24 (1) of the Act of 1948 and the similarity of the subject-matter, it would be difficult to apply one view of how to construe the sub-section in one case and to apply a different view in the other case.

With those two pointers, I look at the notice, and I see that it says "As solicitors for your landlord Raven Frankland". It is to be remembered that, as the special case states, the tenant had approached the landlord with a request to surrender the tenancy, an agreement for which was drawn up and signed by both parties. That document is in the special case, and it is signed by "Edward P. Frankland". Therefore it is obvious on the face of it, and must have been obvious to the tenant if she ever took any trouble to consider this point at all, that there was something wrong about the notice. In my view, having regard to the fact that she knew quite well from the agreement to surrender that her landlord was Edward P. Frankland, it is fair and reasonable to solve the ambiguity which arises by saying that the falsa demonstratio is in the words "Raven Frankland" and not in the phrase "As solicitors for your landlord". There can be no dispute that, apart from that obvious blunder, the notice could not be clearer in what it is intended to achieve, and, therefore, there is no doubt that it falls within the test laid down in *Mountford* v. *Hodkinson* (1). For these reasons, I concur in the view that the appeal should be allowed.

LORD EVERSHED, M.R.: I agree so fully with the conclusions which my brethren have stated, and with their reasons for them, that I will not, I hope, be thought disrespectful to the county court judge or to the argument of counsel for the tenant if I do not attempt any repetition of those reasons. The appeal will be allowed.

Appeal allowed. Order of county court judge set aside. Order that the arbitrator proceed with the arbitration in accordance with the decision of the Court of Appeal that the notice dated July 12, 1957, was a valid notice. A

Solicitors: *Hewitt, Woollacott & Chown*, agents for *Hague & Hague*, Sedbergh (for the landlord); *Corbin, Greener & Cook*, agents for *Willan & Johnson*, Hawes (for the tenant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*] B

Re UNITED RAILWAYS OF THE HAVANA AND REGLA WAREHOUSES, LTD.

[COURT OF APPEAL (Jenkins, Romer and Willmer, L.JJ.), October 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, December 8, 1958.] C

Conflict of Laws—Contract—Discharge of contract—Novation—Debt—Whether proper law of contract applicable.

*(i) Novation of a debt comprises two distinct elements, viz., the annulment of one debt and the creation of a substituted debt in its place. The discharge of the original debtor must precede, and is distinct from, the acceptance by or imposition on the creditor of a substituted debtor. Of these two elements, the first, namely, the discharge of the debtor, is governed by the proper law of the contract (not the lex situs of the debt); this is equally so whether the debt discharged is one that has accrued due under a contract or is a contractual obligation to make a payment in futuro (see p. 229, letters C and G, p. 230, letter D, and p. 233, letters A to C, post). D E

Perry v. *Equitable Life Assurance Society of U.S.A.* ((1929), 45 T.L.R. 468), and *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* ((1890), 25 Q.B.D. 399) applied.

Arab Bank, Ltd. v. *Barclays Bank (Dominion, Colonial & Overseas)* ([1954] 2 All E.R. 226) distinguished; dictum of MAUGHAM, J., in *Re Russian Bank for Foreign Trade* ([1933] All E.R. Rep. at p. 760) considered and not applied. F

(ii) The validity of an assignment of an existing debt, however, depends on the lex situs of the debt (see p. 231, letter E, post).

QUAERE: whether the substitution of the new debtor (on novation of the debt) depends not on the lex situs of the debt but on the law with which the entry of the new debtor is most closely connected, which, in the absence of agreement to the contrary, may be his personal law or the law of his place of business (see p. 233, letter E, post). G

[As to the law governing the discharge of a contract in the field of private international law, see 7 HALSBURY'S LAWS (3rd Edn.) 82, 83, para. 151; and for cases on the subject, see 11 DIGEST (Repl.) 446, 447, *857-863*. H

As to the law governing an assignment of a contract, see 7 HALSBURY'S LAWS (3rd Edn.) 81, 82, para. 150; and for cases on the subject, see 11 DIGEST (Repl.) 446.]

Conflict of Laws—Renvoi—Whether doctrine of renvoi applicable in relation to contracts.

SEMBLE: the principle of renvoi has no place in the field of contract (see p. 236, letter I, and p. 246, letter I, post). I

Dictum of LORD WRIGHT in *Vita Food Products, Inc.* v. *Unus Shipping Co., Ltd.* ([1939] 1 All E.R. at p. 522, letters A to D) not adopted.

[As to the doctrine of renvoi, see 7 HALSBURY'S LAWS (3rd Edn.) 11, para. 17, and p. 54, paras. 103, 104.]

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* These conclusions, though carrying the authority of all members of the court (see p. 246, letter E, post), were obiter (see p. 228, letter I, post).

Conflict of Laws—Contract—Proper law of contract—Lease of railway rolling stock—Trust agreement assigning railway rolling stock and lease to trustee as security for service of trust certificates.

Money—Currency—Rate of exchange—Trust—Rentals due to trustee under American lease of railway rolling stock in Cuba—Sums due from trustee to cestuis que trust for service of equipment trust certificate—Trustee's expenses—Default in payment of rentals—Liquidation of railway company in England—At what dates rents payable to trustee and sum due to beneficiaries should be converted into English currency for purposes of proof in liquidation.

In 1921 an English company, owning a railway in Cuba, entered into a transaction for raising money in the United States of America by the issue of fifteen year 7½ per cent. trust certificates, carrying interest and repayable by instalments and in dollars at a premium, to be administered by a trustee, a corporation of the Commonwealth of Pennsylvania. For this purpose the railway company assigned its rolling stock in Cuba to a subsidiary company of the railway company incorporated in the State of Delaware. By lease executed in 1921 in New York the subsidiary company let the rolling stock to the railway company for fifteen years at a rental, payable in dollars at the office of the trustee in Philadelphia and the railway company covenanted that there should be no assignment or transfer of their rights or interest in the rolling stock. The lease included provision that the parties intended to enter into it and execute it in accordance with the laws of Cuba and to register it under those laws, and also to record it in such territories of the United States as might be required by law. By an agreement (referred to herein as the "trust agreement"), substantially contemporaneous with the lease and also executed in New York, the subsidiary company assigned its rights as lessor under the lease and its interest in the rolling stock to the trustee as trustee for the certificate holders; the trust agreement provided for the re-assignment of the rolling stock to the subsidiary company when all payments had been made. The subsidiary company subsequently re-assigned its interest (subject to the lease and the trust agreement) in the rolling stock to the railway company. Money was raised in the United States by the issue of six thousand $1,000 certificates, the rental from the lease providing funds for the service and the payment of the debt through the trustee. In and after February, 1931, the railway company defaulted in paying the instalments payable under the lease and in and after 1934 it defaulted in paying the interest on the certificates. In 1953 the railway (including the rolling stock) became the subject of state acquisition under the laws of Cuba. The acquisition took the form of a sale by the railway company of its undertaking and assets. By an agreement in 1953 the liabilities in respect of which the Republic of Cuba liberated the railway company included the responsibilities that derived under the certificates. Of the original six thousand certificates the railway company had redeemed 3,800 by instalments before its default. After its default the railway company purchased a further 1,869 certificates, leaving 331 outstanding; these 1,869 certificates remained in the hands of the railway company and were transferred to the Republic of Cuba with the company's other assets as they were not formally redeemed, but both the Republic of Cuba and the trustee renounced any claim in respect of these 1,869 certificates. After default but before the liquidation of the railway company the rate of exchange of the £1 sterling into American dollars had fallen substantially. In the voluntary liquidation of the railway company in England, the liquidators rejected a proof by the trustee for unpaid instalments under the lease and other sums, on the ground that by Cuban law the obligations under the lease were extinguished. It was not disputed that if the laws of Cuba did not apply the railway company had not been

freed from its obligations under the lease. On appeal the railway company pursued two further alternative claims, viz., damages for conversion of the rolling stock, or damages for breach of covenant not to assign it.

Held: (i) the trustee was entitled to prove in the liquidation of the railway company because (WILLMER, L.J., dissenting) the proper law of the contract taken as a whole, viz., the trust agreement and the lease, was not the law of Cuba, but that of Pennsylvania or (possibly) Philadelphia (see p. 236, letter E, post) and consequently the company was not freed from its obligations under the lease.

(ii) the trustee was a creditor of the railway company for all the unpaid instalments due under the lease (see p. 244, letter B, post); and (WILLMER, L.J., dissenting) though, the company being solvent, the rights of the parties should be worked out on the basis that the company paid all such instalments and that the trustee repaid any surplus after discharging what was due to the certificate holders, yet it was right that the trustee's proof should be limited to the total sum needed to pay the certificate holders and the trustee's expenses (see p. 244, letter D, post).

(iii) for the purposes of proof each instalment due under the lease should be converted into English currency at the rate of exchange prevailing when the instalment fell due (see p. 243, letter H, post; *Re Russian Commercial & Industrial Bank*, [1955] 1 All E.R. 75, followed); but the amounts due from the trustee to the certificate holders should be quantified by converting them according to the rate of exchange prevailing at the commencement of the liquidation of the railway company (see p. 244, letters G and H, post), for the principle that the conversion into sterling of an unpaid debt in foreign currency should be effected on the date when the debt became due had no application to the claim of the certificate holders, who were cestuis que trust, and not creditors (see p. 245, letter A, post).

Re Chesterman's Trusts ([1923] 2 Ch. 466) applied.

(iv) the transfer of the rolling stock, to which the trustee had obtained a good title, to the state of Cuba amounted to conversion, but neither a claim for damages in conversion nor a claim for damages for breach of covenant in the lease by reason of that transfer would entitle the trustee to retain more than was retainable by it under head (iii) above (see p. 240, letters F to H, post).

Per CURIAM: in order to be actionable as a tort in this country the act complained of must be an act not justifiable according to the law of the foreign country where it was done (see p. 238, letter A, post).

Decision of WYNN-PARRY, J. ([1957] 3 All E.R. 641) affirmed.

[As to the proper law of a contract, see 7 HALSBURY'S LAWS (3rd Edn.) 72, 73, para. 137; and for cases on the law governing contract being determined by the intention of the parties, see 11 DIGEST (Repl.) 420-425, *715-734*.

As to an act lawful in the country where it is done not being actionable in England, see 7 HALSBURY'S LAWS (3rd Edn.) 86, para. 156.

As to the conversion of money payable in foreign currency into English money, see 23 HALSBURY'S LAWS (2nd Edn.) 173, para. 251; and for cases on the subject, see 35 DIGEST 169, *13* et seq.]

Cases referred to:

(1) *Perry* v. *Equitable Life Assurance Society of U.S.A.*, (1929), 45 T.L.R. 468; 11 Digest (Repl.) 422, *721*.

(2) *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux*, (1890), 25 Q.B.D. 399; 59 L.J.Q.B. 510; 63 L.T. 503; 11 Digest (Repl.) 423, *723*.

(3) *New Zealand Loan & Mercantile Agency Co.* v. *Morrison*, [1898] A.C. 349; 67 L.J.P.C. 10; 77 L.T. 603; 10 Digest (Repl.) 1126, *7847*.

(4) *National Bank of Greece & Athens, S.A.* v. *Metliss*, [1957] 3 All E.R. 608; 3rd Digest Supp.

(5) *Arab Bank, Ltd.* v. *Barclays Bank (Dominion, Colonial & Overseas)*, [1954] 2 All E.R. 226; [1954] A.C. 495; 3rd Digest Supp.

(6) *Re Russian Bank for Foreign Trade*, [1933] All E.R. Rep. 754; [1933] Ch. 745; 102 L.J.Ch. 309; 149 L.T. 65; Digest Supp.

(7) *Re Banque des Marchands de Moscou (Koupetschesky)*, *Royal Exchange Assurance* v. *The Liquidator, Re Banque des Marchands de Moscou (Koupetschesky)*, *Wilenkin* v. *The Liquidator*, [1952] 1 All E.R. 1269; 11 Digest (Repl.) 425, *734*.

(8) *Re Banque des Marchands de Moscou (Koupetschesky)*, [1954] 2 All E.R. 746; 10 Digest (Repl.) 1303, *9175*.

(9) *Bonython* v. *Commonwealth of Australia*, [1951] A.C. 201; 2nd Digest Supp.

(10) *Hamlyn* v. *Talisker Distillery*, [1894] A.C. 202; 71 L.T. 1; 58 J.P. 540; 11 Digest (Repl.) 423, *724*.

(11) *Kahler* v. *Midland Bank, Ltd.*, [1949] 2 All E.R. 621; [1950] A.C. 24; [1949] L.J.R. 1687; 2nd Digest Supp.

(12) *Vita Food Products, Inc.* v. *Unus Shipping Co., Ltd.*, [1939] 1 All E.R. 513; [1939] A.C. 277; 108 L.J.P.C. 40; 160 L.T. 579; 11 Digest (Repl.) 421, *719*.

(13) *Wedd* v. *Porter*, [1916] 2 K.B. 91; 85 L.J.K.B. 1298; 115 L.T. 243; 31 Digest (Repl.) 59, *2157*.

(14) *Re Chesterman's Trusts*, *Mott* v. *Browning*, [1923] 2 Ch. 466; 93 L.J.Ch. 263; 130 L.T. 109; 35 Digest 169, *12*.

(15) *Re Russian Commercial & Industrial Bank*, [1955] 1 All E.R. 75; [1955] Ch. 148; 3rd Digest Supp.

Appeal.

The liquidators of the United Railways of Havana and Regla Warehouses, Ltd. (an English company in voluntary liquidation hereinafter referred to as " the company ") appealed from the order of WYNN-PARRY, J., dated Nov. 19, 1957, and reported [1957] 3 All E.R. 641, that a proof lodged in the winding-up by the trustee for certain certificate holders, which proof had been rejected by the liquidators, should be admitted. The following statement of the facts is taken substantially from the judgments of WYNN-PARRY, J. ([1957] 3 All E.R. at pp. 643-651) and of JENKINS, L.J.

The company was incorporated in England on Aug. 2, 1898. It conducted a railway undertaking in Cuba, and owned assets in Cuba in connexion therewith. Prior to and during the year 1921 the company purchased rolling stock, consisting of locomotives and cars to an aggregate amount of over $14,000,000. For the purpose of financing part of this amount it was decided to raise $6,000,000 in the United States of America under what is known as the Philadelphia Plan, which, as the name suggests, is an essentially American scheme for financing a project. A variation from or addition to the procedure normally followed in carrying out the Philadelphia Plan was, however, adopted. In February, 1921, the company caused to be incorporated in the State of Delaware a corporation under the name of Cuba Rolling Stock Company (hereinafter referred to as " the car company "). The car company was a subsidiary of the company. On Mar. 25, 1921, the company sold to the car company the whole of the rolling stock, and assigned the contracts for future delivery of so much thereof as had not been delivered. The purchase price was the actual cost of the rolling stock delivered in Cuba. By way of confirming the sale and carrying it into effect, the company and the car company executed a document dated Apr. 11, 1921, which was described as a bill of sale, before a notary public in New York. On Apr. 18, 1921, a document, described therein as a lease and agreement (hereinafter referred to as " the lease "), was executed between the car company as lessor and the company as lessee. The lease was executed in New

York before a notary public by attornies for the car company and the company respectively. The attorney for the company was appointed by resolution of a board meeting held in New York pursuant to a power given at a board meeting in London held on Feb. 3, 1921. The recitals to the lease, so far as material, read as follows: A

> " Whereas, the lessee has power under its charter and the laws of the Republic of Cuba and the Acts of the United Kingdom of Great Britain and Ireland to enter into and perform this agreement, and has taken all necessary corporate action to authorise the execution and delivery hereof. B
>
> " And whereas, at the time of the execution hereof the lessor holds contracts for the construction and acquisition of, or is the absolute owner of, the railroad equipment and/or rolling stock hereinafter described, and has agreed to deliver forthwith or as soon as the same shall be completed, such railroad equipment and/or rolling stock to the lessee, which agrees to receive the same, such delivery by the lessor and acceptance hereof by the lessee to be upon the terms and under the conditions herein set forth: C
>
> " And whereas, the lessor desires, upon the execution hereof, and in the manner hereinafter set forth, to assign, transfer and set over to the Commercial Trust Company, of Philadelphia, as trustee, all the lessor's right, title and interest in and to this lease and the rents reserved hereunder, and in and to the railroad equipment and/or rolling stock hereby demised; D
>
> " And whereas the lessee, in consideration of certain rights given it to pay rentals in United Railways of Havana fifteen year 7½ per cent. Equipment Trust certificates, and within six months after certain payments of rental to tender additional certificates and receive cash in exchange therefor, all as hereinafter specifically set forth, consents to said contemplated assignment." E

Then the lease witnessed:

> " That for and in consideration of the sum of one dollar ($1) paid by the lessee to the lessor, as well as of the rentals and covenants hereinafter mentioned, the lessor has let and leased and by these presents does let and lease to the lessee, for the term of fifteen years from Feb. 15, 1921, unless sooner terminated as hereinafter provided, the following described railroad equipment and/or rolling stock, to wit . . ."; F

and there followed a detailed list of the rolling stock. It was then provided that the rolling stock was leased G

> " at and for the rental hereinafter set out, and upon the terms, conditions, and covenants following, to wit:—First.—The lessee shall and will pay to the lessor or its assigns at the office of Commercial Trust Company, hereinafter called the trustee, in the City of Philadelphia, Pennsylvania, or at the office of Central Union Trust Company of New York, in the City of New York when payment in New York is hereinafter specifically required, as rental for the said railroad equipment and/or rolling stock without deduction for any taxes, duties, charges or assessments, which the lessee may be required to pay or withhold under the laws of the United States of America or of any other country: . . ." H

It was made clear that the primary place of payment is Philadelphia. New York was only used for the payment of interest, as emerged from the provisions of para. I (a), which followed, and which, so far as material, read as follows: I

> " I. Half yearly on Feb. 14, and on Aug. 14 in each year, the first payment to be made on Aug. 14, 1921, (a) A sum payable in New York equal to 3¾ per cent. of the par value of certain certificates not exceeding $6,000,000 issued under an agreement [called in this report " the trust agreement "] bearing even date herewith between Cuban Rolling Stock Company, and

A Commercial Trust Company, trustee, and outstanding and unpaid on Feb. 14 and Aug. 14, respectively in each year, during the term of this lease, and an amount equal to the accrued dividends on the certificates purchased by the trustee during the preceding six months under the provisions of the said agreement; less such sums derived from investments by the trustee of undistributed rentals in its hands, as reported from time to time by it to the B lessee as applicable to the payment of dividend warrants on the aforesaid certificates."

Sub-paragraphs (b) and (c) of para. I dealt with the reasonable expenses of the car company and taxes on the property leased or the income therefrom which were to be paid by the company and would be payable in Philadelphia. By para. II provision was made for half-yearly payments on Aug. 14 and Feb. 14 C in each year covering the period from Aug. 14, 1921, to Feb. 14, 1936, of sums which were treated as rentals. The payments of interest under para. I (a) and the half-yearly payments under para. II were calculated to cover the interest and capital and premium payable in respect of the certificates referred to in para. I (a). It was then provided that all the half-yearly payments mentioned in para. II were to be made in gold coin of the United States of America of the D 1921 standard of weight and fineness; and there followed a provision allowing, under certain conditions, payment by delivery up of certificates purchased by the company. The last provision of cl. First allowed the company to pay on any rental day a lump sum sufficient to

"enable the trustee to call for retirement and to retire on the dividend E date next ensuing all outstanding United Railways of Havana fifteen year 7½ per cent. Equipment Trust certificates by the payment of the par value thereof and a premium of ten per cent. thereon, and accrued dividends thereon to the date of retirement."

This provision served to emphasise that the payments under the lease were designed to provide the principal and interest reserved by the certificates, F the lease forming the security for those payments.

Clause Second provided that all the rolling stock and replacements, the subject of the lease were

"to be plainly marked and kept marked on both sides thereof with the words: 'Commercial Trust Company, Trustee, Phila., Pa., owner and lessor, U.H. Equipt. Trust No. ————.'"

G

Clause Fourth required the company

"to keep the said railroad equipment and/or rolling stock insured in some incorporated insurance company or companies of good standing, organised under the laws of the United States of America or of the United Kingdom of Great Britain and Ireland, to be approved by the trustee, assignee of the H lessor . . ."

Clause Fifth, so far as material, read as follows:

"The lessee further covenants that there shall be no assignment or transfer of its rights or interest in said railroad equipment and/or rolling stock under this lease, or any underletting of said leased property, without the consent I of the lessor and its assigns endorsed hereon . . ."

Clause Sixth provided that in case of default in the payment of any of the rentals, the car company may declare the lease terminated and may take possession of the rolling stock. Clause Seventh provided that in that event the lessee was to move the rolling stock to such points on the railroad as the lessor or its assigns should designate and deliver up the same, and

"It is hereby expressly covenanted between the lessor and the lessee that performance of this covenant as herein set forth is of the essence of the

contract between the parties and that upon application to any court having jurisdiction in the premises the said lessor, its successors or its assigns, shall be entitled to a decree against the lessee requiring specific performance hereof."

Clause Eighth, so far as material, read as follows:

"It is understood and agreed by and between the lessor and the lessee, that the lessor may forthwith, upon the execution hereof, assign, transfer, and set over unto Commercial Trust Company, of Philadelphia, as trustee, all the lessor's right, title, and interest in and to said railroad equipment and/or rolling stock hereby leased unto the lessee, and as well all of the lessor's claims, demands, and remedies, under this lease accruing or to accrue . . . and that when it, the lessee, shall have fully paid all the rents, which it has herein covenanted to pay, the said railroad equipment and/or rolling stock may be re-assigned by said Commercial Trust Company, of Philadelphia, trustee, to the lessor, and upon such re-assignment and the expiration of the term of this lease, all said railroad equipment and/or rolling stock shall revert to the lessor . . ."

Clause Eleventh and cl. Twelfth, in full, were

"Eleventh.—It is the intention of the parties to this lease to enter into and execute this lease in accordance with the provisions of the laws of the Republic of Cuba to the end that this lease may be deposited or filed and/or registered thereunder, and the railway company agrees to so deposit and/or register or file the same, and to record the same in such State or Territories of the United States as may be required by law, and to perform any other act required by law that may be necessary to protect the trustee's title. In case it becomes necessary that this lease be translated into the Spanish language in order that it may be filed and/or registered in the proper offices in the Republic of Cuba, then and in that event it is understood and agreed that the English text shall govern in case of any conflict between the English and Spanish texts.

"Twelfth.—The parties hereto submit themselves to the jurisdiction of the tribunals of the City of Havana, in the Republic of Cuba, for all notifications, summonses and other judicial or extra judicial formalities to which this lease shall give rise, with express renunciation of their own jurisdiction if different."

At the same time as the lease was executed, there was also executed in New York an agreement [hereinafter referred to as "the trust agreement"] between the car company and Commercial Trust Company of Philadelphia, a corporation of the Commonwealth of Pennsylvania, which, and whose successors as such trustee, are hereinafter referred to as "the trustee". The trust agreement recited the lease, and the second recital, so far as material, was:

"And whereas, the car company has purchased the said railroad equipment and/or rolling stock particularly mentioned in the lease and has agreed to apply in part payment therefor the proceeds of six million dollars ($6,000,000) par value of Equipment Trust Certificates, to be issued under the terms of this agreement, and known as certificates of the United Railways of Havana fifteen year 7½ per cent. Equipment Trust . . ."

Then by cl. First the car company assigned to the trustee as trustee for the certificate holders, the lease and all its interest in the rolling stock. By cl. Second the trustee covenanted

"that it will from time to time execute and deliver to the car company or upon its order in writing United Railways of Havana fifteen year 7½ per cent. Equipment Trust Certificates [hereinafter called "the certificates"] aggregating in par value $6,000,000."

A Then the clause set out the intended form of the certificates, which fitted in with the payment provisions of the lease. For instance, the due date of payment was Feb. 15, 1936, the day after the day fixed for payment of the last rental under the lease. Payment was to be made at the office of the trustee in Philadelphia in gold coin of the United States of America, as provided in the lease,

B "but only from and out of the rentals when paid as provided for in the lease . . . which rentals are payable to the trustee for the benefit of"

the certificate holders.

Clause Fourth dealt with the issue of the certificates. The money which the company required and which the certificates secured was provided pursuant to an underwriting agreement consisting of a letter dated Feb. 9, 1921, written C by Messrs. Dillon Read & Co., of New York, as underwriters, to the then chairman of the company, and accepted by him. Clause Seventh was as follows:

"In the event of default by [the company], as aforesaid, if it be thought necessary or convenient for the purpose of enforcing and carrying out all the terms and stipulations of the lease, and this agreement under the laws and statutes of the Republic of Cuba, the trustee may in its discretion, and upon D request of the holders of a majority in amount of the certificates then outstanding and the payment of its proper costs, charges and expenses theretofore incurred shall assign, transfer and deliver this agreement and the lease and all its right, title and interest in and to the said railroad equipment and/or rolling stock and all moneys, muniments of title and other property in its hands belonging to the trust, and all of its right, title and interest in E the United States of America government obligations and the proceeds of any sale thereof, to any person or other corporation as substituted trustee authorised to act or doing business in the Republic of Cuba, to be chosen by the holders of a majority in amount of the certificates then outstanding, which person or company, upon accepting the trust, shall thereupon become substituted trustee and shall succeed to all the rights and remedies and be F subject to the stipulations and covenants of the trustee hereunder and the trustee shall thereupon be discharged from all further responsibility and from any liability hereunder."

Clause Eleventh and cl. Twelfth were similar in terms to cl. Eleventh and cl. Twelfth in the lease, except that the last paragraph of cl. Twelfth appeared in G the lease as the last paragraph of cl. Eleventh.

By an agreement dated Apr. 27, 1922, the car company re-sold the rolling stock to the company, "subject to and with the benefit of the lease and the agreement". Provision was made by cl. Tenth of the agreement for the reassignment of the rolling stock by the trustee to the car company on payment of the last of the half-yearly payments and the premium provided for by the H agreement. The company, therefore, had the right, subject to performing its obligations under the lease, to have the property in the rolling stock re-vested in it. In the meantime its only right to the rolling stock was as lessee under the lease. The benefit of the company's obligations under the lease was vested in the trustee as trustee for the certificate holders. The car company dropped out of the picture and was later dissolved.

I Prior to Feb. 14, 1931, the company redeemed certificates to the face value of $3,800,000. Further, it purchased, as it was entitled to do, certificates to the face value of $1,869,000, leaving 331 $1,000 certificates outstanding. It defaulted in paying the instalment of $205,000 due on Feb. 14, 1931, and all subsequent instalments. It thus defaulted in respect of the last eleven instalments of capital. The certificates themselves imposed no liability on the company.

Although defaulting as regards principal, the company continued to pay interest as provided by the lease down to and including Aug. 14, 1934. The

trustee took no step under cl. Sixth of the lease to declare the lease terminated. The trustee took no step under the same clause to take possession of the rolling stock; but it would not have been possible for the trustee to have obtained possession of the rolling stock by reason of the relevant provision of Cuban law, namely, Military Order No. 34 of 1902. A

In 1934, 1940 and 1941 legislation was brought in force in Cuba establishing a moratorium owing to the economic depression which had developed during the early 1930's. The benefit of the moratorium laws extended to public service railroad companies. B

On June 6, 1949, an interventor was appointed by the Cuban government, who took over the management and control of the company's undertaking. By 1952 it had become clear that the company's financial position was so acute that the only solution was that the whole of its undertaking and assets should be sold to the Cuban government, if that could be effected. To facilitate this a scheme of arrangement between the holders of the company's various classes of debenture stock and shares was prepared, brought before the court and sanctioned by VAISEY, J., on Dec. 15, 1952. Neither the holders of the certificates nor the trustee on their behalf were parties to the scheme, but the certificates are mentioned in Part IV, para. 13 of the Preliminary to the Scheme, where there is a statement that the certificates are not affected by the scheme. C D

Negotiations for the acquisition of the company's undertaking and assets in Cuba took place and a number of documents were brought into existence. The first was Law-Decree No. 980, dated July 24, 1953. Article 1 opened:

> " This Law-Decree is entitled ' Law-Decree on the acquisition, operation and rehabilitation of the United Railways of Havana and subsidiary companies ' ". E

Article 3 authorised the Minister of the Treasury to initiate and conduct negotiations for the acquisition by voluntary agreement, or, failing that, by expropriation, with the object of conveying the undertakings and property acquired to a company to be incorporated for the purpose. Chapter III, art. 6, dealt with the incorporation of this company (referred to as " Occidentales "). Article 8 provided that the state would convey the properties acquired from the company to Occidentales, F

> " and the latter shall assume the liabilities which the state shall have contracted by the acquisition of the said properties."

Article 13 provided that Occidentales " cannot sell the real estate they acquire as conveyed by the State except " as specifically provided in that article. Article 14 opened with the words " The State on making the conveyance . . ." This Law-Decree envisaged, first, a sale by the company to the Cuban State, and then a re-sale by the State to Occidentales. The two experts on Cuban law who gave evidence differed as to the effect of the transaction as carried out by this Law-Decree and the three documents next referred to. Dr. Gorrin, for the trustee, regarded the transaction as a sale to the state and then a re-sale by the state to Occidentales. On the other hand, Dr. de Cubas, for the liquidator, expressed the view that a Cuban court would treat the matter as being one in which only one sale was involved. G H

The next document is called " preliminary agreement ". It was dated Sept. 5, 1953. It concerned the company (which was called " the Uniteds ") and a wholly-owned subsidiary of the company (hereinafter referred to as " Terminal "), as vendors and the Cuban State as purchasers, and provided, in effect, for the sale of the respective undertakings and assets of the two companies to the Cuban State for $13,000,000, I

> " which amount will be received . . . at the moment of signing the public deeds, by virtue of which there shall be transferred to the State in full and absolute dominion the assets and properties described in Annex A."

A Clause Fourth (B) read:

"The price agreed upon shall be received by 'the Uniteds' and 'the Terminal' free from all responsibility with respect to liabilities outstanding in Cuba, represented by debts, obligations and responsibilities arising out of the operations of the properties which are to be acquired by the State, whether involving operations prior to June 10, 1949, on which date said properties passed to the management of the interventors of the Government of Cuba, or subsequent to that date."

Included in Annex A as assets was this item "$1,867,000 [this was apparently a mistake for the $1,869,000 certificates which had been purchased by the company but not formally redeemed] of nominal value, amount of the company's holding of the 7½ per cent. Equipment Certificates".

On the same day, namely, Sept. 5, 1953, as the preliminary agreement was executed, another agreement (hereinafter referred to as "the confidential agreement") was executed, the parties being the Cuban State, the National Bank of Cuba and the company. It stated that the parties had agreed:

"First: That among the liabilities in respect of which the State liberates 'the Uniteds' from all responsibility, in accordance with letter B of cl. Fourth of the preliminary agreement signed on this same date between the same parties, it is understood to be included the responsibilities that may derive from the 7½ per cent. Equipment Trust Certificates which were issued under agreement dated Feb. 15, 1921, between the Cuban Rolling Stock Company and Commercial Trust Company as trustees . . .

"Second: That what is established by this agreement does not signify that the State or 'the Uniteds' acknowledge or admit that there can exist legal merit in any claim, demand or proceedings that may be established as a result of the referred to 7½ per cent. Equipment Trust Certificates, but that it is exclusively established what is mentioned in this agreement in respect thereof for the supposed case that a sentence may be handed down as a result of any claim, demand or proceedings derived from said 7½ per cent. Equipment Trust Certificates, whether it be before courts of justice of the republic or in foreign courts."

Finally, in cl. Fifth, it was provided:

"That the contents of the present confidential agreement cannot be revealed by any of the signing parties, but it will be understood that it binds them just as if it had been stipulated in the preliminary agreement referred to in para. First."

Law-Decree 1197, dated Nov. 26, 1953, second recital, stated:

"Whereas: In accordance with the provisions of Military Order No. 34 of 1902, it was agreed in section (B) of cl. Fourth of the preliminary agreement executed between the government and the [company and two other companies] that the said companies as vendors would receive the agreed price free from all responsibility with respect to liabilities outstanding in Cuba, represented by debts, obligations and responsibilities arising out of the operations of the properties to be acquired by the State, and it is therefore appropriate to declare that the provisions of section (u), art. 1 of Chapter V of the aforesaid Military Order are inapplicable to the liquidation of the three selling companies, since upon the passing of such liabilities to the Cuban government the latter shall adopt such measures as it may deem appropriate for the liquidation thereof."

Article Second provided that:

"Section (u), art. 1, Chapter V, of Military Order No. 34 of 1902 is declared inapplicable to the liquidation and dissolution of the"

company and two other companies.

By the deed of purchase, which was dated Dec. 1, 1953 the sale by the company of its undertaking and assets to the Cuban State was completed, the sale being "in a real and effective manner absolutely free from incumbrances." The Seventeenth clause provided:

> "That in consequence of the sale hereby accomplished, they transfer in favour of the Cuban State the full and absolute dominion and possession, with such further rights and equities, real and personal, without any exception, as the vendors have or hold in the properties before mentioned, the Cuban State receiving them as its own, acquired by a just and legitimate title, as is the present deed, which at all times shall be considered as symbol of real delivery and possession and leaving the Cuban State subrogated in the same place and stead of the vendors."

The Twentieth clause read as follows:

> "That in the purchase-sale are included all the assets and any other properties situated in the Republic of Cuba, without exception whatsoever, which comprise and constitute the railroad system which the vendors have been operating."

On the same date as the deed of sale was executed, viz., Dec. 12, 1953, a document, the precise terms of which were not known, was executed, the parties being the Cuban State and Occidentales, by which the Cuban State sold to Occidentales the undertakings which it had acquired from the company. It was thought at first that this sale comprised all the assets acquired, but it emerged in evidence during the hearing that certain property was retained by the State. The purchase price was duly paid by the Cuban State in United States Treasury Bonds. These were then sold for sterling, the proceeds being applied in effect in accordance with the provisions of the scheme of arrangement.

On Mar. 4, 1954, the company went into voluntary liquidation. On June 18, 1954, the trustee lodged a proof. The basis of the claim appeared in para. 4 of the proof, which read as follows:

> "The claimant is the present trustee for the holders of the said certificates being the successor in office of Commercial Trust Company of Philadelphia the original trustee thereof. The liability of the company to the claimant which is the subject-matter of this proof arises under or by virtue of a covenant by the company with Cuban Rolling Stock Company contained in an agreement dated Feb. 15, 1921, but executed on Apr. 18, 1921, between the said Cuban Rolling Stock Company of the one part and the company of the other part the benefit whereof including the ownership of the said railway equipment was by a trust agreement dated Feb. 15, 1921, but executed on Apr. 18, 1921, assigned by the said Cuban Rolling Stock Company to the said original trustee of whom the claimant is the successor in title."

The trustee's proof as lodged made claims under four heads tabulated in para. 2 as follows:

> "2 (a) The sum of £264,076 0s. 1d. being the sterling equivalent on the said date (calculated at the rate of $2.80 to the £) of United States $739,412.81 due and payable to the claimant in respect of $333,000 in face value of United Railways of Havana 15 year 7½ per cent. Equipment Trust Certificates then outstanding in the hands of members of the public as follows namely a sum equal to:

Face value	$333,000.00
Premium of 2½ per cent. on the said face value	$8,325.00
Interest at the rate of 7½ per cent. per annum on the said face value from Aug. 15, 1935, to Feb. 14, 1936	$37,462.50

A Interest at the rate of 6 per cent. per annum on the said face value from Feb. 15, 1936, to Mar. 4, 1954 .. .. .. $360,625.31

$739,412.81

B "(b) In addition thereto the sum of £11,177 6s. 9d. being the sterling equivalent at the rate of $2.80 to the £ of the aggregate amount of the reasonable expenses incurred by the claimant down to Mar. 4, 1954, in the performance of the trust under which the said certificates were issued. Details of the said expenses are as follows:

Out of pocket expenses of claimant	$2,255.46
C Claimant's legal expenses	$20,000.00
Claimant's fee as trustee at $275 per annum	$9,041.10
	$31,296.56

D "(c) In addition thereto the sum of £20,000 being the sterling equivalent of the amount which the claimant estimates to be the value of its future or contingent claim in respect of expenses incurred or to be incurred by it subsequent to Mar. 4, 1954, in the performance of the said trusts until the same shall have been fully performed.

"(d) In addition thereto (subject as hereinafter mentioned) £1,480,570 5s. 7d. being the sterling equivalent on Mar. 4, 1954 (calculated at E the rate of $2.80 to the £) of United States $4,145,596.78, due and payable to the claimant in respect of $1,867,000 in face value of United Railways of Havana 15 year 7½ per cent. Equipment Trust Certificates which had been purchased by the company as follows, namely a sum equal to:

Face value	$1,867,000.00
F Premium on 2½ per cent. on the said face value	$46,675.00
Interest at the rate of 7½ per cent. per annum on the said face value from Aug. 15, 1934, to Feb. 14, 1936	$210,037.50
Interest at the rate of 6 per cent. per annum on the said face value from Feb. 15, 1936, to Mar. 4, 1954	$2,021,884.28
G	$4,145,596.78

The liquidators having rejected the trustee's proof under all four heads of para. 2, the trustee appealed against such rejection by originating summons dated Apr. 25, 1955. The matter came before ROXBURGH, J., on Dec. 4, 1956, H when the learned judge dealt only with head 2 (d) of the proof—that is, the claim for £1,480,570 5s. 7d. (a figure which required correction to accord with the addition to the dollar figure of the two further certificates bought in*) in respect of the $1,869,000 certificates bought in by the company after default. If the claim in respect of the $1,869,000 certificates could be eliminated there would be a clear surplus of assets over liabilities out of which an interim distribution I could be made.

The material part of ROXBURGH, J.'s order of Dec. 4, 1956, was in these terms:

"And this court being satisfied that having regard to the said Exhibit T.W. 39 referred to in the said affidavit of William Robert Tomkinson and Robin Hereward Bruce Wright filed Nov. 1, 1956, the holders in due course of the 1,867 equipment trust certificates the denoting numbers whereof are set forth in the schedule to this order have renounced any claim to participate

* Cf. p. 223, letter B, ante.

in the assets available for distribution in the winding-up and that such renunciation alone is a sufficient ground for the rejection of that part of the applicant's said proof of debt (namely the claim in respect of the sum of £1,480,570 5s. 7d. claimed in sub-para. 2 (d)) which is based upon or measured by reference to the said 1,867 equipment trust certificates doth not think fit to reverse or vary the decision of the respondents as such liquidators rejecting the said proof of debt so far as the same relates to the said sum of £1,480,570 5s. 7d. and doth make no order on that part of the said originating summons accordingly."

The remainder of the summons was directed to stand over and was ultimately restored before WYNN-PARRY, J., who made on it the order now under appeal, which directed three inquiries as to the amount of the trustee's expenses, the first and second being concerned with expenses incurred down to Mar. 4, 1954 (i.e., the date of the commencement of the winding-up), the first not to be proceeded with in the event of the trustee electing to base its proof on the claims for damages. These inquiries differed from each other only in the respect that the first directed conversion into sterling as on the respective dates on which the expenses were incurred, while the second directed conversion into sterling as on Mar. 4, 1954, a maximum of £11,177 6s. 9d., the amount claimed in the proof being set in both cases. The third inquiry related to the amount of the trustee's future or contingent claim for expenses subsequent to Mar. 4, 1954, and directed conversion into sterling as on that date.

The order then provided that the sum for which the trustee could prove should be computed as follows:

" (1) There shall first be computed either:—

" (A) The sterling equivalent of the following amounts of dollars of the United States of America at the respective rates of exchange current on the following dates that is to say 206,000 on Feb. 14, 1931; 205,000 on each Feb. 14 and Aug. 14, from and including Aug. 14, 1931, down to and including Feb. 14, 1936; 82,500 on each Feb. 14 and Aug. 14 from and including Feb. 14, 1935, down to and including Feb. 14, 1954, and 8,136.99 on Mar. 4, 1954, together with either the amount agreed or found on the making of the inquiry first hereinbefore directed or the sum of £11,177 6s. 9d., whichever is the less and together with the amount agreed or found on the making of the inquiry thirdly hereinbefore directed; or, if the applicant shall so elect,

" (B) The sterling equivalent at the rate of exchange current on Dec. 1, 1953, of two million dollars of the United States of America being the maximum amount recoverable by way of damages for conversion of the property comprised in the said lease and being also the amount recoverable by way of damages for breach of the covenant against assignment in the said lease contained.

" (2) From the amount so computed under (A) or (B) as the applicant shall have elected there shall be deducted the amount if any by which the same exceeds the aggregate of the following three amounts namely (a) the amount of sterling which would have been required on Mar. 4, 1954, to purchase $734,971.89 of the United States of America (b) the amount agreed or found on the making of the inquiry secondly hereinbefore directed or the sum of £11,177 6s. 9d., whichever is the less and (c) the amount agreed or found on the making of the inquiry thirdly hereinbefore directed; and the amount so computed after such deduction (if any) as aforesaid shall be the provable sum but so that any interim distribution in respect of the first of the said three amounts shall not be delayed by reason only that the second and third of the said three amounts or either of them shall remain to be agreed or found as aforesaid."

The liquidators now appealed to the Court of Appeal from this order of WYNN-PARRY, J.

A *John Megaw, Q.C., K. W. Mackinnon, Q.C.*, and *Richard H. Hunt* for the liquidators.

R. O. Wilberforce, Q.C., and *R. B. S. Instone* for the trustee.

Cur. adv. vult.

Dec. 8. The following judgments were read.

B **JENKINS, L.J.:** The judgment I am about to deliver is the judgment of ROMER, L.J., and myself. It is concurred in by WILLMER, L.J., except on certain aspects of the case as to which he will be delivering a separate judgment.

This is an appeal by the liquidators in the winding-up of United Railways of Havana and Regla Warehouses Ltd. (a company incorporated in England in the year 1898 and hereinafter called "the company") from an order of WYNN-
C PARRY, J., dated Nov. 19, 1957, to the effect that a proof of debt lodged on behalf of the trustee for the holders of an issue of certificates known as "United Railways of Havana fifteen-year 7½ per cent. Equipment Trust Certificates" should be admitted for a sum to be computed in the manner described in such order.

The present trustee for the holders of these certificates and respondent in this appeal is the First Pennsylvania Banking & Trust Co., a corporation of the
D Commonwealth of Pennsylvania in the United States of America, and is the successor in office of the Commercial Trust Company of Philadelphia, another Pennsylvanian corporation which was the original trustee. References in this judgment to "the trustee" are to be understood as meaning the original trustee or its successor as the context may require.

WYNN-PARRY, J.'s full and careful survey of the documents, acts and events
E leading up to the present dispute* enables us to go straight to the points at issue in this troublesome case, referring to particular facts and documents as and when relevant to the matter under discussion.

The basic question in the case is whether at the commencement of the voluntary winding-up of the company on Mar. 4, 1954, the company was indebted to the trustee under the covenant by the company for the payment of rentals
F contained in the lease of Apr. 18, 1921, of the rolling stock by the car company to the company, the benefit of which was assigned by the car company to the trustee under the trust agreement of even date.

If this question fell to be determined according to English law, it would admit of only one answer. According to the express terms of the covenant the company was bound to pay the stipulated rentals, and it was not in dispute that such
G rentals were in fact in arrear and unpaid, as to the interest element since Aug. 14, 1934, and, as to the element representing instalments of capital, from and including the instalment due on Feb. 14, 1931, down to and including the final instalment due on Feb. 14, 1936, a total of eleven half-yearly instalments in all.

It is no doubt true that the trustee could not in the end be entitled to any greater sum than was required to give full effect to the rights of the holders of
H the 331 outstanding certificates plus any sum properly allowable for its expenses, and if it in fact received more than the amount so required, would have to account for the surplus to the liquidators. It is also true that this necessary limitation, coupled with questions as to the rates of exchange from $ to £ appropriate to the calculation, might well leave room for argument as to the proper way of quantifying the amount for which the trustee could prove in the winding-up in
I respect of this indebtedness; but there could be no doubt whatever that it was a provable debt.

Counsel for the liquidators did in fact raise a subsidiary argument of some weight as to the quantum of the trustee's proof, to which we will later return, but according to his submission this question does not arise, for the simple reason that the right to receive and obligation to pay the debt outstanding under the lease was governed by the law of Cuba either (a) because the situs of

* This survey is substantially reproduced in the statement of facts, ante, p. 217, letter G, to p. 224, letter H.

the debt was in Cuba, or (b) because the proper law of the contract constituted by the lease was Cuban law. If he was right in claiming the application of Cuban law to the debt on either of these grounds, it followed according to his argument that under Cuban law the sale of the company's undertaking to the Cuban State on Dec. 1, 1953, had the effect of transferring the liability for the debt from the company to the Cuban State, or, in other words, brought about a compulsory novation by virtue of which the trustee was compelled to accept the Cuban State as its debtor in lieu of the company.

We propose to begin by examining this argument on the assumption that Cuban law was on one or other of the grounds above stated applicable to this debt. The question then is whether on that assumption the sale to the Cuban State did according to Cuban law have the effect of bringing about the compulsory novation for which counsel for the liquidators has contended. [His Lordship referred to the law decrees and the agreements under which the sale to the state took place, considered the evidence of Cuban law, and concluded:] On this part of the case, that is to say, the question whether, assuming Cuban law to be applicable, there was a compulsory novation in respect of the debts of the company for which the Cuban state assumed liability according to the terms of the sale of Dec. 1, 1953, we have no hesitation in preferring the evidence of Dr. Gorrin to that of Dr. de Cubas, and find ourselves in complete agreement with the view taken by the learned judge. We think there was no more than an agreement between the company and the Cuban state to the effect that as between those two parties the state should discharge the liabilities referred to and indemnify the company in respect thereof, leaving wholly unaffected the rights of the creditors concerned against the company. That conclusion makes it strictly unnecessary to deal with the question whether the sale by the company to the Cuban state was not in any case wholly outside the scope of the Military Order because it was not a sale by one railroad corporation to another. Prima facie it was not such a sale, inasmuch as the purchaser from the company was not another railroad corporation, but the Cuban state. The learned judge held that it was not such a sale. We find ourselves in complete agreement with the learned judge's reasoning and conclusions on this point (summarised in [1957] 3 All E.R. at p. 661, letter C), and, inasmuch as it becomes material only if we are wrong in the view we have formed on the question of novation, we refrain from enlarging further on it.

Finally, on this part of the case, there is the question whether the sums owing to the trustee under the trust agreement were included in the liabilities which were to be assumed by the Cuban state. This again is a point which only arises if we are wrong on the question of novation. [His Lordship considered the provisions of the various agreements and Cuban laws on this point, and concluded thereon:] We think the contractual assumption by the Cuban state under the confidential agreement* of the liability to the trustee would, if the company's argument was maintainable in other respects, suffice to bring it within the scope of the principle of novation for which the company contended. Accordingly, as it seems to us, nothing now turns on this point, and we may therefore pass from it.

As we reject the liquidators' submission that in Cuban law their liability under the lease was transferred away from the company to the Cuban state by compulsory novation, their counsel's further argument, which would have become relevant on the contrary assumption, that novation depends on the lex situs of the debt, and that the situs of the debt now in question was Cuban, does not really arise. We will, however, express our views on it, for the question whether the lex situs applies is an important one and considerable argument was addressed to us on it by counsel on both sides.

Counsel for the liquidators' first proposition on this subject was that where a

* I.e., the agreement referred to at p. 223, letters C to F, ante.

A question of statutory novation of a debt arises, then, whether the novation results in the substitution of a new creditor for the original creditor or of a new debtor for the original debtor, our law will look and look only to the law of the situs of the debt at the date of the relevant foreign legislation. If, on the other hand, no case of novation arises but only a question of modifying a debtor's obligation under a contract, then our courts will look to the proper law of the B contract and not to the lex situs of the debt. A novation of a debt, says counsel for the liquidators, involves one single juridical act and the question whether that act is effectual so as to bind the creditor is to be determined by reference to the lex situs.

Counsel for the trustee, on the other hand, submitted that novation comprises two distinct elements, viz., the annulment of one debt and the creation of a C substituted debt in its place. This difference of approach to the question which is involved in the respective contentions appears to us to be vital and should be considered at the outset. Counsel for the trustee's view is supported by ANSON'S LAW OF CONTRACT (20th Edn.) where it is stated (at p. 263):

> "A liability may be assigned with the consent of the party entitled; but this is in effect the rescission of one contract and the substitution of a D new one in which the same acts are to be performed by different parties. This is called a 'novation' and it can only take place by agreement between the parties; novation cannot be compulsory."

In WOLFF'S PRIVATE INTERNATIONAL LAW (2nd Edn.), p. 458, the following propositions are stated:

E "The substitution of one debtor for another is treated either as a novation, that is, an extinction of an existing debt by the creation of a new one, or as a true succession into an obligation which remains in force. The first method, developed on the basis of Roman law, is to be found in English and French municipal laws; the second method prevails in German law and has been adopted in the legal systems of Austria, Switzerland, and Poland. F In both cases the question whether the old debtor is discharged by the entry of a new debtor depends on the proper law of the debt. But whether the entry of a new debtor has taken place must be determined by the law with which that entry is most closely connected; this may be the new debtor's personal law or the law of his place of business, unless he and the creditor have agreed on a particular legal system."

G No express judicial authority was cited to us in support of counsel for the trustee's suggested dichotomy, but in our view it is right in principle. The discharge of the original debtor must precede, and is distinct from, the acceptance by or imposition on the creditor of a substituted debtor. It follows from this that although the elements of a statutory novation may, and usually will, be comprised in one statute or decree and, for practical purposes, operate simul- H taneously, each has nevertheless a separate and distinct legal identity.

If this view be right, the next question is whether both of the elements to which we have referred are regarded by our courts as governed by the lex situs of the debt; for if even one of them is governed by some other law, and, in particular, by the proper law of the contract, the proposition of counsel for the liquidators cannot be supported. Is then the first part of a novation, namely, I the discharge of a debtor from a contractual liability to pay money, governed by the lex situs (which will normally be the place of the debtor's residence) or by some other, and, if so, what, system of law?

Rule 155 in DICEY'S CONFLICT OF LAWS (7th Edn., p. 804) is in the following terms:

> "The validity of the discharge of a contract (otherwise than by bankruptcy) normally depends upon the proper law of the contract. (1) A discharge in accordance with the proper law of the contract is valid. (2) A

discharge not in accordance with the proper law of the contract is not valid." A

In the discussion on this rule (ibid., at p. 807), the learned author states:

"A contractual debt may, and normally will, be regarded as 'situate' at the debtor's place of residence, but the discharge of a debt, whether by performance or through other events, is a matter subject not to the lex situs of the debt but to the proper law of the contract from which it arises." B

This comment, and r. 155 itself, seem to be amply supported by authority. Thus in *Perry* v. *Equitable Life Assurance Society of U.S.A.* (1) ((1929), 45 T.L.R. 468) the plaintiff sued in this country on an insurance policy which had been issued under a contract whereof the proper law was Russian. The rights under the contract had been annulled by Russian legislation, and BRANSON, J., giving effect to the proper law, was constrained to dismiss the action. It is true that in that case the date for payment under the policy had not yet arrived when the Russian legislation took effect. We agree, however, with WYNN-PARRY, J., in his refusal to apply one principle to a contractual obligation to make a future payment and another to a contractual debt presently due. In our judgment DICEY'S r. 155 applies to a debt which has accrued due under a contract equally with a contractual obligation to make a payment in futuro. This, as it appears to us, is sufficiently shown by the decision of this court (stated in detail by WYNN-PARRY, J., in his judgment, [1957] 3 All E.R. at pp. 655-657) of *Gibbs & Sons* v. *Société Industrielle et Commerciale des Métaux* (2) ((1890), 25 Q.B.D. 399). That decision was approved by the Privy Council in *New Zealand Loan & Mercantile Agency Co.* v. *Morrison* (3) ([1898] A.C. 349), in which it was held that as the Joint Stock Companies Arrangement Act, 1870, did not apply to the colonies a scheme of arrangement sanctioned thereunder by an English court could not be pleaded by the company concerned in a Victoria court as a defence to an action by a non-assenting Victorian creditor for the full amount of her claim. *Gibbs & Sons'* case (2) was also referred to with approval, but distinguished, by LORD SIMONDS in *National Bank of Greece & Athens, S.A.* v. *Metliss* (4) ([1957] 3 All E.R. 608 at p. 611). It accordingly appears to us that the view which we have expressed, that the question whether a debtor has been discharged from his liability depends on the proper law of the contract, is sufficient in itself to dispose of counsel for the liquidators' contention that novation depends on the lex situs; for, on the dichotomy of novation, which we accept, the first limb (viz. the discharge of the debtor) depends on the proper law of the contract, and counsel for the liquidators cannot succeed unless the lex situs applies both to the first limb and to the second. C D E F G

In the course of counsel for the liquidators' argument on this question, however, he sought to rely on the cases in which resort has been had to the lex situs of a debt where the title to the debt has been in question, that is to say, where under the lex situs the rights of the creditor have been transferred away from him to another. There has been a number of such cases and most of them were considered and analysed by WYNN-PARRY, J., so fully in the course of his judgment* that little is to be gained by referring to them again in this judgment. We should, however, refer shortly to one of the most recent cases on this subject, namely, *Arab Bank, Ltd.* v. *Barclays Bank (Dominion, Colonial & Overseas)* (5) ([1954] 2 All E.R. 226). In that case the Arab Bank had a credit balance on its current account with the respondent bank's branch in Jerusalem. The British Mandate over Palestine expired at midnight on May 14, 1948, and thereupon the provisional Council of State and provisional government of the state of Israel were constituted. War broke out between Israel and the Arab states, which rendered the further performance of the contract of current account impossible. From the date of the termination of the mandate the Arab Bank's premises were H I

* See [1957] 3 All E.R. at pp. 652-655.

A situate in Arab-controlled territory and the respondent bank's premises were situate in Israel territory. By legislation the state of Israel vested in an official called " the Custodian of Property of Absentees " the property in the state of Israel belonging to a class of persons and corporations which included Arab Bank, Ltd. The respondents paid the Arab Bank's credit balance, amounting to some £583,000, to the custodian. In 1950 Arab Bank, Ltd. sued the B respondents for this sum. PARKER, J., this court, and the House of Lords, dismissed the action on the ground that the right to be paid the credit balance, being locally situate in Israel, became subject to the legislation of that state and vested in the custodian and was not recoverable by Arab Bank, Ltd. from the respondent bank. In the course of his speech LORD MORTON OF HENRYTON said (ibid., at p. 235) that the Arab Bank's right to be paid their credit balance C on current account was

> " suspended, and not destroyed, by the outbreak of war, and immediately after the outbreak of war it was locally situate in the newly created state of Israel. Thus, it became subject to the legislation of that state, and was vested in the custodian, and the credit balance was rightly paid to the D custodian by the respondents."

Counsel for the liquidators contended that if, as *Arab Bank, Ltd.* v. *Barclays Bank* (*Dominion, Colonial & Overseas*) (5) and other cases show, the lex situs is regarded by our courts as decisive when, under that law, the rights of a creditor are compulsorily transferred to another, the same result should follow where one debtor is compulsorily substituted for another. It appears to us, however, that E there is no true analogy between the two cases. The contractual right to receive payment of a debt is an item of property, that is to say, a chose in action. It can be transferred by the creditor to a third party but the validity of the transfer necessarily depends on the lex situs because the courts of the country where the debt is have jurisdiction over the title to it. Novation, on the other hand, does not involve the transfer of any property at all, for, as we have F already pointed out, it comprises the annulment of one debt and the creation of another. Moreover, in novation a creditor may be vitally prejudiced, whereas it is immaterial to a debtor to whom he pays his debt provided that he gets a good discharge for it. Accordingly, we are unable to accept the suggested application, by analogy, of such cases as *Arab Bank, Ltd.* v. *Barclays Bank* (*Dominion, Colonial & Overseas*) (5) to the present case.

G The only authority which counsel was able to draw to our attention in favour of the proposition that the lex situs governs questions of statutory novation is a passage in the judgment of MAUGHAM, J., in *Re Russian Bank for Foreign Trade* (6) ([1933] All E.R. Rep. 754). In that case a petition to wind up the Russian Bank was presented under s. 338 (1) (d)* of the Companies Act, 1929, by a person who claimed to be a creditor thereof. For present purposes it is sufficient H to say that the evidence on the petition proved that Russian legislation in 1917 and later had transferred the Russian bank's assets and liabilities to the Soviet government, and that payment could not be demanded from any other person or body of persons; and that the result of the legislation was to put an end to the juristic existence of banking companies incorporated in Russia, including those which (like the Russian bank) had branches established in England. The I relevant Soviet legislation was described by MAUGHAM, J. (ibid., at p. 760) as being " of a confiscatory character ". The learned judge, after holding that he had jurisdiction to wind up the bank under s. 338 whether or not it had been dissolved or had completely ceased to exist as a company under the laws of Russia, proceeded to consider the position of the petitioner. That gentleman claimed to be a creditor of the bank for some £23,000 representing proceeds of sale of goods sold by the London branch of the bank on his behalf from time to

* Now the Companies Act, 1948, s. 399 (5).

time and not yet paid for. The debt was disputed, and in the course of considering the matter MAUGHAM, J., said (ibid., at p. 761) that there was A

> "... a real question in dispute, and that is whether the debt to the petitioner was or was not locally situate in Russia at the date of the decree of 1917 and 1918 above referred to. If it was locally situate in Russia, it seems to me that, as the effect of the legislation, the debt is no longer due by the bank as a corporation, and that the only claim of the petitioner is against the Soviet state. By the decree of December, 1917, the assets and liabilities of the bank within Soviet territory were taken over by the people's bank, and this, in my opinion, involves the destruction of the original debt and a kind of statutory novation (in some sense perhaps only a theoretical one) where the State Bank became liable to discharge it." B C

Counsel for the liquidators in the present case has, not unnaturally, fastened on MAUGHAM, J.'s reference to statutory novation, and submits that the learned judge was treating the jus situs of the debt as governing the novation. As appears from the report (ibid., at p. 762) the evidence did not satisfy the learned judge whether the petitioner was a creditor for a debt payable by the Archangel branch of the bank or was a creditor for a debt payable in London. As, however, D there were creditors supporting the petition whose debts were locally situate in England, he did not regard this as being a sufficient objection in itself to a winding-up order being made (see [1933] All E.R. Rep. at pp. 763, 764) and he accordingly made such an order, being well satisfied that it was just and equitable so to do. It is quite true that MAUGHAM, J., does seem to have regarded the Russian law, confiscatory in character thought it was, as effective in so far as E it annulled the claims of creditors whose debts were payable in Russia and transferred the liabilities to the Soviet government. It does not appear, however, to have been suggested in argument before him that it was in any way relevant to look to the proper law of the contract in order to ascertain whether the legislative annulment of the bank's liabilities operated as a discharge which was binding on its creditors. It seems to have been assumed on all hands that the lex situs of F the bank's debts controlled the creditors' rights and the only question (on this point) which was argued was whether the petitioning creditor's debt—which was, in any case, disputed—was situate in Russia or in England. Moreover, the issue was of subsidiary importance against the background of the far wider question whether, in the highly complex circumstances of the case, the court could and should order the bank to be wound up and thus undertake the distribution of such G assets as came under its control. We cannot, at all events, regard the observations of the learned judge on which counsel for the liquidators relies as constituting an authoritative pronouncement that the novation of a debt, brought about by state intervention, is binding on the creditor, whatever may be the proper law of the contract, by virtue of the lex situs of the debt and that alone.

MAUGHAM, J.'s observations above quoted, were referred to by VAISEY, J., H in *Re Banque des Marchands de Moscou* (*Koupetschesky*), *Royal Exchange Assurance* v. *The Liquidator* (7) ([1952] 1 All E.R. 1269) and by ROXBURGH, J., in *Re Banque des Marchands de Moscou* (*Koupetschesky*) (8) ([1954] 2 All E.R. 746) but in neither of these cases was it relevant to inquire whether the claim of creditors who sought in each case to prove in the liquidation of the Banque de Moscou was defeated by Russian law operating as the proper law of the I contract or operating as the lex situs of the debt—though in fact VAISEY, J., resorted to the proper law of the contract as being the appropriate law to consider. In any event, it seems to us that the Russian bank cases, involving as they did the winding-up of foreign organisations already dissolved by their own domestic laws and a consideration of the rights of various types of creditors to prove in liquidations carried out in this country, were cases of so special a character as to afford little guidance in the elucidation and application of principles of private international law in general. As already indicated, we do not think that the

novation of debts is a matter to be determined solely by reference to the lex situs, and we respectfully adopt the conclusion of WYNN-PARRY, J., on the subject, which he expressed as follows ([1957] 3 All E.R. at pp. 658, 659):

> " In this state of the authorities, I come to the conclusion that the proposition contended for by counsel for the liquidators is not established as a rule of English private international law. To my mind it would offend against both principle and considerations of convenience. It must be remembered that, as DR. CHESHIRE says, 'discharge affects the substance of the obligation', whereas questions of title to and assignment of the benefit or burden [the words " or burden " obviously slipped in per incuriam] of the obligation do not. Every contract has a proper law: it is the law which the parties either expressly or impliedly have chosen to govern their contractual relations. One of the most important aspects of any contract is the manner in which it is to be discharged, and one would suppose that the parties would intend the law which they have chosen as the proper law to govern that important matter—discharge."

If we are right in accepting the view that, on analysis, novation comprises two features and that the first (the discharge of the debtor) is controlled by the proper law of the contract counsel for the liquidator's proposition cannot succeed and it is immaterial whether the second feature (the substitution of a new debtor) depends on the lex situs or on some other law. In these circumstances we prefer to express no concluded opinion on that question. There is obviously, however, much to be said for the view expressed in WOLFF'S PRIVATE INTERNATIONAL LAW (2nd Edn.), p. 458, that the question should be determined by the law with which the entry of the debtor is most closely connected and that, in the absence of some agreement to the contrary, such law might be the new debtor's personal law or the law of his place of business.

As ancillary to counsel for the liquidators' submissions as to the lex situs it was, of course, necessary for him to establish that the liabilities which are in question in the present case were, in 1953, situate in Cuba. Inasmuch as we have been unable to accept counsel for the liquidator's main submission, and in any event are of opinion, as already indicated, that no novation was effected by the relevant Cuban legislation, the question of the locality of the company's debt becomes wholly academic; and we think it unnecessary to burden this judgment with a consideration of it.

We turn now to the question of what was the proper law of the lease. This would be relevant to the issue of novation had we accepted the liquidators' contention as to the novationary effect of the legislation on which the contention was founded. The question is, however, also directly relevant to the issues which arise out of the moratorium legislation in Cuba which we consider hereafter; for if, as the trustee contends and as the learned judge held, the proper law of the lease was Pennsylvanian the liquidators cannot, as they concede, rely on the moratorium legislation. In an inquiry what is the proper law of a contract in which the parties have not expressed their own selection of the law to be applied, many matters have to be taken into consideration. Of these, the principal are the place of contracting, the place of performance, the places of residence or business of the parties respectively, and the nature and subject-matter of the contract (DICEY, p. 720, citing FALCONBRIDGE*). As, however, the learned editor points out, the most satisfactory formulation is that the proper law is the one " with which the transaction has its closest and most real connexion " (per LORD SIMONDS in *Bonython* v. *Commonwealth of Australia* (9), [1951] A.C. 201 at p. 219). In CHESHIRE'S PRIVATE INTERNATIONAL LAW (5th Edn.), at p. 207, this passage appears:

> " The country in which [the contract's] elements are most densely grouped will represent its natural seat and the law to which in consequence it belongs.

* SELECTED ESSAYS ON THE CONFLICT OF LAWS (2nd Edn., 1954), p. 378.

It may have factual links with several countries, each of which has some claim to be considered . . . In most cases, however, an examination of these connecting ties will disclose without undue difficulty the country with which the contract is in fact most closely connected and in which lies its natural seat or centre of gravity."

It is further to be observed that the fact that one aspect of a contract is to be governed by the law of one country does not necessarily mean that that law is to be the proper law of the contract as a whole (*Hamlyn* v. *Talisker Distillery* (10), [1894] A.C. 202). Different parts of a contract may be governed by different laws, though "the courts of this country will not split the contract . . . readily and without good reason" (per LORD MACDERMOTT in *Kahler* v. *Midland Bank, Ltd.* (11), [1949] 2 All E.R. 621 at p. 633). WYNN-PARRY, J., held that the proper law of the lease was Pennsylvanian, and the liquidators have not persuaded us that he was wrong.

It seems reasonably clear to us that the trust agreement* between the rolling stock company and the trustee (the commercial trust company) was not intended by the parties to be governed by Cuban law. Both parties to the agreement were American corporations. Under the trust agreement the trustee was to issue to the rolling stock company $6 million Equipment Trust Certificates and the latter company was to transfer to the trustee the lease and all its right, title and interest in and to the rolling stock. The trustee was to hold the rights and interests so transferred as trustee for the holders of the certificates. The certificates were to be retired not later than Feb. 15, 1936, on surrender thereof at the trust company's office in the City of Philadelphia, and in the meantime dividends would be payable in New York. Par value of the certificates, premium and dividends were to be payable in gold coin of the United States of America of 1921 standard of weight and fineness out of the rentals received under the lease. The trustee was to keep at its office in Philadelphia a register in which the holders of certificates might have the same registered. Pausing there, it could scarcely be doubted but that the agreement was essentially an American, and not a Cuban, contract, especially when it is remembered that in 1921, at all events, trusts such as that which was created by the agreement were virtually unrecognised by the domestic law of Cuba. There follow, however, in the agreement certain provisions which were to take effect in the event of the company [i.e., the English company owning the railway] defaulting in payment of the rentals reserved in the lease and, for relevant purposes, cl. Seventh is the most important. [HIS LORDSHIP read the terms of cl. Seventh which is printed at p. 219, letter I, to p. 220, letter A, ante, and continued:] Inasmuch as the rolling stock, which was to be the security for the certificate holders, was situate in Cuba it is clear that events might well arise which would render resort to the Cuban courts by someone who was qualified to apply to them both necessary and desirable in the event of default by the company. That, however, is to our minds quite insufficient ground for attributing to these American contracting parties an intention that the trust agreement as a whole should be governed by Cuban law. So also with cl. Eleventh and cl. Twelfth on which the liquidators relied. These are as follows: [HIS LORDSHIP then read cll. Eleventh, Twelfth, which are printed at p. 220, letters D to F, ante, and continued:] We read these clauses as designed to ensure that the formal execution of the agreement should be in accordance with Cuban law and be registrable thereunder accordingly. No further or other significance can, in our judgment, be fairly attributed to them. In our opinion, therefore, except to the limited extent to which the law and courts of Cuba were invoked for the purpose of cl. Seventh and cl. Eleventh, the proper law of the agreement cannot be regarded as Cuban. Counsel for the liquidators says that if the parties had intended the proper law to be American they would have indicated

* This is the agreement referred to, p. 220, letter G, ante.

whether they had in mind the law of some particular state, that is, Pennsylvania, New York or (possibly) Delaware, in which the rolling stock company was domiciled. As to this, however, we think that Delaware can be safely ruled out and New York only comes into the picture as being the place designated for payment of the interest on the certificates. We accordingly agree with the learned judge in thinking that the proper law to be attributed by the court to this agreement was that of Pennsylvania but not, at all events, that of Cuba.

It has been material to consider the agreement in this connexion because it was held by the learned judge, and argued before us by counsel for the trustees, that the proper law of the agreement and of the lease was intended to be the same. This is probably, though not, we think, inevitably true. In the words of the learned judge ([1957] 3 All E.R. at p. 659):

> " The lease is expressly recited in the [trust agreement], and in the lease there is a recital of the intention immediately to assign the benefit of the lease to the trustee. The two documents are essential parts of the same transaction, namely, the Philadelphia Plan. In these circumstances one would expect that they each would have the same proper law . . ."

One certainly cannot ignore the fact that each of the two documents constituted essential parts of one entire transaction and it would, we think, be unusual if the parties concerned in that transaction should desire one part to be governed by the law of Cuba (which is in many relevant respects totally different from American law) and the other part to be governed by the law of Pennsylvania. It is, however, necessary to consider the provisions and objects of the lease. [HIS LORDSHIP then read or summarised the provisions which are printed at p. 218, letter B, to p. 220, letter G, ante and continued:] On the terms of the lease, then, read in conjunction with those of the trust agreement, with which it was associated, what was the proper law which the parties intended, or must be deemed to have intended, should govern its performance? What was the country with which it had " its closest and most real connexion ", the country " in which lies its natural seat or centre of gravity "?

Counsel for the liquidators in contending that that country was Cuba, relied on the reference in cl. Seventh [of the lease] to " any court having jurisdiction in the premises " and suggested that that reference was to the courts of Cuba and foreshadowed cl. Twelfth of the lease. He further submitted that the subject-matter of the lease was rolling stock in Cuba or to be delivered there; the payments reserved were expressed to be rentals deriving from the operation of the company in Cuba, and, on default, the certificate holders' security, that is the rights and interests in the rolling stock, could only be enforced in Cuba; that practically the whole of the lease was concerned with the preservation of this security and the protection of the trustee's title to it in Cuba; that cl. Eleventh and cl. Twelfth are entirely comprehensive in their scope and indicate a rejection of all law in relation to the lease other than Cuban; and finally, in this connexion also, he relied on the contention, already mentioned, that if the parties had American law in mind they would surely have indicated some particular state (a point with which we have sufficiently dealt already).

On the other hand, counsel for the trustee submitted that the lease and the trust agreement, which were executed on the same day, were both parts of the so-called Philadelphia Plan, which was purely a financial transaction embodying provisions for a loan and for the repayment thereof; that the lease, which constituted a security but not a mortgage for the repayment of the loan, was merely a convenient piece of mechanism; that the Philadelphia Plan was wholly foreign to the law of Cuba; that all payments under the lease were to be in United States of America gold coin and payable in the United States to a trustee resident in that country; that surely the parties could not have intended that questions which might well arise from some alteration in the

American gold clause legislation or as to the remuneration and expenses of the trustee and the like should be dealt with by the Cuban courts in accordance with Cuban law. Counsel for the trustee presented the entire transaction (of which the lease formed an ingredient) as an essentially American (Pennsylvanian) transaction with a Cuban element in it. Clauses Seventh, Eleventh and Twelfth of the lease were introduced, he submitted, because of the presence of this element but are insufficient to transform what was an obviously American contract into a Cuban one, so that all of the contractual obligations should be governed by Cuban law.

In our opinion the trustee's contention on this matter is preferable to that of the liquidators. It does not seem to us that the effect of cl. 7 of the trust agreement, or of cll. Seventh, Eleventh or Twelfth of the lease, is to attract the operation of Cuban law to the lease except for limited purposes. In our judgment the words " to the end that " limit the scope of cl. Eleventh of the lease just as they limited the scope of cl. Eleventh of the trust agreement save that the clause in the lease extends also to the performance under Cuban law of such acts as might be required to protect the trustee's title. Similarly, in cl. Twelfth of the lease, the submission to the jurisdiction of the tribunals of the City of Havana is, significantly, for the purpose of " notifications " and specified " formalities ". In view of these purposes, expressly described, it seems to us difficult in the extreme to suppose that the parties were intending to submit themselves to the law of Cuba for all the purposes of the lease—" expressio unius exclusio alterius est ". And as to cl. Seventh the reference to " specific performance " is a strong reminder of the principles of equity for so long known and applied by our courts and those of the United States.

We accept, without repeating them, the reasons advanced by counsel for the trustee for the view that although the lease, as also the trust agreement, was intended in some of its aspects to be governed by the law of Cuba, nevertheless the proper law of the contract as a whole, the general law which was to govern its performance, was not that of Cuba but the law of Pennsylvania or (possibly) of Philadelphia. In our opinion there is ample justification, dictated by the nature of the transaction and by the terms of the trust agreement and the lease, for holding that both these documents are severable in relation to the law which governs their performance; and that while Cuban law was clearly intended to be applicable to certain aspects of the agreement and the lease, nevertheless the proper law of both these contractual documents was that of Pennsylvania or Philadelphia.

While accepting the trustee's contention that the proper law of the trust agreement and of the lease was not the law of Cuba we are not prepared, as at present advised, to accept their alternative suggestion that had the proper law been Cuban the relevant law to apply would nevertheless, on the evidence of Dr. Gorrin and by virtue of the renvoi doctrine, have been that of Pennsylvania. This view does seem to have been accepted by the learned judge* and receives some support from the judgment of the Privy Council, delivered by LORD WRIGHT, in *Vita Food Products, Inc.* v. *Unus Shipping Co., Ltd.* (12) ([1939] 1 All E.R. 513 at p. 522). This passage from the judgment of the Judicial Committee has, however, by no means escaped criticism (see for example DICEY, pp. 73 and 721; and an article in (1940) 56 LAW QUARTERLY REVIEW 333-335 by Mr. MORRIS and Dr. CHESHIRE). Had it been necessary to decide the point on the present appeal (which it is not) we should have been disposed to hold that the principle of renvoi finds no place in the field of contract; and accordingly that if the parties to the lease here in question ought to be treated as having accepted Cuban law as the proper law of the contract, such law was the domestic law of Cuba and not the rules of the conflict of laws administered by the Cuban courts.

A good deal of evidence at the trial, and considerable argument before us, was

* See [1957] 3 All E.R. at p. 661, letters D, E, head (d).

devoted to the question whether under Cuban law the rolling stock, while in use on the railway, was to be considered as real property or personal property. In the view which we take this question is of no great relevance, but in case we are wrong as to that we think it proper to set out the conclusions at which we have arrived. The learned judge stated in his judgment*:

> " Counsel for the liquidators put forward this question as being relevant on three points: first, as helping to establish that the liabilities of the company in regard to the lease are liabilities situate in Cuba for the purposes of cl. Fourth (B) of the preliminary agreement: secondly, as a factor to be taken into account in determining the proper law of the lease: and, thirdly, for the purpose of throwing light on the question whether or not under Cuban law there had been an effective transfer of the ownership of the rolling stock to the trustee."

It appears to us that with regard to the first two points it matters not whether the rolling stock did or did not have the character of real property. The essential fact was that it was at all material times physically situated in Cuba. With regard to the third point, for reasons which will appear hereafter, we are satisfied that the trust agreement was effective to transfer the ownership of the rolling stock to the trustee, and our conclusion on this point would be the same whether or not, at the time of the agreement, the rolling stock had the character of real property. It was contended by counsel for the liquidators, and not challenged by counsel for the trustee, that in order to determine whether the rolling stock was real or personal property it is necessary to look to the domestic law of the place where it was situated, that is, Cuba. [HIS LORDSHIP considered the evidence and argument as to the Cuban law on this point, and, having referred to the concession by counsel for the liquidators that the burden was on him to satisfy the court that the rolling stock acquired and retained the character of real property, concluded:] We find it impossible to say that the burden of proving that this rolling stock retained throughout the character of real property has been discharged. On this point, therefore, if it is of any relevance, our conclusion is in favour of the trustee. At all material times after Apr. 10, 1921, the rolling stock must in our judgment be regarded as having, under Cuban law, the character of personal property.

As relevant to the issues of conversion and breach of contract which we consider hereafter, the liquidators submitted that, whatever may have been the intention of the parties to the trust agreement and their subsequent belief as to its effect, that document was wholly ineffective to pass any title at all in the railway equipment from the rolling stock company to the trustee. The liquidators admit that by virtue of the trust agreement the trustee became entitled to the benefit of the railway company's covenants in the lease but deny that they acquired any title to the rolling stock itself. [HIS LORDSHIP considered the evidence of Cuban law, held that the trust agreement was valid in Cuban law to pass the car company's† title in the rolling stock to the trustee, and continued:] In the light of this conclusion it is now necessary to consider the alternative claims put forward on behalf of the trustee on the basis of conversion and breach of covenant. We approach this question on the footing that, whatever law is applicable, the trustee, by virtue of the trust agreement, obtained a good title to the rolling stock. This could not in our judgment be affected in any way by the subsequent re-sale agreement of Apr. 27, 1922, whereby the car company purported to sell the rolling stock to the company. From the date of the lease the company must be regarded as remaining in possession of the rolling stock as bailees from the trustee. In such circumstances we entertain no doubt that the transfer of the rolling stock to the Cuban State, in pursuance of the agreement of Dec. 1, 1953, was prima facie an act of conversion. If the lease were to be

* This part of his judgment is summarised in [1957] 3 All E.R. at p. 661, letter D.

† This company is referred to at p. 217, letter H, ante.

regarded as still in force it was plainly contrary to the terms thereof. If the lease be regarded as no longer in force after February, 1936, there is still no ground on which the transfer of the rolling stock could be justified. We accept that in order to be actionable as a tort in this country the act complained of must be an act not justifiable according to the law of the foreign country where it was done, that is, Cuba (see DICEY (7th Edn.), r. 181, at p. 940); but in this connexion we accept the view expressed by Dr. Gorrin in his affidavit, that the transfer of the rolling stock to the Cuban State was an act unjustifiable under Cuban law. The opinion of Dr. de Cubas to the contrary was based solely on his view that the trustee had never acquired the title to the rolling stock, a view which we have already rejected.

It was contended by counsel for the liquidators, and we accept, that an action for conversion will not lie unless the plaintiff can show an immediate right to possession of the chattels in question. It was argued that in this case the trustee could never, at any material time, obtain possession of the rolling stock, because such rights as he had were at all times subject to the limitations imposed by Military Order No. 34 of 1902, particularly Ch. XV thereof. In our judgment there is no substance in this argument. The purpose of Ch. XV of the Military Order, as plainly appears from para. I thereof, was to prevent the interruption of the public services afforded by a railroad which might occur if its equipment were subject to the ordinary processes of execution. It was therefore provided that, in the event of a creditor obtaining judgment against a railroad corporation, the court should appoint a judicial administrator or receiver charged with the duty of temporarily administering the railroad and paying the judgment debt out of the net earnings. It appears to us that this provison of Cuban law has no relevance to the question of the trustee's right to possession. It is no doubt true that Cuban domestic law might well interfere, to some extent, with the free exercise of the trustee's right to possession, in the same way as the company's own possession of the rolling stock was subject to the limitations imposed by Cuban law; but this could not in our view affect the rights of the trustee and the company inter se. As against the company the trustee was at all material times immediately entitled to such possession as the company itself had.

A further objection taken by counsel for the liquidators was that, assuming the ownership of the rolling stock remained throughout in the trustee, it was, by the express terms of cl. Twenty-ninth, excluded from the operation of the sale agreement of Dec. 1, 1953. On this argument the rolling stock never was sold to the Cuban State, and consequently there never was any conversion, the trustee being just as free now to exercise its right to possession as it was before the agreement. In our view this contention is wholly without merit, since one thing which is clear is that the effect of the agreement was de facto to transfer the rolling stock to the Cuban State as part of the consideration for the price of $13 million paid by the state.

Assuming a case of conversion to be made out, as in our judgment it has been, counsel for the liquidators next contended that the damages in respect thereof could only be nominal. In our view there is possibly some force in this contention and for this reason. One result of the act of conversion complained of was to bring into the hands of the company a fund of $13 million against which the trustee became entitled to assert a claim, as it is in effect now doing. It is, therefore, in a better position than it was before Dec. 1, 1953, when, owing to the operation of Military Order No. 34 and to the appointment of the interventor, it had no effective means of enforcing its rights or of obtaining payment of the outstanding debt. It is, however, unnecessary for us to express a concluded opinion about this, for in our view the whole of the protracted discussion as to the measure of damages to which we listened was entirely academic. Assuming, for the sake of argument, that counsel for the trustee was well founded in contending that

A the measure of damages for conversion would be the amount which the company would have had to pay on Dec. 1, 1953, in order to make itself the owner of the rolling stock—that is, the total of the outstanding instalments plus its own expenses to date—it was conceded that the trustee would only be entitled to retain, out of that very considerable sum, such an amount as would be sufficient to discharge the 331 outstanding certificates remaining in its hands and B to cover its own expenses. This is the very same amount for which, for reasons hereafter stated, the trustee is in our judgment entitled to prove under the first head of its claim. For this purpose it does not matter whether that amount be calculated in accordance with the method adopted by the learned judge and contended for by counsel for the trustee, or in accordance with the alternative method suggested by counsel for the liquidators. It follows, therefore, that the C addition of a claim for conversion could not in any event affect the total of the amount in respect of which the trustee is entitled to prove.

Much the same considerations apply in our view to the further alternative claim for damages for breach of covenant, which equally appears to us to raise questions of wholly academic interest. It is at least open to doubt whether the covenant relied on, namely, that contained in cl. Fifth of the lease, D could have survived the expiry of the lease in February, 1936. This may depend on the question whether the proper law of the contract was Pennsylvanian or Cuban. If Cuban law applies, it is clear that Dr. Gorrin was of the view that the lease must be regarded as surviving. There was no evidence as to Pennsylvanian law on this subject, and accordingly, if the proper law of the contract was Pennsylvanian, it would be necessary, in the absence of evidence E as to the foreign law, to apply English law. No English authority was cited to us to show that the doctrine of holding over applies in the case of a lease of chattels. Counsel for the trustee, however, referred us to *Wedd* v. *Porter* (13) ([1916] 2 K.B. 91), which arose out of the lease of a farm, and contended that, on the analogy of that case, the covenant contained in para. 5 of the lease should be regarded as continuing in force as a matter of implied contract. F If so, there could in our view be no room for doubt that the transfer of the rolling stock to the Cuban State by virtue of the agreement of Dec. 1, 1953, would have constituted a breach of the covenant, seeing that the company thereby parted with the whole of its interest in the rolling stock.

It does not, however, appear to us to be necessary to reach any final conclusion on this point. Assuming that the covenant in the lease is to be regarded G as still in force at Dec. 1, 1953, the breach of it by the transfer of the rolling stock to the Cuban State would not confer any additional right on the trustee. The trustee could no doubt elect whether to sue for breach of covenant or for conversion. But in no event could he have his remedy twice for what was, on any view, a single actionable wrong. Exactly the same considerations with regard to the measure of damages would in our judgment apply whether the H trustee's claim be based on breach of covenant or conversion. In neither event would the trustee be entitled to retain out of the damages more than would be sufficient to satisfy the proper claims of the 331 outstanding certificate holders together with its own expenses—the very sum for which in our judgment it is entitled to prove under the first head of its claim.

For these reasons the trustee's alternative claims based on conversion and I breach of covenant in our judgment add nothing to the case, and need not be further considered.

If the proper law of the contract was Cuban, it becomes necessary to consider the application of Cuban moratorium laws, the effect of which, it is contended, would be to reduce to a very considerable extent the sum in respect of which the trustee is entitled to prove. [HIS LORDSHIP considered the evidence of Cuban law, the contentions of the parties, and the views of WYNN-PARRY, J., and concluded, upholding the decision in the court below, that after the sale of its railroad undertaking the company was no longer a public service railroad

company within the relevant Order, and that the liquidators were not entitled to the benefit of its moratorium law.] It remains to consider the question raised as to the quantum of the trustee's proof. Up to Aug. 14, 1930, certificates to the nominal amount of $3,800,000 were duly redeemed, the nominal amount of certificates outstanding being thus reduced to $2,200,000. The company subsequently bought in, pursuant to terms of compromise agreed in June, 1939, of proceedings brought against the company in Maine, U.S.A., further certificates to the nominal amount of $1,869,000 at $147.50 per certificate so that the nominal amount of the certificates left outstanding in the hands of members of the public at the commencement of the winding-up was $331,000. [His Lordship then read para. 2 of the proof, which is printed at p. 224, letter I, ante, and continued:] It clearly appears from para. 5 that the claim in para. 2 (d) in respect of the $1,867,000 (sic) certificates was made as a precautionary measure inasmuch as these certificates (which, be it remembered, were bearer documents) had not been physically surrendered to the trustee for cancellation, although the trustee had been advised that all rights under them had in fact been effectively extinguished. The figures in the proof are thrown out to some extent for the reason that the nominal value of the certificates ultimately left outstanding was taken as $333,000 instead of $331,000, the purchase by the company after default of the two further certificates (nominal value $2,000) having been overlooked. This has resulted in the total nominal value of the certificates bought in after default being put at $1,867,000 instead of the correct figure of $1,869,000, and in the nominal value of the outstanding certificates being overstated by $2,000 as above, with consequential errors in the calculation of premiums and interest. There is, however, no dispute as to the necessary corrections in the figures as such. The corrected total under para. 2 (a) of the proof is $734,971.89 instead of $739,412.81. A discrepancy of $1,000 in the total amount of the eleven unpaid instalments should also be noted. This was due to the fact that the first unpaid instalment was taken as $205,000 whereas it was actually $206,000. This has resulted in the total being understated by $1,000, but nothing of any consequence turns on this relatively small error.

In para. 4 of the proof the liability of the company to the trustee in the sums claimed in para. 2 was assigned primarily to the covenant for payment of rentals contained in the lease, but such liability was stated in the alternative to arise by way of damages for breach of the covenant against assignment contained in the lease and in the further alternative by way of damages for conversion of the rolling stock by the company. In either of these alternatives the amount of damages recoverable by the trustee in the winding-up would take the place of the rentals due under the lease as the fund available to the trustee for the purpose of satisfying the certificate holders' claims.

As appears from what we have said previously, we think that the claim in conversion at all events has been made out but we regard both these claims in damages as academic. Clearly the trustee could not recover damages under both heads, and would have to elect between them. It is also clear that on the footing that the trustee has, as we have held, established its right of proof for the rentals due under the lease, proof under that head would preclude the trustee from proving additionally for damages under either of the heads claimed. The trustee would thus in effect have to elect between proving under the lease and proving for damages under one or other of the heads claimed. [His Lordship then referred to the history of the present litigation, which is set out at pp. 225, 226, ante, and continued:] We should next refer to certain passages in the judgment of Wynn-Parry, J., on this aspect of the case. The first passage is ([1957] 3 All E.R. at pp. 650, 651):

> " Paragraph 2 [that should be 2 (a)] of the proof seeks to quantify the claim of the applicant as trustee in respect of the last eleven instalments

payable under cl. First II of the lease and the premium of 2½ per cent. on their face value and interest. Paragraph 2 (b) quantifies a claim for reasonable expenses under cl. First I (b) of the lease. Paragraph 2 (c) deals with a claim for expenses incurred or to be incurred by the applicant as trustee since Mar. 4, 1954. Paragraph 2 (d) quantifies a claim in respect of the certificates of the face value of $1,867,000, which had been purchased by the company. I am not concerned with this claim, because any claim in respect of these certificates was renounced and on that basis ROXBURGH, J., by an order of Dec. 4, 1956, in effect upheld the rejection of the proof so far as regards the claim in respect of these certificates."

The next passage is where the learned judge says this (ibid., at p. 660):

"The amount for which the trustee is entitled to prove should be ascertained as follows. There must first be ascertained what is due to the trustee under the lease. Expressed in dollars this consists of (i) the first, third and fourth items set out at the end of para. 2 (a) of the proof* and (ii) what on inquiry shall be found to be the correct sum in dollars under para. 2 (b) and (c)*. As regards the premium of 2½ per cent. on the face value of the certificates, this arises under the agreement and not under the lease and should not be taken into account at this stage of the calculation. Then the dollars must be converted into sterling. As regards principal, this represents eleven instalments of rental, and so each instalment should be converted at the rate of exchange obtaining when it fell due. As regards the first claim for interest, this represents interest payable under the lease and therefore payable half-yearly on Feb. 14 and Aug. 14 of each year. Therefore the total sum claimed under this head should be broken down into half-yearly amounts and converted at the rate of exchange obtaining on the respective dates when each half-yearly payment should have been made. The second claim for interest is really a claim for rent on the basis of holding over. I think therefore that, for purposes of conversion into sterling, the same method should be adopted as for the first claim for interest.

"The sums making up what is found to be the correct figure under para. 2 (b) must be converted into sterling at the rate obtaining on the respective dates of payment, while the sum found due under para. (c) must be converted into sterling at the rate obtaining at the commencement of the winding-up, namely, Mar. 4, 1954. If, of course, any of the items comprised in sub-para. (b) were incurred in sterling, there will be no need to convert into dollars and then back to sterling.

"The sum resulting from the above calculation will represent the sum for which the trustee is entitled to prove in the liquidation. As the trustee is a trustee, however, it can only receive in respect of its proof a sum sufficient to satisfy the proper claims of the certificate holders. In this regard I think that counsel for the trustee is right in his submission that the principle underlying the decision in *Re Chesterman's Trusts, Mott* v. *Browning* (14) ([1923] 2 Ch. 466) applies. I do not see how otherwise to deal with the matter.

"The proper course, therefore, is to ascertain the sum in dollars to which the certificate holders are entitled for principal, outstanding interest and the premium of 2½ per cent. To that total must be added the sums found due under sub-para. (b) and sub-para. (c) of para. 2 of the proof. Then there must be ascertained the amount of sterling which would have been required at the date of the liquidation to purchase the aggregate amount of dollars so ascertained. This total will represent the maximum amount which the trustee on behalf of the certificate holders can receive in respect of the sum proved for. How much the trustee will in fact receive will depend on the dividend payable in respect of the sum proved for."

* These are printed at pp. 224, 225, ante.

[His Lordship then read those parts of the order made by Wynn-Parry, J., which are printed ante, p. 226, and continued:] It will be seen that by para. (1) (A) of the order the learned judge has directed the computation of the total amount in sterling represented (a) by the eleven unpaid capital instalments (viz., $2,256,000); (b) by interest at the contractual rate from the date of default down to the date of the commencement of the winding-up on the $2,200,000 certificates outstanding at the date of default; (c) by the amount agreed or found for the trustee's expenses prior to that date on making the first inquiry, or the amount (i.e., £11,177 6s. 9d.) proved for under this head, whichever was the less; and (d) by the amount agreed or found for the trustee's prospective remuneration on making the third inquiry; the sterling equivalent of the sums representing instalments of principal and interest to be ascertained by converting them into sterling as on the dates when they respectively fell due, and the sterling equivalent of the sums representing the trustee's expenses to be calculated in accordance with the terms of inquiries Nos. 1 and 3 respectively.

It will further be seen that the learned judge has next proceeded by para. 1 (B) of the order to direct the alternative computation at the option of the trustee of the sterling equivalent at the rate of exchange current on Dec. 1, 1953 (i.e., the date of the sale to the Cuban State, being the date of the conversion or breach of covenant charged by the trustee) of $2,000,000 described as the maximum amount recoverable as damages for conversion and also the amount recoverable as damages for breach of the covenant against assignment.

Having thus provided for the ascertainment of (a), the total amount in sterling due from the company to the trustee at the commencement of the winding-up, measured simply by reference to the terms of the covenant for payment of rentals, or, alternatively, (b), the amount in sterling of the damages recoverable by the trustee for conversion or breach of covenant fixed in the first instance simply by reference to the value of the rolling stock at the date of the conversion or breach, the learned judge proceeds in para. 2 to limit for the purposes of proof the sum ascertained under (1) (A) or (1) (B), as the case may be, to the aggregate sum required to satisfy in full the claims of the holders of the outstanding certificates for principal, premium and interest (put at $734,971.89) plus the amount of the trustee's expenses (past or prospective) as agreed or found on the making of inquiries Nos. 2 and 3 (with a maximum as regards inquiry No. 2 of £11,177 6s. 9d., being the amount claimed in the proof), by deducting from the sum ascertained under (A) or (B), as the case may be, the amount (if any) whereby the sum so ascertained exceeds the aforesaid aggregate sum.

For the purpose of ascertaining the amount of this deduction, the $734,971.89 representing the principal, interest and premium due on the 331 outstanding certificates is directed by the order to be converted into sterling as on Mar. 4, 1954, and not on the respective dates on which the payments in question respectively fell due. Similarly in the relatively small matter of the trustee's expenses, the sum agreed or found on the making of inquiry No. 2 (which postulates conversion into sterling as on Mar. 4, 1954) is adopted in either alternative as opposed to the amount agreed or found on the making of inquiry No. 1, which postulates conversion into sterling as on the respective dates on which the expenses in question were incurred.

The principles* adopted by the learned judge in quantifying the provable sum thus appear to have been these:

(i) The creditor of the company in this matter is the trustee, as distinct from the holders of the outstanding certificates, who are cestuis que trust, not entitled to claim against the company as creditors, but entitled, as between themselves and the trustee, to have their claim for principal, premium and interest satisfied

* Compare [1957] 3 All E.R. at p. 660.

A out of any moneys recovered by the trustee from the company in its capacity as trustee for the certificate holders.

(ii) The first step must, therefore, be to calculate the amount due to the trustee according to the terms of the lease, or as the case may be, by way of damages for conversion or breach of covenant as if the trustee was beneficially entitled to the amount so due. For the purposes of this calculation the amounts
B found due to the trustee under the lease must be converted into sterling at the rate of exchange obtaining on the respective dates on which they fell due, and on the alternative basis of proof, the damages found due to the trustee must be converted into sterling at the rate of exchange obtaining at the date of the conversion or breach of covenant.

(iii) The trustee cannot, however, prove for the full amount so calculated, but,
C being a trustee, must limit its proof to the amount required to meet in full the claims of its cestuis que trust, or, in other words, the holders of the outstanding certificates and the trustee's own claim for expenses. It is thus necessary to calculate what is due to the holders of the outstanding certificates for principal, premium and interest, or, in other words, what they would be entitled to receive out of the fund calculated as in (ii) above, if that fund was actually in the hands
D of the trustee and available for distribution at the date of the commencement of the winding-up. For the purposes of this calculation the amount in dollars found due to the holders of the outstanding certificates must be converted into sterling as on the date of the winding-up, and this also applies to the trustee's own claim against the fund for its expenses.

(iv) The trustee is thus entitled to prove for the sterling equivalent of the
E amount in dollars representing the principal, premium and interest due on the outstanding certificates and its own expenses at the rate of exchange obtaining at the date of the commencement of the winding-up.

The contest between the parties on this aspect of the case is mainly concerned with the rate of exchange to be adopted for the purpose of converting from
F dollars into sterling the amounts payable to the certificate holders out of the rentals for which the trustee is entitled to prove.

Counsel for the liquidators accepts the figure $734,971.89 given in WYNN-PARRY, J.'s order, which is in fact the amount claimed in para. 2 (a) of the proof, adjusted as above mentioned, as a correct calculation of the sum in dollars for the sterling equivalent of which the trustee is entitled to prove in respect of
G the principal, premium and interest due on the 331 outstanding certificates. But he says that the sum in dollars should be converted into sterling at the rates of exchange prevailing on the respective dates on which the instalments comprised in it fell due, and not as claimed in the proof and held by WYNN-PARRY, J., at the rate of exchange prevailing at the date of the commencement of the winding-up. The difference here is substantial, as the sterling equivalent on counsel for
H the liquidators' view is £180,724 5s. 1d. as compared with the £264,076 0s. 1d. claimed in the proof. So far as this court is concerned, it cannot be disputed that as between the company and the trustee the proper rate of exchange for the purpose of ascertaining the sterling equivalent of the instalments due under the lease is the rate of exchange prevailing at the date when each instalment fell due (see *Re Russian Commercial & Industrial Bank* (15) ([1955] 1 All E.R. 75)
I and the authorities there cited). We should, however, note that counsel for the trustee told us that he wished to keep the point open in case the matter went higher.

Counsel for the liquidators says that the same rule applies to the sums in respect of principal, premium and interest due to the holders of outstanding certificates by reference to which the trustee's claim in respect of the instalments due under the lease must be limited for the purposes of his proof. As we understood him, he contended that the company's only liability to the trustee, so far as the proof was based on the lease, was for rentals and nothing else. The trustee

rightly quantified its proof for rentals by reference to the amounts due for principal, premium and interest under the outstanding certificates, but the amounts proved for did not lose their essential character as rentals because they had been so quantified, and accordingly should be treated as rentals and converted into sterling as on the respective dates when the instalments of which they were composed fell due.

We do not think that this argument accords with the true legal position. The trustee is a creditor of the company for the total amount of the unpaid instalments under the lease, which, through the medium of the trust for the certificate holders, constitutes the security for the due payment of the principal, premium and interest to which such holders are entitled under the trust agreement. The amount due from the company to the trustee under the lease (save as regards interest) does not depend on the number of certificates for the time being outstanding, though the trustee cannot claim to retain out of the amount due to him anything more than the total sum required for payment in full of the principal, premium and interest due on the outstanding certificates together with the trustee's own expenses. It is accordingly right to limit the trustee's proof to that total amount. But on the assumption that the company is solvent, which we understand to be the case, one must, for the purpose of working out the rights of the parties, treat the company as having in the first instance paid over to the trustee the full amount due to the trustee under the lease.

The trustee must then be regarded as bound to apply the fund so provided in paying in full the total amount due for principal, premium and interest on the certificates, together with the trustee's expenses, and to repay the surplus to the company. Once the total amount due on the outstanding certificates and for the trustee's expenses has been ascertained in this way, the trustee's proof may properly be presented as a proof for the rentals due under the lease up to that total amount, but the fact must not be lost sight of that, so far as the holders of the outstanding certificates are concerned, their claim is not for rentals due to them from the company but for payment by the trustee out of the trust fund notionally constituted by the rentals due from the company to the trustee of the full amount of their principal money, premium and interest. The fact that the rentals due from the company to the trustee are to be converted into sterling at the rates prevailing on the dates on which they are respectively due, as opposed to the rate prevailing on the date of the commencement of the winding-up, Mar. 4, 1954, reduces the amount in sterling notionally receivable by the trustee from the company. But it does not follow that this reduction must lead to a corresponding scaling down of the amounts payable to the holders of the outstanding certificates. Their right is to be paid in full out of the fund recovered by the trustee on their behalf so far as the money will go. Thus the rate of exchange appropriate to the quantification of the certificate holders' claims is not determined by the rate appropriate to the quantification of the sums due to the trustee under the lease, but must depend on the nature of those claims. As to that, it is to be once more observed that the certificate holders are not creditors either of the company or of the trustee. Their only right is a right to call on the trustee to execute its trust to the extent of any moneys from time to time received by the trustee for that purpose. Their right to receive from the trustee the amounts of their claims in dollars cannot, therefore, be said to have arisen on any earlier date than the date of the commencement of the winding-up. Nor is it possible to relate the claim under any particular certificate to any particular instalment date under the lease.

As we understand it, the principle underlying the rule that conversion into sterling of an unpaid debt in foreign currency should be effected on the date when the debt became due is that a contract to pay a sum in foreign currency is equivalent to a contract to deliver a chattel, and that failure to deliver it on the due date constitutes a breach of contract for which damages must be assessed

A at the time of the breach. Thus the amount in sterling of the damages suffered through the debtor's failure to pay or deliver the foreign currency on the due date, assessed at the date of the breach, is the price in sterling as at the date of the breach of the sum in foreign currency which the debtor had promised to pay. This principle has no application in the present case so far as the claims of the certificate holders are concerned, since they claim as cestuis que trust and not B as creditors.

Counsel for the liquidators raised a further argument based on ROXBURGH, J.'s affirmation of the rejection of the trustee's proof under para. 2 (d). It will be remembered that this order* was to the effect that the court being satisfied that the holders in due course of the 1,867 (or 1,869, adjusted) certificates had renounced any claim to participate in the assets available for distribution, and C that such renunciation alone was a sufficient ground for the rejection of that part of the proof of debt, namely, the claim in respect of the sum of £1,480,570 5s. 7d. (the figure appropriate to 1,867 certificates) claimed in para. 2 (d) of the proof, which was based on or measured by reference to the said 1,867 (or 1,869) certificates, did not think fit to reverse or vary the liquidator's rejection of that part of the proof. Counsel for the liquidators complained that WYNN-PARRY, J.'s D order was inconsistent with that of ROXBURGH, J. He said that the upshot of ROXBURGH, J.'s order was that the trustee, having proved in respect of $2,200,000 certificates under para. 2 (d), and having had its proof of debt rejected as regards $1,869,000 of them, was now being allowed to formulate its claim in respect of the remaining $331,000 certificates by reference to the amount for which the trustee would have been entitled to prove in respect of rentals if the 1,869 E certificates had in fact been outstanding as well as the 331, in which case the total number of certificates outstanding would have been 2,200. He says that, having regard to ROXBURGH, J.'s order, the proper course would have been not merely to disregard the 1,869 certificates, while treating the proportion of the instalments appropriate to the satisfaction of the claims in respect of them, if such claims had been allowed as available to meet the claims of the holders of F the 331 certificates, but to treat that proportion of the instalments as irrecoverable. On this basis, he says, the proper course would have been to take 331/2,200 parts only of the total amount of the instalments as the sum available to meet the claims under the 331 outstanding certificates, eliminating the remaining 1,869/2,200 parts as attributable exclusively to the 1,869 certificates the trustee's proof in respect of which has been rejected. He pointed out that G the sums proved for in respect of principal and premium due to the holders of the 331 and the 1,869 certificates respectively under para. 2 (a) and (d) amounted together to $2,255,000, or only $1,000 less than the total amount of the eleven unpaid capital instalments, the differences being accounted for in the way already explained. Consequently, he said, the sums in dollars for which the trustee could prove in respect of the 331 certificates must, like the instalments under the lease, H be converted into sterling at the rates of exchange prevailing on the dates when the instalments comprised in them respectively fell due; for if they were converted at the rate of exchange prevailing at the date of the commencement of the winding-up, they could only be satisfied by trenching on the proportion of the instalments attributable to the 1,869 certificates, which would be inconsistent with ROXBURGH, J.'s order.

I We think that there is a fallacy here. The rejection of the proof in respect of the 1,869 certificates meant that no claim could be made in respect of them. It did not mean that the rentals applicable in satisfying the claims of the holders of the outstanding 331 certificates were to be reduced by deducting the proportion of them (1,869/2,200) attributable to the 1,869 certificates. The capital instalments under the lease continued to be payable irrespective of the number of certificates which might for the time being be outstanding. The redemption

* The material part of this order is printed at p. 225, letter I, to p. 226, letter B, ante.

or buying-in of certificates, or, we might add, the renunciation of all claims under any given certificates merely had the effect of improving the security of the certificates left outstanding. The whole fund constituted by the rentals due remained available to satisfy the claims of the 331 certificates in fact outstanding up to the amount required to pay principal, premium and interest in full. Counsel for the liquidators' submission comes near to treating the 1,869 certificates as having been kept on foot for the benefit of the company, which surely cannot be right. Accordingly, we reject this argument. Counsel for the liquidators did not develop his argument on this part of the case with reference to the alternative claims for damages, but we understand his submission there to be that by parity of reasoning the trustee's claim should be limited to a part, 331/2,200, of any damages allowed.

In deciding that the amounts due to the holders of the outstanding certificates should be converted into sterling at the rate of exchange prevailing at the date of the commencement of the winding-up, WYNN-PARRY, J., accepted* counsel for the trustee's submission that the principle underlying *Re Chesterman's Trusts* (14) ([1923] 2 Ch. 466) applied. That submission was repeated before us and we agree with the learned judge's acceptance of it.

For the reasons that we have stated, we are of opinion that the learned judge came to a right conclusion on all the material questions in this case and accordingly that this appeal fails and should be dismissed.

WILLMER, L.J.: I wish to make it clear that I concur in, and share the responsibility for, the judgment which has just been delivered, except with regard to two points on which I have the misfortune to differ from my brethren. I need hardly say that only with some hesitation and diffidence do I venture to express a conflicting view, especially as my view is also in conflict with that of the learned trial judge.

The first point on which I differ from my brethren and from the learned trial judge is with regard to the proper law of the contract. I can find no satisfactory reason for applying Pennsylvanian law. For reasons which I will attempt to state as briefly as possible, I have arrived at the conclusion that the proper law of the contract was that of the Republic of Cuba. Since we have held that even applying Cuban law the liquidators must fail on their plea of statutory novation, as also in their reliance on the Cuban moratorium laws, it is obvious that the issue as to the proper law of the contract has become one of only academic interest. But as the matter has been very fully argued, and in case it should hereafter be thought to be of any relevance, I think it only right to state my conclusion and the reasons which have impelled me to it.

The principles to be applied in determining what is the proper law of the contract have already been stated by my Lord in the judgment which has just been delivered. I do not disagree, nor do I think there is any room for disagreement, as to the principles to be applied. They are succinctly summed up in the words of LORD SIMONDS, in the passage already quoted (ante, p. 233), from *Bonython* v. *Commonwealth of Australia* (9) ([1951] A.C. 201 at p. 219) to the effect that the proper law is the one " with which the transaction has its closest and most real connexion ". It is by my attempt to apply those principles to the particular facts of this case that I, for my part, have been led to the conclusion that the proper law of this contract, i.e., of the Lease Agreement, was Cuban. [HIS LORDSHIP then referred in detail to the wording of the lease and the trust agreement, and to the argument on that question.]

It remains for me to add that I am fully in agreement with my Lords that the principle of renvoi finds no place in the field of contract. I share with them the view that, if Cuban law were to be regarded as the proper law of the contract, such law would be the domestic law of Cuba, and not Cuban private international law.

* See [1957] 3 All E.R. at p. 660, letter I.

A The other point on which I have the misfortune to disagree is with regard to the quantum in respect of which the trustee is entitled to prove. This seems to me to raise questions of very grave difficulty, and in order to appreciate the questions involved it is necessary to refer briefly to the history of what occurred. By cl. First I of the lease agreement the company was liable to pay interest half-yearly at the rate of 3¾ per cent. on all outstanding certificates up to and B including Feb. 14, 1936. By cl. First II the company was liable to pay half-yearly instalments in respect of capital at the rate of $206,000 up to and including Feb. 14, 1931, and thereafter at the rate of $205,000 up to and including Feb. 14, 1936. Prior to Feb. 14, 1931, the company redeemed certificates to the face value of $3,800,000, leaving $2,200,000 then outstanding. It defaulted in paying the instalment of $206,000 due on Feb. 14, 1931, and all subsequent instalments. It C thus defaulted in respect of the last eleven instalments of capital, to a total amount of $2,256,000. It continued to pay interest up to and including Aug. 14, 1934, but thereafter it defaulted in respect of all interest payments due. By Feb. 14, 1936, the total of the default in respect of capital instalments and interest had reached $2,503,500. No interest has been paid since Feb. 14, 1936, and the trustee has included a claim for interest at the rate of six per cent. per D annum from that date to the date of the liquidation, that is to say Mar. 4, 1954. It has not been suggested to us that six per cent. per annum was other than a proper rate of interest to charge in respect of this period. The effect of this interest was to increase the total indebtedness outstanding at the date of the liquidation to $4,886,009.59. In 1937 certain proceedings were instituted by the trustee against the company in the Superior Court of the State of Maine in the E United States of America. It is unnecessary to refer to the details of those proceedings: it is sufficient to record that they were ultimately compromised on the terms, inter alia, of an offer by the company to purchase outstanding certificates at a price of $147.50 per certificate. This led to the company purchasing a number of the outstanding certificates, and by the time of the liquidation a total of 1,869 certificates had been purchased by the company, leaving only 331 cer-F tificates outstanding in the hands of the public. The 1,869 certificates purchased by the company were never presented for retirement, but remained in the hands of the company until the date of the sale to the Cuban State. These certificates, in accordance with para. (D) of annex A (I) to the preliminary agreement of Sept. 5, 1953, were transferred to the Cuban State together with all the rest of the company's assets in Cuba. They were then, in turn, transferred by the Cuban G State to the new company, Ferrocarriles Occidentales de Cuba S.A.

The claim of the trustee is set out under four headings in para. 2 of the proof of debt filed on his behalf. [HIS LORDSHIP then referred to the contents of para. 2, which is printed at p. 224, letter I, ante, and continued:] The sums in dollars claimed in the various sub-paras. of para. 2 of the proof of debt are converted into sterling at a uniform rate of $2.80 to the £, and it is this circumstance H which has given rise to dispute between the parties. But, to continue with the history of the matter, in December, 1956, the liquidators applied to the court for leave to make an interim distribution. For the purpose of enabling the court to arrive at any decision about this it was necessary to consider what the amount of the company's liability in respect of the outstanding certificates was likely to be. If the trustee was to be entitled to claim in respect of all the 2,200 cer-I tificates outstanding, it was clear that insufficient funds would be available in the hands of the liquidators to justify any interim distribution. But if the trustee's claim could be confined to the 331 certificates remaining outstanding in the hands of the public, it was considered that some interim distribution would be justifiable. The application to the court was supported by an affidavit sworn by the liquidators, which proved the purchase of 1,869 certificates by the company and the fact that those certificates were handed to the Cuban government on completion of the sale of the company's undertaking, and were subsequently

delivered by the Cuban government to the new company, Ferrocarriles Occidentales. It was also proved: (a) that these 1,869 certificates were deposited with the National Bank of Cuba with an instruction from Ferrocarriles Occidentales that they were not to be withdrawn without the authority in writing of the Minister of Finance of Cuba; (b) that such certificates had been stamped "Not transferable"; and (c) that the Cuban government had stated that no claim had been or would be made by the Cuban State against the company or against the trustee in respect of these certificates.

The application came before ROXBURGH, J., who made an order dated Dec. 4, 1956, which has been placed before us. The order recites that the court was satisfied that the holders in due course of the certificates (wrongly stated to number 1,867) had renounced any claim to participate in the assets available for distribution in the winding-up and that such renunciation alone was a sufficient ground for the rejection of that part of the trustee's proof of debt—namely, the claim contained in para. 2 (d) thereof—which was based on or measured by reference to the 1,867 certificates. The court accordingly did not think fit to reverse or vary the decision of the liquidators rejecting the proof of debt in so far as it related to the claim contained in para. 2 (d). Having regard to this decision the trustee has not in fact sought to proceed further with any claim in respect of the 1,869 certificates purchased by the company, which formed the subject-matter of para. 2 (d), and in these proceedings he has limited himself to the claims set out in sub-paras. (a), (b) and (c). So far as the claims under sub-paras. (b) and (c) are concerned, WYNN-PARRY, J., directed certain inquiries as to the expenses there claimed. No argument has been addressed to us with regard to this part of the learned judge's order, nor has any question been raised before us with regard to the rate of exchange applicable to any claim for expenses under these two sub-paragraphs. The problem which has arisen has been with regard to the method of computation to be adopted in order to quantify in sterling the claims of the trustee under sub-para. (a).

WYNN-PARRY, J., directed that the amount for which the trustee is entitled to prove should be ascertained as follows: In the first place it must be ascertained what in dollars was due to the trustee in respect of interest under cl. First I (a) of the lease, and in respect of capital instalments due under cl. First II. This would represent the liability of the company at the date of the termination of the lease, that is, Feb. 14, 1936. The claim for further interest subsequent to that date he treated as in effect a claim for rent on the basis of holding over. The learned judge directed that, for the purpose of converting the total of the sums so ascertained into sterling, each payment due, whether of interest or of capital instalment, should be converted at the rate of exchange prevailing on the date when it was due. He held that any sums due for expenses under para. 2 (b) should be converted into sterling at the rates prevailing on the respective dates of payment; and any amount found due for expenses under para. 2 (c) should be converted at the rate prevailing at the commencement of the winding-up. The resulting sum in sterling would, in the learned judge's view, represent the amount for which the trustee would be entitled to prove in the liquidation.

Pausing there, it will be seen that this sum would represent the sterling equivalent of the whole of the sums in dollars claimed under sub-paras. (a), (b), (c) and (d), that is, a total of nearly $5 million. The learned judge, however, then went on to point out that, being a trustee, the trustee would only be entitled to receive in respect of its proof such a sum in sterling as would be sufficient to satisfy the proper claims of the certificate holders, which means in this context the claims of the holders of the 331 certificates, with the addition of such a sum as might be found due for expenses under sub-paras. (b) and (c) of para. 2 of the proof. As to the claims of the certificate holders he held that the principle of *Re Chesterman's Trusts* (14) ([1923] 2 Ch. 466) applied. Applying this principle he directed that the sum in dollars must be ascertained to which the 331 certificate holders are entitled, under the terms of the trust agreement, in respect of

A principal, outstanding interest and premium of 2½ per cent. This sum, when ascertained, he held should be converted into sterling at the rate prevailing at the date of the liquidation, and the resulting amount in sterling would represent the maximum that the trustee, on behalf of the certificate holders, would be entitled actually to receive in respect of the sum proved for.

This method of computation involves that, although for the purpose of ascer-
B taining in sterling the total of the capital instalments and interest in default the conversion was to be at the rates of exchange prevailing on the dates when the various payments ought to have been made (in most cases approximately $5 to the £), the holders of the 331 certificates would be entitled to claim, out of the total so ascertained, a sum in sterling sufficient to purchase the dollars attributable to their share at the rate of exchange prevailing at the date of the
C liquidation (that is, substantially $2.80 to the £). This, counsel for the liquidators argued, could not possibly be justified, for it would result in the 331 certificate holders being able to claim for too large a slice of the available cake. His argument may be summarised as follows. The method of computation adopted by the learned judge is inconsistent with the order made by ROXBURGH, J., the effect of which was to uphold once and for all the liquidator's rejection of the
D proof in so far as it was based on or measured by reference to the 1,869 certificates purchased by the company. It follows that the trustee is only entitled to claim for such proportion of the company's total indebtedness as is attributable to the 331 certificates remaining in the hands of the public. It is therefore wrong to allow the trustee to prove for the whole of what is due in respect of all 2,200 outstanding certificates, and to retain out of the proceeds enough sterling to pay
E off the 331 certificate holders in dollars purchased at the rate of $2.80 to the £. On the contrary, the total indebtedness of the company in dollars having quite properly been converted into sterling at the rates of exchange appropriate on the dates when the various payments were due, the trustee is only entitled to claim, on behalf of the 331 certificate holders, such proportionate part of the sum in sterling so ascertained as is attributable to the 331 certificates—that is,
F 331/2,200 parts of the sterling sum. In order to illustrate his argument counsel for the liquidators prepared and placed before us a revised calculation showing in detail what the result would be, that is, what would be the sterling liability of the company attributable to the 331 certificate holders, if his argument were accepted. This calculation results in a figure of £180,724 5s. 1d. in respect of para. 2 (a) of the proof, instead of the sum of £264,076 0s. 1d. as therein claimed.

G Counsel for the trustee, on the other hand, strenuously defended the order made by the learned judge, and contended that the method adopted by him was the correct method of computation in the circumstances of this case. But, in spite of counsel (Mr. Wilberforce) for the trustee's attractive argument to the contrary, I am unable to see any logical answer to counsel for the liquidators' contention. The argument may be tested by considering what would be the
H position if the whole of the 2,200 outstanding certificates were in the hands of the public. In such circumstances the trustee would be entitled to prove for the whole of the sums in dollars set out in sub-paras. (a) and (d) of para. 2 of the proof, converted into sterling at the rates of exchange prevailing on the dates when the amounts, whether of capital instalments or of interest, were due. As trustee, it would then have to account to all the certificate holders in equal
I shares, so that each certificate holder would be entitled to 1/2,200 part of the sterling sum so ascertained. Here the trustee is claiming on behalf of 331 certificate holders, and I do not see how he is entitled to claim on their behalf more than 331/2,200 parts of the sterling sum. If the 331 certificate holders were entitled to have their dollar claims converted into sterling at the current rate of exchange, they would be put in a privileged position as compared with the notional holders of the remaining 1,869 certificates.

Putting the matter in another way, if the trustee were able to put its hands on the whole of the sum representing the sterling indebtedness of the company,

it would, as I see it, have to account to the company (or to the Cuban State) for the proportion attributable to the 1,869 shares, in the same way and to the same extent as to the 331 certificate holders for the proportion attributable to their share. The notional cake is only a certain size, and each certificate holder is entitled to 1/2,200 part of it. Paragraph 2 (a) of the proof represents the trustee's claim in respect of its liability to the 331 certificate holders: para. 2 (d) represented its claim in respect of what would have been its liability in respect of the remaining 1,869 certificates if they had not been purchased by the company. The two added together represent the total indebtedness of the company in respect of capital instalments and interest due but unpaid. The sterling equivalent of that indebtedness must be calculated having regard to the rates of exchange prevailing on the dates when the respective payments ought to have been made. Having regard to the order made by ROXBURGH, J., no claim can now be made in respect of so much of the total as is attributable to the 1,869 certificates. The trustee's claim under para. 2 (a) must, therefore, in my judgment, be limited to 331/2,200 parts of the total as so ascertained.

I would, therefore, allow the appeal to the extent of reducing the trustee's claim under para. 2 (a) of the proof to a sum calculated in accordance with counsel for the liquidator's submission, and I would have been disposed to direct an inquiry as to the actual figures, if these could not be agreed. Since, however, my brethren take a different view, the order to be made must be as directed by them.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Norton, Rose & Co.* (for the liquidators); *Herbert Smith & Co.* (for the trustee).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

Re No. 1, ALBEMARLE STREET, W.1.

[CHANCERY DIVISION (Upjohn, J.), December 10, 11, 12, 15, 1958.]

Landlord and Tenant—New tenancy—Business premises—Terms of new tenancy—Licence to exhibit advertising signs—Jurisdiction to include licence in new lease—Landlord and Tenant Act, 1954 (2 & 3 *Eliz.* 2 c. 56), *s.* 32 (3), *s.* 35.

Under a lease dated Mar. 25, 1937, the applicants held as business premises the second floor of a building for a term of twenty-one years expiring at the end of December, 1957, at an inclusive rent of £2,270 per annum plus charges for cleaning, heating and lighting. The applicants applied under the Landlord and Tenant Act, 1954, s. 24, for a new tenancy. The demised premises were used as offices only by the applicants who had occupied them since 1912. The respondents, the landlords, did not challenge the applicants' right to a new tenancy under the Act, but the terms of the new tenancy were in dispute, and, in particular, it was disputed whether the applicants should be entitled by the lease to exhibit signs outside the building advertising their products. The expiring lease provided by cl. 7 (after the usual clauses providing for the demise, the term, the rent, covenants and the proviso for re-entry): "The lessors hereby authorise and permit the lessees to maintain during the continuance of this lease the advertising signs or such other signs as shall be approved by the lessors' surveyors in their present position . . . outside the building of which the demised premises form part . . ." There was also a covenant "not to affix upon the external walls or otherwise on the outside or staircase or corridors of the demised premises any name sign or placard except . . . as the lessors shall in writing sanction".

Held: there was jurisdiction under s. 35* of the Landlord and Tenant Act, 1954, to include in the new tenancy a term conferring such a licence as that contained in cl. 7 of the lease of Mar. 25, 1937, for, though the rights that must be included under s. 32 (3)* in a new tenancy were such as were enjoyed " in connexion with " the property comprised in the tenancy and the licence was a personal right having no real connexion with the property demised, yet the terms which the court had a discretion under s. 35 to include in a new tenancy were not similarly restricted; a licence to exhibit signs would not harm the respondents and the court would order such a licence to be granted for the term of the new tenancy.

[As to the terms included on the grant of a new tenancy of business premises by order of the court, see 23 HALSBURY'S LAWS (3rd Edn.) 899, para. 1726. For the Landlord and Tenant Act, 1954, s. 32, s. 35, see 34 HALSBURY'S STATUTES (2nd Edn.) 417, 419.]

Cases referred to:

(1) *Thomas* v. *Hayward*, (1869), L.R. 4 Exch. 311; 38 L.J.Ex. 175; 20 L.T. 814; 31 Digest (Repl.) 165, *3007*.

(2) *Dewar* v. *Goodman*, [1908] 1 K.B. 94; *affd.* H.L., [1909] A.C. 72; 78 L.J.K.B. 209; 100 L.T. 2; 31 Digest (Repl.) 154, *2915*.

Adjourned Summons.

The applicants, Triplex Safety Glass Co., Ltd., who were the tenants of business premises in No. 1, Albemarle Street, in the County of London, applied by originating summons under the Landlord and Tenant Act, 1954, s. 24, for an order for the grant of new tenancies. The facts appear in the judgment.

Sir Lionel Heald, Q.C., and *J. T. Plume* for the applicants, the tenants.

R. E. Megarry, Q.C., and *R. W. Vick* for the respondents, the landlords.

UPJOHN, J.: This is an application under the Landlord and Tenant Act, 1954, s. 24, asking for a grant of new tenancies of business premises. There are two leases; the first and main one is dated Mar. 25, 1937, and was a demise of the second floor of No. 1, Albemarle Street, Piccadilly, in the County of London, for a term of twenty-one years expiring on Dec. 25, 1957, at an inclusive rent of £2,270 plus charges for cleaning, heating and lighting services. The second lease was dated Feb. 24, 1939, and was a demise of a storeroom in the basement of the building, No. 1, Albemarle Street, for a term expiring at the same time as the main lease at a rent of £30. Those leases were continued, having regard to the provisions of s. 24, but the landlords gave a notice, as they were entitled to do under the Act, terminating both those leases as on Dec. 31, 1957, and these proceedings have followed. The original leases were granted by the District Bank, Ltd., and a Mr. Herbert Roper Barrett. It appears that the freehold reversion is now vested in the second respondent, who was added by amendment, Mr. Slazenger; he has granted a lease of the whole of No. 1, Albemarle Street to the first respondents, Volito Managements, Ltd., for a term which expires on Dec. 25, 1970. It appears, therefore, that everyone interested in the reversion is before me, and no difficulty arises on that score.

The applicants are the Triplex Safety Glass Co., Ltd., who have changed their name since the issue of the proceedings to Triplex Holdings, Ltd., and the demised premises on the second floor are occupied by the applicants as their head office. They do not contain showrooms or anything of that sort; they are purely used as the head office, and as an old balance sheet which has been produced shows, the applicants have been in occupation of these premises since about the time of their incorporation in 1912.

The respondents do not challenge the right of the applicants to a new tenancy under the terms of the Act, but there is a dispute as to what the terms of the new tenancy should be. There are four matters in dispute as follows: first,

* The relevant terms of s. 32 (3) and s. 35 are printed at p. 253, letters G and H, post.

should the duration of the new lease to be granted be for seven years, as the respondents suggest, or for fourteen, as the applicants suggest. At one time the applicants were pressing for the right to break the lease if they are successful in getting a lease for fourteen years, at seven and ten years, but the right to break is not now pressed. Secondly, a question arises what is the proper rent to be paid under the new lease. Thirdly, the question arises as to the rights of access to the demised premises; and fourthly, and undoubtedly in the eyes of the parties the most important, will the applicants be entitled to exhibit signs outside the building advertising Triplex Safety Glass as a term of the new lease. With regard to the lease of the basement, the only question in issue is as to the amount of the rent. I propose to deal with those matters in order. [His Lordship held that the new lease should be for a term of fourteen years, that the rent should be £5,500 per annum, and that there was no reason why the terms of the new lease should differ from those of the original lease so as to give the applicants the right (which they would not otherwise have) to have the demised premises cleaned by their own staff of cleaners and not by the respondents' cleaners who cleaned the remainder of the building. His Lordship continued:] Now I come to the most important matter, and that is this question of signs. Under the terms of the lease, to which I must refer in a moment, the applicants are entitled during the continuance of it to exhibit certain signs advertising Triplex Safety Glass. Those signs are easily seen in a picture of the building which appears on the cover of the report and balance sheet for the Triplex Group for 1957. They are also to be found in two small photographs exhibited by Mr. Temple. There are four signs in all, three signs on the outside of the building between the ground and first floors. One sign is in Albemarle Street and says: "Triplex Safety Glass"; one sign is over a corner of the premises and says: "Fit Triplex and Be Safe", and the other sign is facing Piccadilly and again says: "Triplex Safety Glass". All those signs are between the ground and first floor. The fourth sign is between the fourth and fifth floors and says: "Safety Triplex Glass". As I understand it, that last sign is illuminated, as is the corner one on the ground floor, but the others are not.

The terms in the lease dealing with this exhibition of signs are to be found in cl. 7. It has been rightly pointed out that that clause comes after the ordinary clauses that one expects to find in a lease, and it comes after the proviso for re-entry. It comes after a clause entitling the lessees to break the lease. Clause 7 provides:

> "The lessors hereby authorise and permit the lessees to maintain during the continuance of this lease the advertising signs or such other signs as shall be approved by the lessors' surveyors in their present position facing Piccadilly and Albemarle Street outside the building of which the demised premises form part . . ."

subject to provisions which I need not read. It is plain that these signs had been there before this lease came into being, but no one can remember for how long these signs had been there. One other clause in connexion with this matter which I must read is cl. 2 (10). It is the covenant by the lessees

> "not to affix upon the external walls or otherwise on the outside or staircase or corridors of the demised premises any name sign or placard except of such dimensions and in such manner and place or places (if any) as the lessors shall in writing sanction."

Whence it follows that without the lessors' sanction the lessees are not entitled to exhibit any signs on or outside the premises demised to them on the second floor. It is perhaps worthy of note that the lessors are defined as including their successors and assigns where the context so admits, and the expression "the lessees" includes their successors and permitted assigns where the context so admits. I have one further general observation. It seems to me that these are purely advertising signs; they do not in any way indicate, at any rate to

my mind, that the applicants in fact have a head office within No. 1, Albemarle Street.

Objection to the continued exhibition of these signs is taken by the respondents on two grounds; first, that there is no jurisdiction to include a clause such as cl. 7 in a lease ordered under s. 29 of the Act; secondly, they submit that, if there is such a jurisdiction, it ought not to be exercised in this case. This question of jurisdiction raises an interesting and difficult point, and some reference to the sections of the Act now becomes necessary.

The first one to which I need refer is s. 23 which provides:

"(1) Subject to the provisions of this Act, this Part of this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes.

"(3) In the following provisions of this Part of this Act the expression 'the holding', in relation to a tenancy to which this Part of this Act applies, means the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business by reason of which the tenancy is one for which this Part of this Act applies."

Section 24 provides for the continuation of tenancies on their termination by the landlord or at the request of the tenant for a new tenancy. Section 29 (1) provides:

"Subject to the provisions of this Act, on an application under s. 24 (1) of this Act for a new tenancy the court shall make an order for the grant of a tenancy comprising such property, at such rent and on such other terms, as are hereinafter provided."

I have already mentioned s. 33 and s. 34 earlier in this judgment*. Section 32 contains one very important and relevant provision. Sub-section (1) provides:

"Subject to the next following sub-section, an order under s. 29 of this Act for the grant of a new tenancy shall be an order for the grant of a new tenancy of the holding; and in the absence of agreement between the landlord and the tenant as to the property which constitutes the holding the court shall in the order designate that property by reference to the circumstances existing at the date of the order."

Sub-section (3) provides:

"Where the current tenancy includes rights enjoyed by the tenant in connexion with the holding, those rights shall be included in a tenancy ordered to be granted under s. 29 of this Act."

The applicants rely on that sub-section. Section 35 is the other provision on which the applicants rely. It provides:

"The terms of a tenancy granted by order of the court under this Part of this Act (other than terms as to the duration thereof and as to the rent payable thereunder) shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court; and in determining those terms the court shall have regard to the terms of the current tenancy and to all relevant circumstances."

In s. 69 (1) "tenancy" is defined in this way:

"'tenancy' means a tenancy created either immediately or derivatively out of the freehold, whether by a lease or underlease, by an agreement for a lease or underlease or by a tenancy agreement or in pursuance of any enactment (including this Act), but does not include a mortgage term or any interest arising in favour of a mortgagor by his attorning tenant to his

* I.e., in relation to the decision on the duration of the tenancy and the amount of the rent (see p. 252, letter C, ante) on which questions this case is not reported.

mortgagee, and references to the granting of a tenancy and to demised property shall be construed accordingly." A

Then it provides " ' terms ', in relation to a tenancy, includes conditions ". Dealing first with s. 35, counsel for the applicants invites me to give the widest possible meaning to the word " terms " wherever it is found in s. 35, in granting a new lease, and to the phrase " terms of the current tenancy ". He referred me to some authorities on the earlier Landlord and Tenant Act, 1927, and on the Rent Restrictions Acts. I do not, however, refer to them in detail, for it is after all a question of construction of the Act in each case. Certainly it is true to say that those authorities favour a wide construction. B

Counsel for the respondents, on the other hand, invites me to take a narrower view of these words and phrases. I think that one thing must be clear in the circumstances of this case. Clause 7 of the original lease creates a licence to exhibit these signs and no more. It cannot possibly be said in my view that this right to exhibit signs can be described as part of the demised premises or as part of the holding, for these signs are not part of the holding; they are not contiguous to the holding or anything of that sort. Counsel for the respondents submits that in construing s. 35, I ought to have regard only to the terms of the tenancy. He points out that in contrast to the Rent Restrictions Acts, the reference is to the tenancy and not to all the terms contained in the tenancy agreement or anything of that sort. He therefore says that in s. 35 the only terms to which the court ought to have regard are those terms which are properly described as the terms of a tenancy by demise, and ought not to include any terms which cannot properly be described as relating to the demised property. He suggests two tests by way of analogy. First he suggests that the terms might be taken to be analogous to the easements and quasi easements which are to be found set out in the Law of Property Act, 1925, s. 62. Secondly, he suggests, as another test to discover what terms are relevant, that one should have regard only to the terms which can properly be described as touching or concerning the land demised, and which therefore would run with an assignment of the lease, or with an assignment of the reversion, on any assignment. He refers me to two cases: *Thomas* v. *Hayward* (1) ((1869), L.R. 4 Exch. 311) and *Dewar* v. *Goodman* (2) ([1908] 1 K.B. 94)*. He submits, and I accept it, that judged by the tests laid down in those cases, the rights contained in cl. 7 would not pass on an assignment of the lease. It is possible that they might pass by express assignment, but that would require the consent of the landlords. But he submits, and I agree with him, that the rights set out in cl. 7 are not terms which touch or concern the land demised. It is a pure licence to exhibit certain signs on property which has no relevant connexion with the actual property demised. C D E F G

However, it is, as I say, a question of construction of the Act, and before dealing with that, I want to say a few words about s. 32 (3). It is clear there that the rights enjoyed by the tenant in connexion with the holding must be included in any tenancy granted under s. 29. The court has no discretion in the matter, unlike the position under s. 35. In my judgment, although it is not necessary to come to a final conclusion on the matter, s. 32 is dealing with terms connected with the holding. Whether it is right to confine those terms to terms which touch and concern the land demised or not I need not say, but that is the type of right which is being dealt with in s. 32. It seems to me that under s. 35 the court is dealing with a question of judicial discretion, and it is dealing, as the sidenote says, with other terms of the tenancy. It seems to me that that section goes much further than s. 32. I do not believe that, when s. 35 was framed, Parliament was contemplating that there was to be an elaborate dissection of the terms contained in the tenancy as between those terms which touch and concern the demised premises and those terms that do not. I think that Parliament intended to give a very wide discretion to the court, and the H I

* Affirmed by the House of Lords, [1909] A.C. 72.

court is entitled to look at all the terms contained in the current tenancy agreement. Further than that, the great width of this section is shown by the fact that the court is entitled to, and indeed must, have regard not only to the terms of the current tenancy but to all relevant circumstances. It seems to me, therefore, that Parliament intended to confer on the court the widest possible discretion.

I have come to the conclusion, as I have said, that I have the widest possible discretion in looking at all the terms of the current tenancy agreement and in considering all relevant circumstances, and it seems to me, therefore, that I have jurisdiction to make an order for a new lease which contains some clause on the lines of cl. 7. The question, however, is whether I should in fact exercise that discretion. First of all we start with this, that this is in fact a clause which has no real connexion with the demised property; it is purely personal and it is merely a licence. Nevertheless, the applicants have had it and have exercised that right for at least twenty-one years, and it may be much longer. They do in fact attach a very great importance to it, and that I think is perfectly natural. It may be that if they do not get that right, they will not accept the tenancy.

Objection on the merits, however, is taken by Mr. Ascroft, who is and has been for eight years the manager and secretary of the first respondents, and in his affidavit he dealt with the matter in para. 7 and para. 8. In para. 7 he stated that it was desirable to preserve and maintain the prestige value and high quality nature of the building. In para. 8 he went on:

> "It is within my personal knowledge that it is the policy of the [first respondents] not to permit the affixing and maintenance on the outside of the buildings of which the demised premises form a part of signs of the nature of the sign exhibited by the [applicants], which is a lighted advertisement sign [that is not quite accurate]. In the opinion of the [first respondents] and myself this or any advertising sign is out of keeping with the use of the said building for the purposes mentioned in para. 7 hereof and detrimental to the structure and appearance of the said building."

When we reached that stage, I pointed out that I travelled along Piccadilly most mornings and saw the building from the vantage point of the upper deck of a No. 9 bus, and I asked whether the parties desired me to close my eyes to that fact, or whether I might take into account my own knowledge of the locus in quo, and I was in fact invited by both parties to take that into account. I did, in fact, during the course of the hearing, make a careful inspection from Hamilton Terrace to Piccadilly Circus, and the idea that these signs are out of keeping seems to me, with all respect to the deponent, complete nonsense. There are signs almost by the hundred of that sort, and no detriment is suffered in that part of London if a building has a sign on it. For many years, as we see from the Triplex report for 1957, this building had yet another sign on it "Car and General Insurance", and when its owners left, that sign left with them. Counsel for the respondents did not press this point. However, when Mr. Ascroft went into the witness-box, he was asked certain questions in chief and he put it in quite a different way. He said that:

> "In my experience of lettings to other tenants, they object to paying the same rent as the one tenant who is entitled to have this big sign, although he is only occupying one fifth of the premises."

He said that they are trying to get tenants only of the highest standing and that the presence of the signs has an effect on the tenants of the highest class who dislike signs of any type. Curiously enough, that general statement was not supported by a single example of any kind, sort or description. Mr. Ascroft has had a good deal of experience of letting No. 1, Albemarle Street, but he never told me of a single case where an intending tenant objected to paying a very high rent on the ground that there was some sign advertising Triplex outside.

I shall not mention any names because matters are still in negotiation, but it

appears that negotiations are now going on, and a friendly foreign power is endeavouring to acquire the ground floor, and indeed the first floor. It appears, if Mr. Ascroft's method of calculation is correct, to be prepared to pay a very high sum for the first floor. But there is no suggestion that it is the less willing because between the first and ground floors there is a very large sign advertising Triplex Safety Glass. Further, a curious feature of the case is that none of the applicants' witnesses was cross-examined on this matter at all, and Mr. Rose, although called for the respondents as their expert, never dealt with it in his report or in his affidavit. He was asked some questions about it in chief, and he gallantly did his best to support the idea, but he did so obviously without conviction.

There is one further circumstance, and that is that in 1956 Mr. Ascroft had a conversation with the estate agent then acting for the applicants, a Mr. Crole Smith. I have no doubt that Mr. Ascroft said that they did not want to continue the lease with regard to the signs; they did not want to have any more signs. I accept that. But he suggested that they might pay £7,200 per year for nineteen years, and £2,500 a year for the signs. He said he suggested that figure as a joke, merely to choke them off, but be that as it may, that offer was made and apparently accepted seriously by Mr. Crole Smith who communicated it to his principals.

Taking all these matters into consideration, I am quite satisfied on the evidence that the continued existence of these signs on this building, where they have been for twenty-one years at least, has no adverse effect on the letting of the property at all. I do not for one moment accept it that intending tenants are prepared only to pay lower rents; indeed the exhibit PBA.1 shows that they are most willing and have been most willing to pay extremely high rents. I do not accept it that, by reason of these advertisements, the highest class type of tenant is turned away from trying to obtain a tenancy in this desirable building. The evidence is all the other way. Therefore, notwithstanding that this is a purely personal right, it does not seem to me that its continued existence does the slightest possible harm to the respondents, and I propose to exercise my jurisdiction to grant that right during the currency of the lease which I shall order. That being so, there is no real dispute before me as to the proper rent for that right. I have had evidence from two experts, one on each side, and they substantially agree. I shall assess the rent for this right at £300 per annum.

In those circumstances it is unnecessary for me to consider whether the applicants would have established a case under s. 32 (3); I have already said enough to indicate in my judgment that that is a very different section from s. 35. [His Lordship then fixed the rent of the storeroom at £60 per annum, and continued:] Therefore the order that I propose to make is this: with regard to the main lease it will be for a period of fourteen years with no option to break, at a rent of £5,800*. The lease will be on the same terms as at present with the change in rent and the change in the term, i.e., it will not vary the present terms as to access and it will contain cl. 7. With regard to the subsidiary lease, that will be on the same terms as at present, but with the rent of £60 instead of £30. If there are any necessary modifications as a result of those alterations, no doubt the parties will agree on them, but if there is any failure to agree, the matter can be mentioned to me and I will give a ruling on it.

Order accordingly.

Solicitors: *Bird & Bird* (for the applicants); *Stuart Hunt & Co.* (for the respondents).

[*Reported by* R. D. H. Osborne, Esq., *Barrister-at-Law.*]

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* Viz., £5,500 for the premises and £300 for the licence for the signs. The £5,500 was exclusive of rates.

RHYL URBAN DISTRICT COUNCIL *v.* RHYL AMUSEMENTS, LTD.

[CHANCERY DIVISION (Harman, J.), November 3, 4, 5, 6, 7, 11, December 9, 1958.]

Local Authority—Lease—Power to demise land—Failure to obtain consent of Ministry of Health—Validity of lease—Ultra vires—Estoppel—Effect of invalidity of lease on surrender made in consideration of the grant of the lease—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 177—*Rhyl Improvement Act*, 1892 (55 & 56 *Vict. c.* clix), *s.* 43.

Landlord and Tenant—Surrender of tenancy—Surrender by deed in consideration of new lease—New lease invalid—Effectiveness of surrender.

Landlord and Tenant—Tenancy—Yearly tenancy—Notice to quit—When yearly tenancy is determined—Whether fixed term is substituted by notice to quit—Tenancy for purposes of Landlord and Tenant Act, 1954 (2 & 3 *Eliz.* 2 *c.* 56), *s.* 25.

Limitation of Action—Statute—Limitation period under Limitation Act, 1623, *expiring in* 1938—*Whether Limitation Act*, 1939, *should be pleaded in action after* 1939.

By a local Act, the Rhyl Improvement Act, 1892, the predecessors in title of the Rhyl Urban District Council were empowered to reclaim lands from the River Clwydd and, by s. 39, to appropriate all or any part of those lands for the purposes of an ornamental lake and pleasure grounds. By s. 43 they were further empowered to "sell and convey or dispose of all or any part or parts of any lands acquired by them under this Act . . . to such person or persons . . . as they think fit". By s. 46 they were given power to erect and maintain and permit the erection of refreshment rooms, and also to let any refreshment rooms erected by them for a term not exceeding three years. In 1895 the council took over the rights and duties of their predecessors. By the Rhyl Improvement Act, 1901, s. 83, the council were authorised to let for any period not exceeding seven years any pavilion or other buildings in any recreation ground for the purpose of the provision of entertainment. In 1910 and again in 1921 the council leased the lake and pleasure grounds to the defendants, the latter lease being for a term of twenty-four years from Feb. 1, 1921. By deed dated June 23, 1932, the defendants surrendered to the council the property comprised in the lease of 1921. In that deed it was recited that the surrender had been agreed in order to enable the council to grant to the defendants a new lease of the premises, and the habendum provided for the merger of the term in the freehold "to the further intent that the council may forthwith grant to the [defendants] a new lease of the surrendered premises". By a further lease dated June 24, 1932, the same property was expressed to be demised to the defendants for a term of thirty-one years from May 1, 1932. The consent of the Minister, which was required for a lease under s. 177 of the Public Health Act, 1875, was not obtained. The defendants continued in occupation of the premises and paid rent as at May 1 and Nov. 1 in each year in accordance with the terms of the lease of 1932. On June 10, 1954, the council served notice to quit requiring the defendants to quit and deliver up the premises "which premises you hold of the . . . council as yearly tenants" on May 1, 1955, the notice being served on the basis that the lease of 1932 was void for want of the Minister's consent. This notice to quit was rendered ineffective by the coming into force on Oct. 1, 1954, of Part 2 of the Landlord and Tenant Act, 1954. The defendants continued in possession paying the rent reserved by the lease of 1932. On Oct. 28, 1955, the council served a notice under s. 25 of the Act of 1954 to terminate the defendants' tenancy on May 1, 1956, stating that an application for a new lease would be opposed. The defendants gave a counter-notice under

s. 25 (5), and followed it by a letter stating that the steps taken by them under the Act were precautionary and without prejudice to their contention that the lease of 1932 was valid. On Feb. 21, 1956, the defendants issued an originating summons for a new lease. In the present action, which was begun by writ issued on Sept. 13, 1956, the council claimed declarations that the lease of 1932 was void and that the notice served on Oct. 28, 1955, under s. 25 of the Act of 1954 was valid. The defendants counterclaimed for damages for the council's failure to obtain the necessary consent to the lease of 1932.

Held: (i) the lease of 1932 was void ab initio because—

(a) the only sufficient power of letting which the council had was that conferred by the Public Health Act, 1875, s. 177, since s. 43 of the Act of 1892 did not enable a term of years to be granted, as the words " dispose of " in that section referred to absolute disposition (see p. 264, letter I, post), and

(b) the necessary consent of the Minister to the exercise of the power conferred by s. 177 of the Act of 1875 had not been obtained (see p. 265, letter H, post).

(ii) the council, having acted ultra vires in granting the lease, could not be estopped from denying its validity (see p. 265, letter I, post).

Minister of Agriculture & Fisheries v. *Matthews* ([1949] 2 All E.R. 724) followed.

(iii) the notice under s. 25 (1) of the Landlord and Tenant Act, 1954, served by the council on Oct. 28, 1955, to terminate the tenancy on May 1, 1956, was valid for the following reasons—

(a) the surrender of the lease of 1921 (the term demised by which began on Feb. 1, not May 1) was effective, notwithstanding the invalidity of the lease of 1932, to merge the term in the freehold reversion, since the surrender was effected by deed, though the surrender might have been voidable up to the date when the lease of 1921 would have expired (see p. 268, letter A, post).

Canterbury Corpn. v. *Cooper* ((1909), 100 L.T. 597), *Doe d. Earl Egremont* v. *Courtenay* ((1848), 11 Q.B. 702) and *Doe d. Biddulph* v. *Poole* ((1848), 11 Q.B. 713) distinguished.

(b) the yearly tenancy of the defendants, consequent on the lease of 1932 being void, began when they held over, viz., June 24, 1932, but, since a term imported from the void lease was that rent was payable on May 1 and Nov. 1 in each year, by 1954 the parties must be taken to have agreed that the yearly tenancy should be by reference to those dates; therefore, notice to quit served by the council on June 10, 1954, was rightly given for May 1, 1955, and similarly, when that notice to quit had been rendered ineffective by the Landlord and Tenant Act, 1954, the subsequent notice to quit served on Oct. 28, 1955, to terminate the tenancy on May 1, 1956, was good (see p. 269, letters F to I, post).

(c) where a notice to quit has been given to terminate a yearly tenancy, the tenancy is not brought to an end until the notice expires, and, therefore, the tenancy existing in the present case when the Landlord and Tenant Act, 1954, came into force on Oct. 1, 1954, was the yearly tenancy, not a tenancy for a fixed term ending when the notice to quit served on June 10, 1954, would expire (see p. 270, letter E, post).

Dictum of LORD GODDARD, C.J., in *Clarke* v. *Grant* ([1949] 1 All E.R. at p. 769) considered.

Dictum of LUSH, J., in *Davies* v. *Bristow* ([1920] 3 K.B. at p. 438) applied.

(iv) the council's failure to obtain the Minister's consent to the lease of 1932 was not a continuing default and the counterclaim by the defendants for damages for breach of contract to obtain the consent was barred by the Limitation Act, 1939, which applied notwithstanding that the

prescribed limitation period under the Limitation Act, 1623, would have expired in 1938 (see p. 272, post).

Pegler v. *Great Western Ry. Co.* ([1947] 1 All E.R. 355) applied.

[Editorial Note. Section 177 of the Public Health Act, 1875, was repealed by the Local Government Act, 1933, s. 307 and Sch. 11, Part 1. The present power to let land is conferred by s. 164 of the Act of 1933 and is a power to let land " with the consent of the Minister, for any term ".

As to the disposal of land by local authorities, see 24 HALSBURY'S LAWS (3rd Edn.) 599-601, paras. 1104-1107.

As to estoppel and acts ultra vires, see 15 HALSBURY'S LAWS (3rd Edn.) 226, para. 427; and for cases on the subject, see 21 DIGEST 296, 297, *1059-1068.*

As to the surrender of a term of years, see 23 HALSBURY'S LAWS (3rd Edn.) 683-685, paras. 1412, 1413; and for cases on the subject, see 31 DIGEST (Repl.) 567-569, *6877-6899.*

As to the determination of a yearly tenancy by notice to quit, see 23 HALSBURY'S LAWS (3rd Edn.) 516-520, paras. 1165-1171; and for cases on the subject, see 31 DIGEST (Repl.) 478, *6032-6038.*]

Cases referred to:

(1) *Davis* (*W.*) (*Spitalfields*), *Ltd.* v. *Huntley*, [1947] 1 All E.R. 246; *on appeal*, C.A., [1947] 2 All E.R. 371 n.; 31 Digest (Repl.) 496, *6219.*

(2) *Tennant* v. *London County Council*, (1957), 121 J.P. 428; 3rd Digest Supp.

(3) *Carter* v. *Carter*, [1896] 1 Ch. 62; 65 L.J.Ch. 86; 73 L.T. 437; 13 Digest 140, *1772.*

(4) *Astley* v. *Manchester, Sheffield & Lincolnshire Ry. Co.*, (1858), 2 De G. & J. 453; 27 L.J.Ch. 478; 31 L.T.O.S. 188; 44 E.R. 1065; 11 Digest (Repl.) 298, *2036.*

(5) *Minister of Agriculture & Fisheries* v. *Hulkin*, (1948), Unreported.

(6) *Minister of Agriculture & Fisheries* v. *Matthews*, [1949] 2 All E.R. 724; [1950] 1 K.B. 148; 2nd Digest Supp.

(7) *Canterbury Corpn.* v. *Cooper*, (1908), 99 L.T. 612; *affd.*, C.A., (1909), 100 L.T. 597; 73 J.P. 225; 30 Digest (Repl.) 381, *247.*

(8) *Doe d. Egremont* (*Earl*) v. *Courtenay*, (1848), 11 Q.B. 702; 17 L.J.Q.B. 151; 11 L.T.O.S. 25; 116 E.R. 636; 31 Digest (Repl.) 575, *6957.*

(9) *Doe d. Biddulph* v. *Poole*, (1848), 11 Q.B. 713; 17 L.J.Q.B. 143; 11 L.T.O.S. 25; 116 E.R. 641; 31 Digest (Repl.) 576, *6966.*

(10) *Martin* v. *Smith*, (1874), L.R. 9 Exch. 50; 43 L.J.Ex. 42; 30 L.T. 268; 30 Digest (Repl.) 492, *1358.*

(11) *Cole* v. *Kelly*, [1920] 2 K.B. 106; 89 L.J.K.B. 819; 123 L.T. 105; 31 Digest (Repl.) 341, *4738.*

(12) *Croft* v. *William F. Blay, Ltd.*, [1919] 2 Ch. 343; 88 L.J.Ch. 545; 121 L.T. 18; 31 Digest (Repl.) 492, *6180.*

(13) *Cadogan* (*Earl*) v. *Guinness*, [1936] 2 All E.R. 29; [1936] Ch. 515; 105 L.J.Ch. 255; 155 L.T. 404; Digest Supp.

(14) *Shaw* v. *Kay*, (1847), 1 Exch. 412; 17 L.J.Ex. 17; 154 E.R. 175; 30 Digest (Repl.) 487, *1302.*

(15) *Wedd* v. *Porter*, [1916] 2 K.B. 91; 85 L.J.K.B. 1298; 115 L.T. 243; 31 Digest (Repl.) 470, *5961.*

(16) *Roe d. Jordan* v. *Ward*, (1789), 1 Hy. Bl. 97; 126 E.R. 58; 31 Digest (Repl.) 492, *6178.*

(17) *Clarke* v. *Grant*, [1949] 1 All E.R. 768; [1950] 1 K.B. 104; [1949] L.J.R. 1450; 31 Digest (Repl.) 507, *6322.*

(18) *Davies* v. *Bristow*, *Penrhos College* v. *Butler*, [1920] 3 K.B. 428; 90 L.J.K.B. 164; 123 L.T. 655; 31 Digest (Repl.) 510, *6349.*

(19) *Bolton* (*H. L.*) (*Engineering*) *Co., Ltd.* v. *Graham* (*T. J.*) *& Sons, Ltd.*, [1956] 3 All E.R. 624; [1957] 1 Q.B. 159; 3rd Digest Supp.

(20) *Re Bleachers' Assocn. Ltd.'s Leases, Weinbergs Weatherproofs, Ltd.* v. *Radcliffe Paper Mill Co., Ltd.*, [1957] 3 All E.R. 663; 3rd Digest Supp.
(21) *Castle Laundry (London), Ltd.* v. *Read*, [1955] 2 All E.R. 154; [1955] 1 Q.B. 586; 3rd Digest Supp.
(22) *Pacific Coast Coal Mines, Ltd.* v. *Arbuthnot*, [1917] A.C. 607; 86 L.J.P.C. 172; 117 L.T. 613; 9 Digest (Repl.) 660, *4376*.
(23) *Whitmore-Searle* v. *Whitmore-Searle*, [1907] 2 Ch. 332; 76 L.J.Ch. 576; 97 L.T. 160; 38 Digest 720, *664*.
(24) *Pegler* v. *Great Western Ry. Co.*, [1947] 1 All E.R. 355; *affd.* H.L. sub nom. *Pegler* v. *Railway Executive*, [1948] 1 All E.R. 559; [1948] A.C. 332; [1948] L.J.R. 939; 2nd Digest Supp.
(25) *Brueton* v. *Woodward*, [1941] 1 All E.R. 470; [1941] 1 K.B. 680; 110 L.J.K.B. 645; 165 L.T. 348; 2nd Digest Supp.

Action.

This was an action by Rhyl Urban District Council for (i) a declaration that a deed dated June 24, 1932, by which they purported to demise to the defendants a lake and pleasure grounds for a term of years was not effective; and (ii) a declaration that a notice dated Oct. 28, 1955, given by them to the defendants under the Landlord and Tenant Act, 1954, was valid. The facts appear in the judgment.

J. L. Arnold, Q.C., and *J. Monckton* for the plaintiffs.
R. E. Megarry, Q.C., and *C. F. Fletcher-Cooke, Q.C.*, for the defendants.

Cur. adv. vult.

Dec. 9. **HARMAN, J.**, read the following judgment: In 1892 the Rhyl Improvement Commissioners, then the local authority for the district of Rhyl, North Wales, promoted a local Bill for the improvement of the town. The Bill received the royal assent on June 27, 1892*. Under it the commissioners were empowered to enclose and reclaim by means of embankments certain stretches of the foreshore of the tidal River Clwydd adjacent to the town and known as " the Foryd Mudlands ", and to appropriate the whole or part of the reclaimed land for the purpose of an ornamental lake and pleasure grounds, and to lay out the land for recreation purposes. This was effected by Part 3 of the Act, which conferred limited powers of purchase, both compulsorily and by agreement, and power to construct the specified works at an estimated cost, so far as the ornamental lake and pleasure grounds were concerned, of £3,000 which the commissioners were authorised to borrow. Section 38 of the Act provides:

> " The commissioners may from time to time enclose and reclaim from the River Clwydd so much of the Mudlands now belonging or reputed to belong to Her Majesty the Queen in right of Her Crown and situate in the parish of Rhuddlan as will lie to the north-east east and south-east of the embankment Number 1 by this Act authorised."

Section 39 of that Act provides:

> " The commissioners may appropriate all or any part of the lands lying to the north-east east and south-east of the embankment Number 1 for the purposes of an ornamental lake and pleasure grounds and may level drain gravel lay out plant ornament and improve such lands for recreation purposes and cover such parts thereof with water as to them may seem desirable . . ."

Section 42 provides:

> " All lands reclaimed by the commissioners under this Act shall for the estates terms or interests therein so acquired by the commissioners and in accordance with and subject to the terms and conditions on which they

* Rhyl Improvement Act, 1892 (55 & 56 Vict. c. clix).

A are so acquired be vested in them for the purposes and subject to the provisions of this Act."

Section 43 provides:

"The commissioners may from time to time when and as they think fit but subject to the provisions hereinafter contained sell and convey or B dispose of all or any part or parts of any lands acquired by them under this Act (not being the site of either of the embankments by this Act authorised) or the reversion of the commissioners in any such lands to such person or persons and upon and subject to such terms and conditions as they think fit."

Section 44 deals with the proceeds of sale of superfluous lands. Section 46 is in C these terms:

"The commissioners may in any part of the pleasure grounds erect and maintain refreshment rooms and may permit the erection of refreshment rooms and of booths for the sale of goods on such terms and conditions pecuniary and otherwise as they may see fit. The commissioners may let any refreshment rooms erected by them for such term not exceeding three D years and for such rent and generally subject to such covenants and conditions as they may see fit."

The commissioners in fact anticipated one of their powers by acquiring from the Crown part of the foreshore on the River Clwydd. This was effected by an indenture of May 17, 1892, which contained a covenant not to use the land for any other purpose than an ornamental lake and pleasure ground. The E embankment and works were duly constructed, either by the commissioners or their successors, the plaintiffs in this action, who took over their rights, powers and duties in 1895. Parts of the reclaimed land were duly appropriated for the ornamental lake and pleasure grounds, and these were duly constructed.

By a subsequent Act, the Rhyl Improvement Act, 1901, Part 8, s. 83, the following further power was conferred:

F "The council may in any pavilion or other buildings for the time being belonging to them or under their control in any recreation ground or upon the pier when acquired by the council provide and carry on or arrange for the provision or carrying on of suitable entertainments exhibitions and amusements or may let for any period not exceeding seven years any such pavilion or other building for the purpose of such entertainments exhibitions G or amusements upon such terms and conditions as they may think fit."

I know nothing of the history of the matter until 1908 when the defendant company, who style themselves amusement caterers, came into possession of the marine lake and pleasure grounds abutting on it. What tenancy was then created does not appear, but by an indenture of Mar. 21, 1910, the plaintiffs H leased, or purported to lease, the lake and pleasure grounds to the defendants for a term of fourteen years, to be calculated from June 1, 1910, at a rising rent. In 1921 negotiations were entered into between the parties for a further lease, and as a result, in an indenture of surrender dated June 18, 1921, the property comprised in the lease of 1910 was surrendered to the council, the term being expressed to be merged in the freehold. The consideration expressed was the I grant of a new lease, and accordingly, by a further indenture of June 20, 1921, the plaintiffs demised to the defendants a part of the same property, comprising the lake and pleasure grounds as they were then enclosed, for a term of twenty-four years from Feb. 1, 1921, with rights to abridge which were never exercised, and at a rising rent.

In 1932 there were further negotiations for a new lease, as a result of which, by a deed of surrender made June 23, 1932, the defendants surrendered to the plaintiffs all the property comprised in the lease of 1921, such term to merge in the reversion. This deed, after reciting the lease of 1921, further recites:

" And whereas the company has agreed with the council for the surrender to the council of the said premises described in the schedule hereto for the unexpired residue of the said term to enable the council to grant to the company a new lease of the said premises ",

and the habendum is in the following terms:

" To hold unto the council and their successors for all the unexpired residue of the said term to the intent that the said term may merge and be extinguished in the freehold and inheritance of the said premises And to the further intent that the council may forthwith grant to the company a new lease of the surrendered premises."

By another lease made June 24, 1932, between the plaintiffs of the one part and the defendants of the other part the same property was expressed to be demised to the defendants for a term of thirty-one years from May 1, 1932, at a rent rising to £1,500 a year from May 1, 1945. At some date after the execution of this document it appears to have occurred to the clerk to the council that this lease might be invalid because necessary consent to its execution had not been obtained from the Minister of Health, and therefore that the council had no power to grant such a lease. No steps were, however, taken either to communicate this doubt to the defendants or to invalidate the lease until the beginning of 1953 when negotiations were opened for a surrender of the existing lease and the grant of a further one. These negotiations, however, broke down after a long period of bargaining on the question of the amount of rent to be paid under the new lease, and ultimately, on June 10, 1954, notice to quit was served by the council. This document was in the following terms:

" We, the undersigned, as solicitors and agents of the Rhyl Urban District Council hereby give you notice to quit and deliver up to them possession of the premises situate and known as the Marine Lake and Pleasure Grounds at Rhyl . . . which premises you hold of the said council as yearly tenants on May 1, 1955, or other . . . the end of the year of your tenancy which will expire next after the end of one half-year from the service of this notice. Dated this June 10, 1954. Joseph Lloyd & Co., solicitors and agents for your landlords."

The basis on which this notice was served was that the lease of 1932 was void, and that therefore the defendants held the property comprised in the lease on a yearly tenancy, beginning on May 1 in each year, and otherwise on the terms of the void lease.

On July 30, 1954, there was passed the Landlord and Tenant Act of that year, one of the objects of which, as appears from its long title, was

" to enable tenants occupying property for business, professional or certain other purposes to obtain new tenancies in certain cases."

It is agreed that Part 2 of this Act applies: it came into force on Oct. 1, 1954. On the same date the defendants served on the council notice under s. 26 (1) of the Act, proposing a new tenancy to commence on May 1, 1955, and to be for a term of fourteen years at a rent of £3,000 a year. This notice was accompanied by a letter stating that it was given without prejudice to any existing rights or claims of the defendants, i.e., their right or claim that the lease of 1932 was still current and valid. This notice was repudiated by the council, and no further steps were taken on it. The defendants continued in possession, paying the rent payable under the lease of 1932.

In 1955 the council threatened proceedings for possession, but took no further step until Oct. 28, 1955, when they served through their solicitor a statutory notice under s. 25 (1) of the Act of 1954 to terminate the defendants' tenancy on May 1, 1956. This notice stated that an application for a new lease would be opposed. The defendants retorted with a counter-notice under s. 25 (5), stating their unwillingness to give possession, and on Dec. 22, 1956, they followed

this with a letter stating that any steps taken by them under the Act were precautionary and without prejudice to their contention that the lease of 1932 was valid and the council's notice a nullity. A technical objection was taken to the form of the notice, which has since been abandoned, but as a result the council served a further notice to terminate the tenancy on May 1, 1957, but stated on this occasion that they were not opposed to an application for the grant of a new tenancy. On Oct. 18, 1956, the defendants served a further counter-notice, stating their unwillingness to give up possession.

As a result of this setting to partners the defendants started proceedings by an originating summons dated Feb. 21, 1956, applying to the court for a new tenancy. This summons maintained that the lease of 1932 was still current, and by way of alternative that a yearly tenancy subsisted to be inferred from the payment and acceptance of rent. When the matter came before the master it became obvious that questions of fact arose which it was necessary to decide before the summons could proceed, and this action is the result.

From the circumstances which I have stated the following questions seem to emerge: (i) Whether the defendants, having served notice for a new lease under s. 26 of the Act of 1954 and having issued the originating summons, can still be heard to argue that the lease of 1932 is valid. (ii) The validity of the 1932 lease. (iii) Whether, if the lease be invalid, the plaintiffs are estopped from relying on that fact. (iv) The validity of the lease of 1921. (v) The validity of the two notices served by the council in 1955 and 1956, the point here being whether either of these comply with s. 25 of the Act in seeking to terminate the defendants' tenancy on May 1, 1956, or May 1, 1957, respectively. (vi) There is a counterclaim by the defendants for damages for failure by the council to obtain, or attempt to obtain, any necessary consent to the grant of the lease of 1932. By way of answer the council pleads the Limitation Act, 1939.

The case has raised a number of points of law, and much authority has been cited. In fact, before the end of the hearing, something like fifty books had accumulated on my desk, to all of which I had been referred by one side or the other.

(i) The first point taken is that the defendants, having asked for a new lease, must be taken to have elected to rely on their rights under the Act of 1954, and cannot now be heard to say that the lease of 1932 is still subsisting. This is a point akin to estoppel and should have been, but it is not, taken in the pleadings, and I was asked to hold that it was not open to the plaintiffs. It would, however, be open to me to allow an amendment, and I propose to consider the merits of this point as if I had done so. In my opinion, there is nothing in it. It is true that in 1954 the defendants did by their notice under s. 26 of the Act demand a new lease, but they sent a covering letter on the same date stating that this was a notice made without prejudice. In my judgment this shows that there was no true election. The defendants were alleging the validity of the lease of 1932, but by way of insurance, in case that proved wrong, they sought to protect themselves under the Act of 1954, and I do not see why they should not take this course.

It was argued that the decision of HENN COLLINS, J., in *W. Davis (Spitalfields), Ltd.* v. *Huntley* (1) ([1947] 1 All E.R. 246) was authority which I ought to follow in this respect. That was an application under a different Act, viz., the Landlord and Tenant Act, 1927. The headnote, so far as relevant, is in these words:

> "... A tenant who asks for a new tenancy under the Landlord and Tenant Act, 1927, s. 5 (1), cannot be heard to say that the old tenancy is still subsisting, even if he fails to obtain a new tenancy ..."

The learned judge dealt with the point in these terms (ibid., at p. 248):

> "Where, however, the tenant is asking for a new tenancy (under s. 5 (1) of the Act), the matter is completely different. He cannot have both the old tenancy and a new one. If he affirms the position that he wants a new

tenancy, he can only do so on the footing that the old one is at an end. If and in so far as the tenant claims a new tenancy, he is not thereafter entitled to say that the old one is still subsisting, and he certainly is not entitled to do so any the more if he fails to obtain the new tenancy . . ." A

That case went to the Court of Appeal ([1947] 2 All E.R. 371 n.), but that court did not deal with this point. It has, however, been approved in *Tennant* v. *London County Council* (2) ((1957), 121 J.P. 428 at p. 440). In my judgment, it does not apply here. The tenancy which the defendants here were desirous of retaining was the lease of 1932, which the plaintiffs were alleging to be void, and not the yearly tenancy of which notice to quit had been given under the Act by the plaintiffs. It was, therefore, not a matter of waiving some point about the sufficiency of the notice, but a claim that no notice could be given at all. B C

It is said further that by issuing the originating summons on Feb. 21, 1956, the defendants once more elected to have a new lease, but it seems to me clear from the form of the summons itself that the defendants did all they could there to preserve their rights, and I am of opinion that even if the plaintiffs are entitled to take this point it will not avail them.

(ii) The question of the validity of the lease of 1932 depends on the construction of the Act of 1892. The defendants argue that on a true reading of this statute there was adequate power of letting under s. 43. The words relied on are: D

" The commissioners may from time to time when and as they think fit but subject to the provisions hereinafter contained sell and convey or dispose of all or any part or parts of any lands acquired by them under this Act . . ." E

It is argued that the words " disposed of " are the widest words possible, and the greater must include the less.

In this connexion I was referred to *Carter* v. *Carter* (3) ([1896] 1 Ch. 62) where the word " disposition " in the Fines and Recoveries Act, 1833, was under consideration, and STIRLING, J., said (ibid., at p. 67): F

" The words ' dispose ' and ' disposition ' in the Fines and Recoveries Act are not technical words, but ordinary English words of wide meaning; and where not limited by the context those words are sufficient to extend to all acts by which a new interest (legal or equitable) in the property is effectually created." G

That was said in relation to that Act, and to a declaration by a married woman. It is a very different matter from that under consideration here.

On the other hand, I was referred to the use of this word in the Lands Clauses Consolidation Act, 1845, where it is used in connexion with the words " sell and convey ", sometimes with the word " absolutely " added and sometimes without, and seems to mean in either case an absolute or out and out disposition. I was referred to *Astley* v. *Manchester, Sheffield & Lincolnshire Ry. Co.* (4) ((1858), 2 De G. & J. 453), where the words " dispose of ", as used in s. 128 of the Lands Clauses Consolidation Act, 1845, were under discussion, and LORD CHELMSFORD, L.C., decided that " dispose of " meant an out and out disposition. H

In my judgment the words " dispose of " here used must mean dispose of absolutely. It is merely a description of the disposition of the land following on a sale. Apart from this, the very limited powers of letting conferred on the commissioners by s. 46 of the Act of 1892 which I have read would be unnecessary if s. 43 already gave them an unlimited power of letting, and Parliament must have taken the same view when it passed the Rhyl Improvement Act, 1901, s. 83, granting a power to let not exceeding seven years. In addition, I am of opinion that in fact s. 43, when read in conjunction with s. 44 shows that the former was only intended to apply to surplus lands, and therefore did not apply I

to the marine lake and pleasure grounds as a whole. In my judgment, therefore, the only power of letting which the plaintiffs had at the time of the lease of 1932 was that contained in the Public Health Act, 1875, s. 177, which provides:

> "Any local authority may, with the consent of the Local Government Board, let for any term any lands which they may possess, as and when they can conveniently spare the same."

By 1932 the Local Government Board had been superseded by the Ministry of Health. If, therefore, the consent of that body was not obtained the lease was, in my opinion, ultra vires and void. Apart from this the land in question was in fact acquired, as I have mentioned, before the Act of 1892 came into force, and it follows that it cannot have been acquired "under the Act", and that s. 43 is not available for this purpose.

The question of consent or no consent is one of fact. Evidence was given by a Mr. Edwards, clerk to the council since 1935, and in 1932 deputy clerk. He deposed that he remembered the grant of the lease of 1932, and he produced the relevant minute book covering the period from May, 1932, to April, 1933, which contains no entry from which it might be inferred that consent was ever asked for or considered. Mr. Edwards attended the meetings, and stated that if consent were considered necessary a certified copy of the council's resolution recommending the application would be required to be sent to the Ministry, and that if such a resolution had been passed it should have been recorded in the minute book. His own recollection was that no such application was made. He also deposed to having searched the press copy letter book for 1932 kept in his office, and swore that it contained no letter to the Ministry nor anything on this subject.

In addition, evidence was tendered by one Harold William Cauthery, an assistant secretary to the Ministry of Housing and Local Government. As regards his evidence an order had been made by the master in these terms:

> "It is ordered that an affidavit of Harold William Cauthery in the form of the draft affidavit delivered with the said summons and identified by the initials of the master thereon be admissible in evidence at the trial of this action."

This seems to me an unfortunate form of order for it affects to prejudge the question whether the evidence proffered is admissible. In fact it is not. It is entirely hearsay, and Mr. Cauthery on being summoned to the court for cross-examination frankly admitted that he really knew nothing of the matter, but came forward according to Civil Service protocol as the person now responsible for the relevant office. He had only been in this position since 1953, and was unaware of office practice before that date. I derive no help from his evidence.

Nevertheless, I am of opinion that the plaintiffs have sufficiently proved that no consent was applied for, still less given, to the grant of the lease of 1932, which was, therefore, in my judgment not merely voidable but void.

(iii) It was, nevertheless, argued by the defendants, and so pleaded, that the plaintiffs are now estopped from denying the validity of the lease. The plea is based on the fact that the relations of the parties have been regulated by it ever since 1932, and that in that year the defendants changed their position by surrendering their lease of 1921 on a promise to grant the new one. The representation so acted on must have been that the plaintiffs had power to grant a valid new lease. If the plaintiffs were private people this would be a strong plea, but in my judgment a plea of estoppel cannot prevail as an answer to a claim that something done by a statutory body is ultra vires—see *Minister of Agriculture & Fisheries* v. *Hulkin* (5), an unreported case alluded to by CASSELS, J., in *Minister of Agriculture & Fisheries* v. *Matthews* (6) ([1949] 2 All E.R. 724; [1950] 1 K.B. 148), where the learned judge says ([1950] 1 K.B. at p. 153; [1949] 2 All E.R. at p. 729):

"If, therefore, the Minister does something which is an ultra vires act, it is not the act of the Minister at all. In the unreported case of *Minister of Agriculture & Fisheries* v. *Hulkin* (5), the present plaintiff was suing for the possession of a cottage and garden which was in the possession of the defendant. The action was brought in the county court and the county court judge took the view that under the relevant defence regulations, it was competent for the county agricultural committee, acting under the authority of the Minister, and as the delegate of the Minister's own powers, to create a relationship of landlord and tenant between the Minister and the defendant. The case went to the Court of Appeal and the appeal of the plaintiff was allowed. The first point which called for consideration was the finding of the county court judge that under the regulation the Minister had power to create a tenancy and that, by the document relied on in that case, he had in fact done so. In the Court of Appeal the defendant's counsel disclaimed any intention of attempting to support the county court judge's judgment on that point. He contended, however, that the Minister having done what he had done in that case was estopped from denying that the document under which the defendant was in possession, created a tenancy. In dealing with that contention, LORD GREENE, M.R., said: 'He [the defendant's counsel] suggested, first of all, that even assuming, as he conceded, that the regulations gave no power to the Minister to create a tenancy, nevertheless the Minister was estopped from denying that the document in question did create a tenancy and, accordingly the relationship must be regarded as one of landlord and tenant. There is, I think, a very short answer to that. Accepting the view which Mr. Bailleu [the defendant's counsel] accepts, that the Minister had no power under the regulations to grant a tenancy, it is perfectly manifest to my mind that he could not by estoppel give himself such power. The power given to an authority under a statute is limited to the four corners of the power given. It would entirely destroy the whole doctrine of ultra vires if it was possible for the donee of a statutory power to extend his power by creating an estoppel. That point, I think, can be shortly disposed of'."

If I may say so, with respect, this seems as good sense as it is good law.

It was ingeniously argued that the present was not a case of the council having no power, but that they had a power if they obtained the necessary consent and that the doctrine does not apply except where no power exists, so that the council might be estopped from denying that they obtained consent. If this be not, as I suspect, a quibble, a like answer could be made that it would destroy the necessity of ever obtaining consent, if a statutory body omitting to obtain it could thereafter be held estopped. Such a body could by these means confer on itself a power which it had not got, and the ultra vires doctrine would be reduced to a nullity.

(iv) The position when the lease of 1921 was executed seems to have been the same as in 1932. Mr. Edwards was already then in the plaintiffs' employ as a junior clerk. He did not pretend to any clear recollection of this transaction, but he produced the relevant minute books which showed that there were negotiations between the parties for the surrender of the lease of 1910 and the grant of a new one, and that these resulted in a resolution on May 9, 1921, to affix the plaintiffs' seal to the new lease. No entry in these books suggested that anyone thought that consent was required, or made any attempt to obtain it. Mr. Edwards searched such letter books as he could find, but he could not swear that all contemporary letters were preserved. No relevant letter was found. In my judgment the evidence is enough to show that no consent was obtained in 1921, and that the lease of 1921 was therefore similarly invalid. It may well be that a like invalidity affects the lease of 1910, but no evidence was proffered on this subject, and I must assume the validity of that lease.

It will be remembered that before the grant of the leases of 1921 and 1932 there were formal documents of surrender of the existing terms, and it was argued before me that if and so far as the new lease in each case was a nullity so was the surrender made in consideration of the grant of a new lease, with the result that the lease of 1910 continued until its expiration on June 1, 1924, and similarly the lease of 1921, if held valid, would have continued until its expiration on Feb. 1, 1945. The importance of this will be seen when I deal with the statutory notices under the Act of 1954.

In support of this proposition there was cited *Canterbury Corpn.* v. *Cooper* (7) ((1908), 99 L.T. 612). That was a decision of a Divisional Court on appeal from a county court, and the relevant judgment is that of CHANNELL, J., who held that a lease granted by the corporation under the Municipal Corporations Act, 1822, was invalid, that the surrender by the defendant of a former lease was similarly ineffective and therefore that the old lease continued in operation: there was, however, no express surrender of the old lease: it was merely a surrender by operation of law and delivery up of the lease. That case went to the Court of Appeal ((1909), 100 L.T. 597). The decision of the Divisional Court was upheld.

To a like effect is *Doe d. Earl Egremont* v. *Courtenay* (8) ((1848), 11 Q.B. 702). That was a case of a lease executed by a tenant for life in excess of his powers and in consideration of the surrender of a former lease. Here again there was no surrender by deed, though as the sidenote shows surrender was expressly mentioned in the lease. The sidenote reads as follows:

> " Tenant in fee demised the land by indenture for a term depending on certain lives, and then devised his estate to his son for life, with remainders over, and with a power to tenant for life to grant leases. After testator's death, and during the above term, the son granted the lessee a fresh lease of the land, and the new indenture of lease set forth that it was granted in consideration of the surrendering up into the hands of the lessor by the lessee, at or before the delivery thereof, of the lease first granted, which surrender is hereby made and accepted accordingly. The new lease was a bad execution of the power. One of the lives mentioned in the first lease was still existing. Held, that the surrender was inoperative, and the first lease remained in force; and this, whether the second lease, at the time of the demise, was void or only voidable at the will of the tenant for life, and whether the surrender was implied or express: the ground of decision being that the new lease did not pass an interest according to the contract, and therefore the acceptance of it, though with express words as above stated, did not effect an absolute surrender."

Giving judgment, COLERIDGE, J., said (ibid., at p. 712):

> " . . . where the new lease does not pass an interest according to the contract, the acceptance of it will not operate a surrender of the former lease; that, in the case of a surrender implied by law from the acceptance of a new lease, a condition ought also to be understood as implied by law, making void the surrender in case the new lease should be made void; and that, in case of an express surrender, so expressed as to show the intention of the parties to make the surrender only in consideration of the grant, the sound construction of such instrument, in order to effectuate the intention of the parties, would make that surrender also conditional to be void in case the grant should be made void."

I was then referred to the case reported immediately afterwards, *Doe d. Biddulph* v. *Poole* (9) ((1848), 11 Q.B. 713), where ERLE, J., said (ibid., at p. 718):

> " Indeed, where the terms of a lease import an express surrender solely in consideration of the new grant, we think a construction that such surrender was conditional would be warranted, and would give effect to the intention of the parties."

In my judgment these cases do not carry the defendants home. They are not authority in a case where, as here, there has been a separate surrender by deed. No doubt, as CHANNELL, J., points out in *Canterbury Corpn.* v. *Cooper* (7) (99 L.T. at p. 615), the surrenders may have been voidable and might have been set aside while the former terms were still running, but that was never done here and the terms have long since expired. In my judgment the surrenders did operate to merge the term in each case in the reversion, as they were expressed to do.

(v) What then was the position on June 24, 1932* ? Clearly the plaintiffs as freeholders were under a contractual obligation to grant a new lease to the defendants, and this they purported to do by the lease of June 24, but that document being, as I hold, void, what is the result ? It has admittedly, in view of the fact that the grantee has been in possession and has paid rent and performed the covenants as provided by the void lease, created a yearly tenancy. This is shown by *Martin* v. *Smith* (10) ((1874), L.R. 9 Exch. 50), where KELLY, C.B., thus expressed himself (ibid., at p. 52):

> " The agreement being void at law as a lease [it was a lease over seven years, orally created] under 8 & 9 Vict. c. 106, s. 3, but the tenant having entered into possession and having occupied and enjoyed the premises during the whole period, the question is, what are the liabilities of the tenant under the agreement coupled with this occupation and enjoyment. It is now clearly settled that when a tenant enters under an agreement for a term which is void at law, he is liable as a tenant from year to year, on all the terms of the agreement applicable to a yearly tenancy."

See also the judgment of ATKIN, L.J., in *Cole* v. *Kelly* (11) ([1920] 2 K.B. 106 at p. 132).

Where the parties differ, and this was the most debated question before me, is on the date from which the yearly tenancy should be held to run. The plaintiffs point to the fact that it was one of the terms of the void lease that the term should be calculated by reference to May 1 and that rent should be paid on Nov. 1 and May 1 every year, and argue that this provision is applicable to a yearly tenancy and must, according to the judgment which I have just read of KELLY, C.B., in *Martin* v. *Smith* (10), be one of the terms of the yearly agreement on which the tenants hold. This seems in the earlier stages of the dispute to have been also the view of the defendants, for when in 1954 they applied for a new lease under the Act of that year they asked for a new tenancy starting on May 1, 1955. The defendants have now changed their ground, for reasons which will be clear later on. They allege that a holding over by a tenant must begin from the expiration of the former tenancy. On my findings this would be June 23 when the surrender operated, and on that footing the yearly tenancy would run from that date. In support of this proposition *Croft* v. *William F. Blay, Ltd.* (12) ([1919] 2 Ch. 343) was cited. The argument there was that a holding over must be dated from the beginning of the expired tenancy agreement, but the Court of Appeal would not accept that and held that the annual tenancy created by the holding over should be deemed to begin on the day when the lease expired. I was also reminded that the estate of the lessee begins on the date of the grant and not the date from which the habendum is expressed to run: see *Earl Cadogan* v. *Guinness* (13) ([1936] 2 All E.R. 29) where CLAUSON, J., said (ibid., at p. 31):

> " But it must be borne in mind that it is not possible by a deed executed in March, 1936, to create a term in such a sense as that it shall bring into existence a term prior to the date of the execution of the deed . . . Although in the instance I have given the term is looked upon as a twenty-one years' term, in fact it is twenty-one years less the period which had elapsed from

* This date was the date of the lease which purported to demise the property to the defendants for thirty-one years from May 1, 1932.

Dec. 25, 1935, when the term nominally begins, and the date of the execution of the deed. That seems to me to be a reasonably obvious proposition. But I am supported in my opinion of its obviousness by referring to *Shaw* v. *Kay* (14) ((1847), 1 Exch. 412), a decision of the Court of Exchequer and a case in which the proposition which I have suggested as being a correct proposition was quite plainly accepted."

On the other side it is argued that one must calculate the yearly tenancy by reference to the date prescribed by the document under which the relevant rent is paid. This finds some support in *Cole* v. *Kelly* (11)—see the judgment of ATKIN, L.J. ([1920] 2 K.B. at p. 132) where the lord justice says:

"... Upon what terms did the defendant hold the premises under the new quarterly tenancy? In reference to that one has to approach the question recognising that the law is that, 'where tenants hold over after the expiration of a term, and the facts do not exclude an implied agreement to hold upon the terms of the old lease, then the law determines that they impliedly hold subject to all the covenants in the lease which are applicable to the new situation:' per SWINFEN EADY, L.J., in *Wedd* v. *Porter* (15) ([1916] 2 K.B. 91 at p. 98). I think that that rule applies wherever there has been a holding over, the law being, as I understand it, that a holding over with the consent of the landlord prima facie gives rise to a tenancy at will, which by subsequent payment of rent may be converted into a tenancy from year to year ..."

Further support was sought in *Roe d. Jordan* v. *Ward* (16) ((1789), 1 Hy. Bl. 97), where the sidenote reads as follows:

"Tenant for life makes a lease for years, to commence on a certain day, and dies before the expiration of the lease, in the middle of the year. The remainderman receives rent from the lessee (who continues in possession, but not under a fresh lease) for two years together, on the days of payment mentioned in the lease. This is evidence from which the court will presume an agreement between the remainderman and the lessee, that the lessee should continue to hold from the day, and according to the terms of the original demise, so that notice to quit ending on that day is proper."

I have felt some doubt about this point. I accept that the yearly tenancy begins on the date from which the tenant held over, viz., June 24, 1932, but one of the terms imported from the void lease was that rent should be payable on May 1 and Nov. 1, and that was in fact done. I hold that by 1954 at any rate the parties must be taken to have agreed that the yearly tenancy should be by reference to the dates when rent was paid, i.e., half-yearly on Nov. 1 and May 1. If this be right, notice to quit should be given for May 1. This is what was in fact done by the notice served on June 10, 1954, for May 1, 1955. That notice was, when given, effective for any date on which the end of the year of the tenancy would expire after Dec. 10, 1954.

The coming into force of the Act of 1954, by virtue of s. 24 (1), rendered the notice to quit ineffective, and the plaintiffs, recognising this, served the notice of Oct. 28, 1955, as prescribed by s. 25 of the Act. This section, by sub-s. (2), provides that it must be of not more than twelve nor less than six months; and by sub-s. (3) (a):

"the date of termination specified in a notice under this section shall not be earlier than the earliest date on which apart from this Part of this Act the tenancy could have been brought to an end by notice to quit given by the landlord on the date of the giving of the notice under this section."

It was agreed in the course of the hearing that, if May 1 be the right date of termination, this was a good notice, and on my findings that is an end of this point. If, however, the alternative view be taken that the right date was June 24, May 1 was too early if sub-s. (3) (a) applies.

At this point a further controversy arose, viz., what was the effect of the common law notice to quit of June, 1954 ? The plaintiffs argued that this notice, which was admittedly good at common law, put an immediate end to the yearly tenancy, and that all that remained was a tenancy for a fixed term expiring when the notice to quit expired. For this the plaintiffs relied on the decision in *Clarke* v. *Grant* (17) ([1949] 1 All E.R. 768; [1950] 1 K.B. 104). This was a decision of LORD GODDARD, C.J. I do not think that I need read the headnote because the point there was quite a different one, about the waiving of a notice to quit. The Lord Chief Justice said ([1950] 1 K.B. at p. 105; [1949] 1 All E.R. at p. 769):

> " With regard to the payment of rent after a notice to quit, however, that has never been the law: if a notice to quit has been given in respect of a periodic tenancy such as a yearly tenancy, the result is to bring the tenancy to an end just as effectually as if there had been a term which had expired. Therefore, when a landlord has brought a tenancy to an end by means of a notice to quit, a payment of rent after that date will only operate in favour of the tenant if it can be shown that the parties intended that there should be a new tenancy."

The Lord Chief Justice, however, was not considering the present point which is what tenancy was existing on Oct. 1, 1954, when the Act came into force. If it was only a term certain, s. 25 (3) (a) does not apply but s. 25 (4) does, and the notice would be good. The words of the Lord Chief Justice seem to me ambiguous on this point, but in my judgment, where a notice to quit has been given under a yearly tenancy, that tenancy is not brought to an end until the notice to quit expires. I find some support for this in the judgment of LUSH, J., in *Davies* v. *Bristow* (18) ([1920] 3 K.B. 428), where it seems to me (from a passage ibid., at p. 438) that the learned judge held that the tenancy is not terminated until the notice to quit expires. If this be right the tenancy which existed on Oct. 1, 1954, was the annual tenancy, and it is this which is expressed to continue by virtue of the Act—see the statement of DENNING, L.J., in *H. L. Bolton (Engineering) Co., Ltd.* v. *T. J. Graham & Sons, Ltd.* (19) ([1956] 3 All E.R. 624).

I should prefer to express it rather differently. " Tenancy ", in my judgment, here means the right to continue as tenant. The conditions surrounding this right are those attending the previously existing tenancy, with one exception, viz., that the right may be terminated as the Act provides. In order to find how that may be done, s. 25 is to be consulted. It was pressed on me by the defendants that this view was inconsistent with my own decision in *Re Bleachers' Assocn. Ltd.'s Leases, Weinbergs Weatherproofs, Ltd.* v. *Radcliffe Paper Mill Co., Ltd.* (20) ([1957] 3 All E.R. 663), and with the decision of SELLERS, J., in *Castle Laundry (London), Ltd.* v. *Read* (21) ([1955] 2 All E.R. 154). I do not accept this. In my judgment the two cases, right or wrong, and I think right, have no effect on the position in this case, and are in fact irrelevant. They deal with break clauses under leases, which are contractual terms between lessor and lessee. SELLERS, J., and myself saw no reason why they should be interfered with by the Act, but that has no bearing in my judgment on the notices to quit served in this case.

If then I had held that the tenancy in the present case would have expired, apart from the Act, after May 1, i.e., on June 24 in any calendar year, then I should have held the statutory notice of 1955 and the similar notice of 1956 to be bad, because s. 25 (3) prescribes that the notice must not indicate a date earlier than that of the expiration of the tenancy continued by the Act. May 1 was on this footing too early, because the former tenancy could only have been ended on June 24. As it is, I hold the notice of 1955 is good, and the notice of 1956 is irrelevant.

(vi) There remains the counterclaim. The plea here is that the defendants

surrendered the lease of 1921 on the promise of a grant by the plaintiffs of a valid and effectual lease in the terms of the document of 1932, and that the plaintiffs are in breach of contract in that they did not obtain, or attempt to obtain, a consent which would have rendered the lease of 1932 valid. It is certainly suggested by CHANNELL, J., in *Canterbury Corpn.* v. *Cooper* (7) that this was so. Talking about the lady who held under a void tenancy, he says (99 L.T. at p. 615):

> "There was a binding compromise; that binding compromise may have included a contract by the corporation, and I think it did, to grant her an effectual new lease for life, and it would have been an effectual new lease if they had obtained the consent of the Local Government Board. Therefore there may have been a contract to procure the consent of the Local Government Board, just as a contract to assign a lease includes the consent of the lessor when that is wanted. It is similar to that. Therefore her complaint, if any, is that she has not got this valid lease, and that there was a contract to give it to her. She may or may not make out that there was such a contract. I offer no opinion on it, for many other considerations arise upon it. She ought to have claimed damages for not getting the valid lease which she expected to get, and which possibly they contracted to give her."

On the other hand, it is argued that the necessity for a consent to a grant by a statutory body must be as well known to lessee as lessor, this not being a matter of internal management, and that therefore it was the duty of the defendants to see to it that the necessary consent was obtained, and that they cannot complain having neglected so to do. This proposition has the authority of VISCOUNT HALDANE in his speech in *Pacific Coast Coal Mines, Ltd.* v. *Arbuthnot* (22) ([1917] A.C. 607), where he says (ibid., at p. 616):

> "No doubt where some act, such as the granting of an obligation in the course of its business, is put by the constitution of a company within its power, and certain formalities of administration are prescribed by the articles of association which for domestic purposes regulate the duties of the directors to the shareholders, the mere failure to comply with a formality, such as a proper appointment or the presence of a quorum of directors, will not affect a person dealing with the company from outside and without knowledge of the irregularity . . . But the case stands quite otherwise when the act is one which has not, by the constitution of the corporation, been put within its power excepting on the fulfilment of a condition. In that event the persons dealing with the corporation are bound to ascertain whether the condition has been fulfilled."

I confess that I prefer the view of CHANNELL, J., but however this may be, the real defence is the Statute of Limitations. As to this, it was said that the failure to obtain consent was a continuing default on the part of the plaintiffs, going on throughout the term, and that therefore the statute has not run. I do not accept this. The lease of 1932 was void in my judgment and not voidable, and subsequent consent could not have validated that instrument. It is not like *Whitmore-Searle* v. *Whitmore-Searle* (23) ([1907] 2 Ch. 332), where a subsequent consent by the protector of a settlement to the remainderman's deed of disentail was held effective. Such a deed is not void, though it has only a limited effect, viz., the creation of a base fee until the protector assents. This is quite different from a deed void ab initio. If that be so, the statute will protect the plaintiffs unless there is any substance in yet one more point, viz., that the wrong statute has been pleaded.

This was the statute of 1939. It is said that time would have run by 1938 under the Act of James 1 (the Limitation Act, 1623)*, and therefore that Act should have been pleaded. The answer made is, first, that the implied promise

* 21 Jac. 1 c. 16; see s. 3 of that Act.

(if any) was a promise contained in a document under seal, viz., the surrender of June 23, 1932, and therefore was a specialty for which twelve years was the proper period, and, secondly, that the Act of 1939 was in either event the right Act to plead. Reliance was placed on the terms of s. 33 (a) of that Act, and the decision of LORD GREENE, M.R., in *Pegler* v. *Great Western Ry. Co.* (24) ([1947] 1 All E.R. 355 at p. 356). The decision in that case involved a finding that time had run before the coming into force of the Act of 1939, which was nevertheless held to be rightly pleaded. See also *Brueton* v. *Woodward* (25) ([1941] 1 All E.R. 470).

I hold that the latter answer prevails, and that the counterclaim must be dismissed.

Judgment for the plaintiffs in the action and on the counterclaim.

Solicitors: *Speechly, Mumford & Soames*, agents for *Joseph Lloyd & Co.*, Rhyl (for the plaintiffs); *Preston, Lane-Claypon & O'Kelly*, agents for *Edward Hughes & Co.*, Rhyl (for the defendants).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

COMPAGNIE ALGERIENNE DE MEUNERIE *v.* KATANA SOC. DI NAVIGATIONE MARITTIMA S.P.A.

[QUEEN'S BENCH DIVISION (Diplock, J.), December 4, 5, 1958.]

Shipping—Charterparty—Loading—Implied warranty—Warranty by shipowners to use reasonable diligence to obtain, and in fact to obtain within a reasonable time, permission of authorities at port of loading to load cargo—Duration of a reasonable time.

A vessel, which in 1955 had discharged cargo at an Israeli port, was chartered in 1956 to load a cargo of grain at a Syrian port. The charterparty, which was in Gencon form, stated that the vessel was "now trading and expected ready to load under this charter about May 24, 1956", and provided that, after loading, she was to proceed to one or two Algerian ports and that, in the event of her not being ready to load on or before May 31, 1956, the charterers might cancel the charterparty. The vessel arrived off the port of loading on May 28, 1956, but was refused free pratique by the Syrian authorities on the ground of a Syrian law of 1954 prohibiting foreign vessels from anchoring if they had called at an Israeli port. The Syrian Ministry of National Economy had discretion to exempt vessels from the prohibition. On instructions of the shipowners the master of the vessel signed a declaration of non-co-operation with Israel and endeavoured to get permission to load, but, while permission was still withheld, the Syrian authorities placed an embargo on export of grain to French or Algerian ports which, as finally continued by decision of the Syrian authorities on June 3, 1956, commercially frustrated the charterparty. On June 5, 1956, the vessel sailed from the port of loading having taken on only fresh water and stores. At the time of the charterparty the shipowners knew that the vessel had called at an Israeli port in 1955 and that previous declarations of non-co-operation with Israel had been made by the master and knew or ought to have known of the Syrian law of 1954, but the charterers neither knew nor ought to have known of these matters. On a claim by the charterers for damages for breach of warranty by the shipowners in failing to get permission to load,

Held: (i) it being, as a result of the Syrian law of 1954, solely within the power of the shipowners to obtain permission to load at the port of loading, a warranty by the shipowners would be implied that they would use reason-

able diligence to obtain permission to load the cargo; further, as the charterers neither knew nor ought to have known that such permission would be needed, a warranty by the shipowners would be implied that they would obtain the permission within a reasonable time.

(ii) there was, however, no breach of these implied warranties, because the shipowners had used reasonable diligence to obtain the permission and a reasonable time for obtaining it had not expired when the embargo was imposed which, as finally continued, frustrated the contract.

[As to shipowners' duty to obtain free pratique and to comply with requirements of port of loading, see 30 HALSBURY'S LAWS (2nd Edn.) 428, para. 594.]

Cases referred to:

(1) *Sanday & Co.* v. *Keighley, Maxted & Co., Sanday (S.) & Co.* v. *Hillerns & Fowler*, (1922), 91 L.J.K.B. 624; 127 L.T. 327; 41 Digest 328, *1845*.

(2) *Levy* v. *Costerton*, (1816), 4 Camp. 389; Holt, N.P. 167; 1 Stark. 212; 171 E.R. 124; 41 Digest 476, *3091*.

(3) *Ciampa* v. *British India Steam Navigation Co., Ltd.*, [1915] 2 K.B. 774; 84 L.J.K.B. 1653; 41 Digest 413, *2569*.

(4) *Dahl* v. *Nelson, Donkin & Co.*, (1881), 6 App. Cas. 38; 50 L.J.Ch. 411; 44 L.T. 381; 41 Digest 517, *3471*.

Special Case.

This was an award, dated Aug. 15, 1958, in the form of a Special Case stated under s. 21 (1) (b) of the Arbitration Act, 1950, by an umpire appointed by the parties' arbitrators, the arbitrators having failed to agree on the dispute before them. By a charterparty dated May 17, 1956, the claimants, Compagnie Algerienne de Meunerie (referred to hereinafter as " the charterers "), chartered from the respondents, Katana Soc. di Nav. Marittima S.p.a. (referred to hereinafter as " the owners "), the owners' vessel, the Nizetti, an Italian steamship. The charterparty which was in Gencon form provided that the Nizetti was " now trading and expected ready to load under this charter about May 24, 1956 ", and that the vessel

> " shall proceed to Lattakia [in Syria] or so near thereto as she may safely get and lie always afloat, and there load a full and complete cargo of 2,750 metric tons, five per cent. more or less, quantity in master's option to be declared on giving notice to shippers. Wheat in bulk, charterers to supply up to five per cent. of bagged cargo, as demanded by the master for safe stowage . . . and being so loaded the vessel shall proceed to one or two ports in charterers' option, out of Philippeville, Alger or Oran."

Clause 5 of the charterparty provided:

> " Cargo to be loaded, stowed and trimmed by charterers' stevedores free of expense to the vessel at the average rate of eight hundred tons per weather working day of twenty-four consecutive hours Sundays and holidays excepted. Time to commence at 2 p.m. if notice of readiness to load is given before noon and at 8 a.m. next working day if notice given during office hours after noon. Telegraphic notice to be given to the shippers' agents."

Clause 11 provided:

> " Laydays not to commence before May 24 and should the vessel not be ready to load (whether in berth or not) on or before May 31, 1956, charterers have the option of cancelling this contract such option to be declared, if demanded, at least forty-eight hours before vessel's expected arrival at port of loading."

The charterparty contained an exceptions clause in the Gencon form on which the owners relied, but in the event, it was not necessary for the court to construe this clause and the court did not do so.

The following facts were found by the umpire. On May 16, 1956, the charterers agreed to purchase five thousand metric tons of Syrian hard wheat for shipment May/June 25, 1956, aboard the Nizetti. The wheat was to be imported into Algeria under an agreement between the charterers and the official authority controlling imports of grain into Algeria; under that agreement, the charterers paid a deposit to the Algerian grain authority which was liable to be forfeited in the event of non-performance of the agreement. On Sept. 23, 1954, the Syrian legislature made certain provisions regarding the prohibition of trade with Israel. By an Instruction applying those provisions, foreign vessels were forbidden to anchor in Syrian ports if they had previously called at an Israeli port; para. 2 of the Instruction provided that a vessel coming within the scope of the Instruction would be placed on a blacklist and deprived of the right to load or discharge, or to take on water, fuel, food and other necessities, but by para. 4, the Ministry of National Economy were empowered to remove vessels from the blacklist if their owners offered " sufficient guarantees against non-repetition of infringements of the boycotting provisions ". It was not clear from the umpire's finding whether the prohibition of anchorage was automatic or whether it operated only when the vessel was placed on the blacklist, although it was clear from the findings in the Special Case that any prohibition of anchorage could be withdrawn at the discretion of the Ministry. During February, 1955, the Nizetti had discharged cargo at Haifa, in Israel, but between February, 1955, and the date of the charterparty she had passed through the Suez Canal at least four times without being detained for any substantial period, the master on each occasion signing a declaration of future non-co-operation with Israel. At 1200 hours on May 28, 1956, the Nizetti anchored in the roads at Lattakia preparatory to loading under the charterparty, and at 1500 hours she was moved to a closer anchorage. Immediately after the vessel had moored, the vessel's minutes and hatch log book were examined by a police officer who informed the master that free pratique would not be granted and instructed the master not to communicate with the shore pending a decision by the military command of the city. There was no finding by the umpire whether the anchorage at which the vessel lay at this time was within the limits of the port of Lattakia. On May 29 the owners' brokers were informed by the charterers' brokers of the refusal to grant free pratique and this information was cabled to the owners. The owners thereupon cabled to the master instructing him to sign a declaration of future non-co-operation with Israel, but as the master was still forbidden to land, he did not receive the cable on May 29 which awaited him at the agent's office. During the latter part of May 29 the Syrian government prohibited the export of grain to France and to French colonies; this prohibition is referred to hereinafter as " the temporary embargo ". On May 30 the master was permitted to land and on that day he received the owners' cable sent to him on the previous day. The master thereupon made a declaration of non-co-operation with Israel, but the Syrian authorities still refused to allow the vessel free pratique. On May 31 the Syrian government relaxed the temporary embargo on the export of grain in favour of vessels which had already begun loading before May 29, when the temporary embargo came into force; the Nizetti, however, had been unable to begin loading because of the refusal to grant her free pratique. On June 2, 1956, the Syrian Council of Ministers, by Decision No. 568, prohibited the export of grain to Algeria; this prohibition (referred to hereinafter as " the final embargo ") took effect from June 3, 1956. On June 5, 1956, the Nizetti sailed from Lattakia after being allowed to take on fresh water and stores.

The charterers claimed damages from the owners for the loss of profit on the intended importation of wheat into Algeria under their agreement with the Algerian grain authority. They contended that the owners impliedly warranted that the Nizetti was not subject to any restriction which would prevent or delay loading at Lattakia; that it was the owners' responsibility to obtain all papers which were necessary for the granting of free pratique; that it was the owners'

A duty to go through the necessary formalities for obtaining free pratique, including making a declaration of future non-co-operation with Israel, in time for free pratique to be granted immediately the vessel arrived at Lattakia; that the owners could not rely on the final embargo as frustrating the charterparty since the prohibition on loading imposed by the final embargo was due to the owners' default; and, finally, that the owners' failure to disclose to the charterers that B the vessel had called at Haifa and that, in the past, it had been necessary for the master to make declarations of non-co-operation with Israel, were breaches of the charterparty. The owners contended, inter alia, that in the absence of an express provision in the charterparty, neither the owners nor the charterers were liable for delay occasioned by the demand of the Syrian authorities that the master should sign a declaration of non-co-operation with Israel in respect of a C vessel which was not on the official blacklist of the country of the port of loading, and that, at most, the owners' obligation was to make the declaration with reasonable dispatch if required to do so; the owners further contended that the refusal to grant the vessel free pratique amounted to a restraint of princes for which the owners were not liable. The owners counterclaimed against the charterers for a sum in respect of the loss which they suffered by reason of the D charterers' failure to ship the contractual cargo.

The umpire found in so far as it was a question of fact, and held in so far as it was a question of law, as follows. The Nizetti began the approach voyage to Lattakia in due time and proceeded there with due dispatch. If she had been permitted to start loading when she arrived at Lattakia, on May 28, the owners could have loaded 2,750 tons of the cargo before the final embargo was imposed. E Alternatively, if the vessel had been permitted to start loading immediately after the master made the declaration of non-co-operation with Israel the owners could have loaded about 1,600 tons of cargo during the ordinary working hours of the port and 2,750 tons if overtime had been worked. The owners and the master acted with reasonable diligence with regard to making the declaration of future non-co-operation with Israel. On May 28 and at all material times F thereafter the charterers were ready, willing and physically capable of shipping a contractual cargo in accordance with the terms of the charterparty, and the charterers did not at any material time exercise their right of cancellation under cl. 11 of the charterparty. Had the vessel remained at Lattakia after June 5, it would have been impossible, because of the final embargo on the export of grain to Algeria which was still in force at the date of the Special Case, to load the G contractual cargo or any part of it on to the vessel for carriage to Algeria within such a time as would not have frustrated the commercial purpose of the charterparty. It was not proved that at any material time the vessel was on the Syrian blacklist or that the Syrian authorities refused to grant free pratique in exercise of their powers under the Syrian law of 1954 relating to prohibition of trade with Israel. On examining the vessel's log book, if not before, the Syrian authorities H found out that the vessel had discharged cargo in 1955 at Haifa in Israel, and they made use of this as an expedient for delaying the loading of the vessel until such time as an embargo on the export of grain came into force. Although, if the final embargo had not been imposed, the Syrian authorities would ultimately have allowed the vessel to load her cargo within such a time as would not have frustrated the commercial purpose of the charterparty, the decisive and/or I efficient and/or effective cause of the non-performance of the charterparty was the fact that the vessel had discharged cargo at Haifa in 1955. At the time of the negotiation and execution of the charterparty the owners knew that the vessel had called at an Israeli port in 1955 and knew, or ought to have known, of the existence and effect of the Syrian law of 1954; the owners also knew that on previous occasions the master had made declarations of future non-co-operation with Israel. The charterers did not know at the time of the negotiation and execution of the charterparty that the vessel had called at an Israeli port or that the master had been required to make the aforesaid declarations. During the

negotiations no question was asked by the charterers and no statement was made by the owners whether the vessel had previously called at an Israeli port, whether a declaration as aforesaid might be required, or would be made by the master if required, or whether the vessel was on the Syrian blacklist. By agreeing that the vessel was to load the contractual cargo at Lattakia, the owners impliedly warranted that the vessel was not at that time subject to any restriction which would delay or prevent her loading the contractual cargo at Lattakia. The non-performance of the charterparty was a direct consequence of the owners' breach of this warranty and the owners were not entitled to rely on the final embargo as a frustrating event which discharged them from performing their obligations under the charterparty. The charterers were entitled to recover the loss directly occasioned by the breach of the warranty, and the measure of damages recoverable by them was the profit of £4,573 19s. 7d. which the charterers would have made on the importation of the cargo of wheat into Algeria under their agreement with the Algerian grain authority. Accordingly, the umpire awarded that the owners pay to the charterers the sum of £4,573 19s. 7d. and that the owners' counterclaim failed.

The questions of law stated for the opinion of the court were (i) Whether on the facts found and on the true construction of the charterparty the owners committed any breach of their obligations under the charterparty. (ii) Whether on the facts found and on the true construction of the charterparty the charterers committed any breach of their obligations under the charterparty. (iii) If the owners committed a breach of their obligations, (a) whether the charterers were entitled to recover as damages their loss of the profit which they would have made by importing the intended cargo into Algeria; (b) whether the charterers were entitled to recover as damages the amount of the deposit which they forfeited to the Algerian grain authority under their agreement with the authority.

John Megaw, Q.C., and *R. A. MacCrindle* for the charterers, the claimants.
A. A. Mocatta, Q.C., and *J. F. Donaldson* for the owners, the respondents.

DIPLOCK, J., having read the relevant terms of the charterparty, referred to the findings in the Special Case. In relation to the finding that the owners, at the date of the charterparty, knew that the Nizetti had called at an Israeli port in February, 1955, knew or ought to have known of the existence and effect of the Syrian law of 1954 and knew that, previously, the master of the vessel had made declarations of future non-co-operation with Israel, HIS LORDSHIP said that it was not suggested that this knowledge of the owners was any breach of the warranty contained in the words " expected ready to load under this charter about May 24, 1956 ", no doubt because, in view of their Suez experience, the expectation on the part of the owners was honestly held and based on reasonable grounds (see *Sanday & Co.* v. *Keighley, Maxted & Co.* (1) (1922), 91 L.J.K.B. 624). HIS LORDSHIP further commented that, while there was a finding that the charterers were ready, willing and physically capable of shipping a contractual cargo in accordance with the terms of the charterparty, it would, on the umpire's findings as to the temporary embargo* and the final embargo*, have been unlawful for them to do so after the latter part of May 29 because the embargo was only suspended in respect of vessels which had already started loading before that date. HIS LORDSHIP continued: The position therefore seems to be that if the Nizetti had been allowed to load on arrival she would have been stopped by the temporary embargo late on May 29, 1956; loading could have been resumed on May 31 when the temporary embargo was lifted off the ships which had already begun to load and could have continued up to June 2. I take the umpire's finding† to mean that in this event she could have loaded a full cargo, but unless she had started to load before the latter

* See p. 274, letters G and I, ante.

† See p. 275, letter D, ante.

part of May 29 she could never lawfully have loaded at all because the temporary embargo was never lifted in respect of vessels which had not started to load before it was imposed.

This is not a case of inadequate documentation which would have been a breach of warranty of seaworthiness (see *Levy* v. *Costerton* (2) (1816), 4 Camp. 389), nor is it a case, as it was in *Ciampa* v. *British India Steam Navigation Co., Ltd.* (3) ([1915] 2 K.B. 774), where the vessel at the time the charter was fixed was to the knowledge of the owners, not shared by the charterers, foredoomed to inability to carry the contractual cargo, which would indeed be a breach of the warranty " expected ready to load ".

There is an express finding of fact by the umpire that " if the final embargo " —that is to say, on the export of grain to France and the French colonies— " had not been imposed the Syrian authorities would ultimately have allowed the vessel to load her cargo within such a time as would not have frustrated the commercial purpose of the charterparty ". What in the event frustrated the charterparty was the imposition of the final embargo on June 3, 1956, which made it unlawful for both charterers and owners to perform their respective duties under the contract, for it is not suggested that the charterers at any time prior to June 2 exercised their contractual right of cancellation under cl. 11, or any right which they may have had to treat the charterparty as rescinded for breach of condition on the part of the owners.

The question, therefore, is whether at any time before the beginning of June 3, 1956, the owners were guilty of any breach of warranty and, if so, what damage did that breach cause. It is not contended, quite apart from any exceptions clause, that there is an absolute warranty that the vessel will get to Lattakia and there load a full and complete cargo. Such a contention would ignore the words " or so near thereto as she may safely get ". It is well settled that this qualification is not limited to physical obstacles. Prohibition of entry into a named place by the authority having jurisdiction in that place, prima facie entitles the owner to rely on the right to proceed to the alternative port (see *Dahl* v. *Nelson, Donkin & Co.* (4) (1881), 6 App. Cas. 38).

The charterers are thus driven to rely on some implied term in the charterparty. Counsel for the charterers contends, I think rightly, that the effect of the Syrian law of 1954 which was in force at the time when the charterparty was entered into was to make the Nizetti a vessel of a class which did, or at least might, require permission or licence from the Syrian authorities to load any cargo at Lattakia. Such permission could be obtained only by the owners, because, at any rate if the vessel were placed on the blacklist, a guarantee from them that she would not again call at an Israeli port was the condition precedent to such permission being granted. It lay, therefore, solely within the power of the owners and outside the power of the charterers to obtain the permission if it should become necessary to give business efficacy to the contract.

In these circumstances there must at least be an implied warranty by the owners that they will use reasonable diligence to obtain the necessary permission to load the cargo on the vessel. If the necessity or possible necessity of such permission were known or ought to have been known to both parties when the charterparty was entered into, then I think that the only warranty to be implied would have been that the owner would use reasonable diligence to obtain the permission. There is, however, the finding of fact by the umpire that the charterers did not at the time of the negotiation and execution of the charterparty know that the vessel had called at an Israeli port or that the master had been required to make the declaration of non-co-operation. It is proper to infer from this finding not only that the charterers did not know but that there was no evidence that they ought to have known that the Nizetti had called at an Israeli port and, therefore, they neither knew nor ought to have known that the Nizetti fell into the special category of vessel for which permission might be needed under the relevant Syrian law of 1954 before it could load any

cargo at Lattakia. In the absence of such knowledge on the part of the charterers at the time the charterparty was entered into, I am prepared to hold, although I do not think that any of the cases cited really assists me in this, that there was an implied warranty by the owners not merely that they would use due diligence to obtain but that they would in fact obtain whatever permissions to carry cargoes were necessary under the Syrian law of 1954 which was in force at the time that the charterparty was entered into and applicable to vessels of the category into which the Nizetti as they, the owners, knew, but as the charterers neither knew nor ought to have known, fell.

Even if I am prepared to hold that such a warranty is to be implied, there is still a time factor to be considered. What is the period within which the owners warrant that any permission to load the Nizetti which may be required under the Syrian law of 1954 shall be obtained? We are dealing here with an implied term, placing on one of the parties obligations not expressed in the contract, and I apprehend that what is to be implied in such circumstances is the obligation least onerous on the party on whom it is imposed which will, nevertheless, give business efficacy to the contract. It seems to me that the highest at which the warranty on the part of a shipowner may be put is that he will (a) exercise due diligence to obtain and (b) will in fact obtain within a reasonable time any permission to load the vessel which is required under the Syrian law in force at the time when the charterparty was entered into.

So far as (a), that is to say, due diligence is concerned, there is the finding of the umpire that

> "The respondents [the owners] and the master acted with reasonable diligence with regard to the making of the declaration of future non-co-operation with Israel."

It can legitimately be inferred from the other findings of fact which I have already quoted that this is tantamount to a finding that the owners used due diligence to obtain any permission to load the vessel which was required under the Syrian law of 1954 in force at the time when the charterparty was entered into.

So far as (b) is concerned, the relevant question, in order to see whether there was a breach of warranty by the owners before the contract was frustrated, is: What was a reasonable time? The umpire has not specifically applied his mind to this question, understandably enough, because the arguments addressed to him were in a somewhat different form from those which have been addressed to me, as often happens in Cases Stated. It seems to me, however, that a reasonable time for obtaining the necessary permission—subject, of course, to due diligence being used—must extend to the moment at which the commercial purpose of the charterparty would be frustrated.

What that time is is no doubt a mixed question of fact and law. In so far, however, as it is a question of fact, it is implicit in the findings of fact which I have already quoted that such time had not expired when the final embargo took effect on June 3, 1956; the finding of fact to which I refer being the umpire's finding that

> ". . . if the final embargo had not been imposed the Syrian authorities would ultimately have allowed the vessel to load her cargo within such a time as would not have frustrated the commercial purpose of the charterparty."

In so far as what is a reasonable time is a question of law, I am certainly not prepared to hold that apart from the embargo the contract would already have been frustrated by midnight on June 2 if loading had been prevented by some other cause outside the control of the parties until that date but not of a permanent character.

I may add, although in view of what I have held it does not matter, that to establish a breach of warranty for which anything but nominal damages would

be recoverable the charterers would have to show that a reasonable time for obtaining the permission had expired before "the latter part"—to use the umpire's words—"of May 29", because any permission given under the Syrian law of 1954 thereafter would have been ineffective to enable the charterers lawfully to start to load their contractual cargo of grain for Algeria once the temporary embargo had been imposed.

It is no doubt because he recognises that any allowance of a reasonable time after the arrival of the Nizetti in Lattakia roads for the owners to obtain any necessary permission under the Syrian law of 1954 would impose grave difficulties in the way of any claim for damages on the part of the charterers that counsel for the charterers contends that the terms of the implied warranty are that the owners warrant that the permission required under the Syrian law of 1954 will be granted by the time when—apart from any question of necessity to obtain any such permission—the vessel would be ready to present herself for loading. But this is being wise after the event. It does not seem to me that a term so onerous on the owners was necessary to give business efficacy to the contract on May 17, 1956, when it was entered into. At that time neither party could foresee that there would or even might be an embargo on the export of wheat from Syria to Algeria, much less that it would be imposed on ships which had not started to load before the latter part of May 29, 1956. And in the absence of such foresight a warranty by the owner that he would use due diligence to obtain and would in fact obtain within a reasonable time any necessary permission to load the cargo on his vessel would, I think, be considered by each party and by the officious bystander, if present, to be amply sufficient to give business efficacy to the contract.

I hold, therefore, that even if the Nizetti was refused free pratique because she fell within the category of vessels covered by the Syrian law of 1954, the charterers have failed to establish any breach of warranty on the part of the owners before the charterparty was frustrated on June 3, 1956, by the coming into effect of the final embargo on the export of grain from Lattakia to Algeria.

If I am wrong as to this, there is a further difficulty with which counsel for the charterers is faced, which logically, perhaps, comes first, but which I deal with second because had it been the decisive point in the case I should have had to consider whether I ought not to remit the Case to the umpire for some further elucidation of his findings. In sub-para. (6) of para. 15 the umpire says this:

> "It was not proved that the vessel was at any material time on the Syrian blacklist or that the Syrian authorities refused to grant the vessel free pratique in exercise of the powers prescribed in the Legislative Decree and the Instruction relating thereto referred [passed in 1954]. Upon examining the vessel's log-book, if not before, the Syrian authorities found out that the vessel had discharged cargo at Haifa in 1955. They used this fact as an expedient for delaying the loading of the vessel until such time as an embargo should come into force. Although, if the final embargo had not been imposed the Syrian authorities would ultimately have allowed the vessel to load her cargo within such a time as would not have frustrated the commercial purpose of the charterparty, the decisive and/or efficient and/or effective cause of the non-performance of the charterparty was the fact that the vessel had discharged cargo at Haifa in 1955."

The first sentence seems to be saying, quite clearly, that it was not established either that the Nizetti required permission to load under the Syrian law of 1954, or, at any rate, that it was not established that the absence of such permission was the cause of the refusal of free pratique.

Counsel for the charterers asked me to read the paragraph as a whole, saying in effect that while there was no direct evidence that free pratique was withheld in the exercise of powers under the Syrian law of 1954, the umpire has drawn and expressed an inference of fact which he was entitled to draw that the Nizetti

was in fact refused free pratique under that legislation. This contention is, I think, really based on the absence of any reference in the Special Case to any other Syrian law under which free pratique could have been withheld. But the assumption that the Syrian authorities must have acted under some law is based on the further assumption (which I am not prepared to make without evidence) that the rule of law as we know it in England is uniformly applied in Syria. That the umpire made any such assumption is, I think, negatived by his use of the word " expedient ". No expedient was necessary if the Nizetti was disqualified from obtaining free pratique without permission under the Syrian law of 1954. All the authorities had to do was to apply that law.

This paragraph read as a whole seems to me to be consistent and consistent only with a finding that the delay in granting free pratique was a high-handed action taken by the Syrian authorities, no doubt for good political reasons, for which the fact that the vessel had in 1955 discharged cargo in Haifa and not the Syrian law of 1954 formed the ostensible excuse. If the Nizetti had never called at Haifa this ostensible excuse would not have been available and it may be that the last sentence of the sub-paragraph by the umpire contains a finding by him that in the absence of that ostensible excuse free pratique would not have been withheld. Would that suffice, on any view, to enable the charterers to succeed here? It cannot be suggested that the owners warranted that the Nizetti had never called at an Israeli port or that she had never done anything which the Syrian authorities might seize on as an excuse for refusing free pratique, irrespective of any provisions of Syrian law in existence at the date at which the charterparty was entered into.

I do not think that any further light is thrown on the meaning of this paragraph by the contents of para. 15 (9), (10) of the Special Case. Paragraph 15 (9) reads as follows:

> " By agreeing that the vessel should load the contractual cargo at Lattakia the respondents [the owners] impliedly warranted that the vessel was not at that time subject to any restriction which would delay or prevent the vessel loading the said cargo at Lattakia."

Paragraph 15 (10) reads:

> " The non-performance of the charterparty was a direct consequence of the respondents' breach of the aforesaid warranty and the respondents are not entitled to rely upon the final embargo as a frustrating event which discharged them from performing their obligations under the charterparty. The claimants [the charterers] are entitled to recover the loss directly occasioned by the aforesaid breach."

Sub-paragraph (9) is a finding of law as to an implied warranty which I hold to be wrong, at any rate unless the qualifying words " beyond a reasonable time " are inserted after the word " delay ". Sub-paragraph (10) merely refers one back to sub-para. (6)* to see of what facts the non-performance of the charterparty was the direct consequence, and there " the decisive and/or efficient and/or effective cause " is expressed in the terms that I have already examined.

The findings are not as clearly expressed as one could have wished; but I think that on analysis their meaning is sufficiently plain, and in any event, having regard to the other ground on which I am prepared to decide this case, no useful purpose would be served by remitting it to the umpire for further elucidation. In criticising certain obscurities in the paragraph to which I have referred I should like, in compensation, to pay tribute to the careful way in which he has set out his findings of fact and the considerations of law in the case.

It is unnecessary for me to decide any of the other questions raised in this case,

* This paragraph is at p. 279, letters G and H, ante, beginning with the words " It was not proved " and ending ". . . had discharged cargo at Haifa in 1955 ".

either as to the applicability of the exceptions clause or as to the measure of damages.

Question (i) is: "Whether on the facts found and on the true construction of the charterparty the [owners] committed any breach of their obligations under the charterparty". The answer to that question is "No".

Question (ii) is: Whether on the facts found and on the true construction of the charterparty the [charterers] committed any breach of their obligations under the charterparty". Counsel for the owners concedes that that question must also be answered in the negative.

The consequences are those set out in para. 20, sub-para. (v), and para. 21, sub-para. (iii) of the Case, namely, that neither the charterers nor the owners shall be entitled to recover any sum by way of damages and that the charterers and the owners shall bear the costs of the award equally.

The owners are entitled to judgment accordingly.

Judgment for the owners, the respondents.

Solicitors: *Ince & Co.* (for the charterers, the claimants); *Edward Thompson & Hauser* (for the owners, the respondents).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

HILL *v.* HILL.

[PRIVY COUNCIL (Lord Somervell of Harrow, Lord Denning and Mr. L. M. D. de Silva), December 1, 2, 3, 1958, January 14, 1959.]

Privy Council—Barbados—Marriage—Validity—Failure to comply literally with form of marriage service—Marriage Act, 1904 (*Laws of Barbados, No.* 9 *of* 1904), *s.* 2.

Marriage—Validity—Presumption of validity—Cohabitation before as well as after marriage ceremony—Whether presumption applicable.

Since about 1925 the deceased had cohabited with Miss G., and he continued to do so until his death in April, 1955. He had been married in early life, the wife of that marriage dying before October, 1954. In October, 1954, the deceased, who was seriously ill, and in a clinic, told Miss G. that he would marry her and two days later a ceremony of marriage took place between them. By s. 2 of the Marriage Act, 1904*, of Barbados, each of the parties, whenever the form and ceremony used are other than that of the Anglican Church in the Island, must make a declaration that they know of no lawful impediment why they may not be joined together in matrimony, and must call on the persons present to witness that they have taken each other to be "my lawful wedded wife (or husband)". The deceased and Miss G. were married according to the Book of Common Order of the Church of Scotland, under which either both parties are charged, if either of them knows of any just cause why they may not lawfully be joined together in marriage, to confess it, or there must be reply to the question whether, in the case of the husband, he takes the woman to be his wedded wife†. Declarations as set out in s. 2 of the Marriage Act, 1904, were not made and there was a conflict of evidence as to what happened at the ceremony of marriage.

Held: the ceremony of marriage was valid, because—(i) where, as in the present case, each party intended to contract a Christian marriage and there were in the marriage service passages making plain the necessity

* The relevant provisions of s. 2 are set out at p. 283, letter H, to p. 284, letter B, post.

† See p. 285, letters A to C, post.

for the absence of lawful impediment and the taking of one another to be the lawful wedded wife or husband, failure to comply literally with s. 2 of the Marriage Act, 1904, did not invalidate the marriage, and (ii) the presumption of validity of marriage, flowing from participation in a ceremony of marriage followed by cohabitation, was not rendered inapplicable by cohabitation having also preceded marriage, and, on the facts, there was no sufficiently satisfactory or decisive evidence to rebut the presumption.

Appeal dismissed.

[As to marriages out of England, see 19 HALSBURY'S LAWS (3rd Edn.) 810, 811, paras. 1317-1320; and for cases on the subject, see 27 DIGEST (Repl.) 67, 68, *461-465*.

As to presumption of marriage from cohabitation, see 19 HALSBURY'S LAWS (3rd Edn.) 812, para. 1323; and for cases on the subject, see 27 DIGEST (Repl.) 70-72, *485-505*.]

Cases referred to:

(1) *In the Estate of Park, Park* v. *Park*, [1953] 2 All E.R. 1411; [1954] P. 112; 3rd Digest Supp.

(2) *Catterall* v. *Sweetman*, (1845), 1 Rob. Eccl. 304; 4 Notes of Cases, 222; 163 E.R. 1047; sub nom. *Catterall* v. *Catterall*, 6 L.T.O.S. 19; 42 Digest 711, *1289*.

(3) *Beamish* v. *Beamish*, (1861), 9 H.L. Cas. 274; 5 L.T. 97; 11 E.R. 735; 27 Digest (Repl.) 66, *454*.

(4) *Piers* v. *Piers*, (1849), 2 H.L. Cas. 331; 13 L.T.O.S. 41; 9 E.R. 1118; 27 Digest (Repl.) 75, *555*.

Appeal.

Appeal by Ernest Clarence Hill from a judgment of the Chief Judge in the Court of Ordinary of Barbados (COLLYMORE, C.J.), dated Oct. 19, 1956, dismissing a petition by the appellant for a declaration that a ceremony of marriage between Ernest Clarence Hill, deceased, and Marion Allanzena Green was invalid and to grant probate in solemn form of a will dated Sept. 19, 1952, made by Ernest Clarence Hill, deceased, prior to the ceremony of marriage. The facts appear in the judgment of the Board.

Neil Lawson, Q.C., and *John Wilmers* for the appellant.

John Latey, Q.C., and *K. B. Campbell* for the respondent.

LORD SOMERVELL OF HARROW: This is an appeal pursuant to special leave from a judgment of the Chief Judge in the Court of Ordinary of Barbados dismissing a petition by the appellant for a declaration that a marriage between Ernest Clarence Hill and Marion Allanzena Green was invalid and to grant probate in solemn form of a will dated Sept. 19, 1952.

Ernest Clarence Hill, hereafter called " the deceased ", died on Apr. 30, 1955. He was over eighty years of age. The deceased had been married in early life. There are three surviving children of that marriage. It is common ground that the wife of that marriage had died before October, 1954, when the ceremony in issue took place. Since about 1925 the deceased had cohabited with Marion Allanzena Green, and he continued to do so until his death. She bore him eight children, of whom the appellant is one. The will made provision for Miss Green and several of the said children and under it the appellant and Miss Green were appointed executors. The appellant filed the will for probate on Apr. 6, 1956. On June 21, 1956, a caveat was entered on behalf of the respondent as heir-at-law. He petitioned for letters of administration on the basis that the deceased had died intestate the will having been revoked by a subsequent marriage.

In October, 1954, the deceased suffered from dysentery and a strangulated hernia. His physical state was critical. An operation was necessary and was performed at Dr. Bayley's Clinic on Oct. 25. It was doubtful whether he

A would survive. He did so and left the clinic on Nov. 1. Miss Green said in her evidence that in the evening—after the operation—"He told me to go and bring the Reverend and he would marry me". The Reverend was a Mr. Winter, a Christian Minister of the New Testament Church of God in Barbados. Mr. Winter, who died before the trial, and Mrs. Winter, who gave evidence, were friends of the deceased and Miss Green and the family. Miss
B Green told Mrs. Winter, whom she saw on Oct. 26, what the deceased had said to her. Mrs. Winter told her husband and, as a result, Mrs. Winter took Miss Green on the morning of Oct. 27 to get the licence which was necessary as no banns had been published. On the evening of Oct. 27 a ceremony of marriage took place between the deceased and Miss Green. Two witnesses were present, one of whom gave evidence, the other not being available. Mrs. Winter was
C present and two of the children.

The appellant submits that the deceased had not capacity, in that he was not sufficiently capable of understanding the contract of marriage. It is convenient to consider this point first. Their Lordships accept the formulation of the test as laid down by SINGLETON, L.J., in *In the Estate of Park, Park* v. *Park* (1) ([1953] 2 All E.R. 1411 at p. 1430):

D

> "Was the deceased . . . capable of understanding the nature of the contract into which he was entering, or was his mental condition such that he was incapable of understanding it? In order to ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage."

E The onus is on the appellant to negative capacity. The deceased had been married before. Mr. Winter, as one would expect, had previously urged him to marry Miss Green. The idea was not a new one. The deceased told Miss Green on Oct. 25 that he would marry her. Dr. Emtage said that, after his operation, his general condition improved rather rapidly:—"He talked to me every day normally. He answered my questions normally. Of course my
F questions were only professional." Mr. Gill the witness (who was not cross-examined) said:

> "When we got there Rev. Winter asked Mr. Hill if he knew who he was. He said 'Yes'. He asked if he knew what he had come there about. He said 'Yes, to marry him to Miss Green'."

G A Mr. Thomas went to see the deceased two days after he returned home. The deceased remembered his name and Mr. Thomas said he had heard he was married. "He"—the deceased—"said there was no difference between the first and the second": referring to his two marriages.

In their Lordships' opinion, the point as to capacity clearly fails.

The appellant submits that the marriage was invalid as to form. This raises in the first place a question on the construction of s. 2 of the Marriage Act, 1904.
H That section applies to

> "any minister of the Christian religion . . . according to the usage of the persuasion to which he may belong."

The earlier part of the section deals with the publishing of banns which does not arise here because of the licence; it then proceeds to authorise the minister
I as set out above

> "to solemnise matrimony between the said parties according to such form and ceremony as shall be in use or be adopted by the persuasion to which the minister solemnising such marriage shall belong; provided that whenever the form and ceremony used shall be other than that of the Anglican Church in this Island each of the parties shall in some part of the ceremony make the following declaration:
>
> 'I do solemnly declare that I know not of any lawful impediment

why I, A.B., may not be joined together in matrimony to C.D. here present.' A

" And each of the parties shall say to the other:

' I call upon these persons here present to witness that I, A.B., do take thee, C.D., to be my lawful wedded wife (*or* husband).' B

" And provided also that there be no lawful impediment to the marriage of such parties."

If the first proviso has to be literally complied with, the marriage was invalid. Neither the deceased nor Miss Green made the declarations as set out. There are a number of cases in which courts have had to determine whether provisions are mandatory or directory. It depends in each case on the general subject-matter of the statute in relation to the provision in issue. Marriage is admittedly sui generis and no help is to be got from decisions in other fields. In *Catterall* v. *Sweetman* (2) ((1845), 1 Rob. Eccl. 304 at p. 320), DR. LUSHINGTON had to decide whether non-compliance with the provisions of a local Marriage Act nullified a marriage. He said: C D

" . . . in any case of doubt, I ought never to pronounce a marriage null and void. In this case I do entertain (to express my opinion in the weakest terms) the gravest doubt as to this act creating a nullity. I think so, firstly, because I find no instance of any words in any Marriage Act being held to import a nullity, if the act did not expressly create a nullity. Secondly, if this interpretation should be at variance with decisions of other courts on other matters, it must always be remembered that marriage is essentially distinguished from every other species of contract . . ." E

In *Beamish* v. *Beamish* (3) ((1861), 9 H.L. Cas. 274), the House of Lords considered the question whether a man in holy orders could officiate at his own marriage. It was decided that he could not. In delivering his opinion LORD CAMPBELL, C.J., said (ibid., at p. 339): F

" It was argued, as a conclusive objection, that, the bridegroom officiating as clergyman, it would be utterly impossible for him to use the language of the marriage service in the Prayer Book, or to follow the directions of the rubric respecting the opening address to the congregation; the adjuration to the couple about to be married, as to confessing any lawful impediment to their union; the demand, ' Who giveth this woman away to be married to this man ? ' the putting on of the ring on the finger of the bride, and in pronouncing the benediction. But none of these is absolutely essential to the validity of the marriage, although very fit to be strictly observed; and marriages have been held to be valid where each of these parts of the service has been omitted, the essential part of the service being the reciprocal taking each other for wedded wife and wedded husband till parted by death, and having joined hands, being declared married persons." G H

The judges were dealing of course with an Anglican marriage and the provisions of the rubric.

Their Lordships are of opinion that a failure to comply literally with the proviso does not invalidate the marriage. It must, however, be clear that each party intended to contract a Christian marriage, and there must be in the service passages which make plain the necessity for the absence of lawful impediment and the taking of one another to be the lawful wedded wife or husband. Mrs. Winter produced the book which her husband used. It was the Book of Common Order of the Church of Scotland. (It had interleaved a page from another marriage service similar to that in the Revised Prayer I

A Book of the Church of England.) The service in the book contains the following passage:

> "Into this holy estate these two persons now desire to enter. Wherefore if any one can show any just cause why they may not lawfully be joined together in marriage, let him now declare it.
>
> B "Also I require and charge you both, as you shall answer at the day of judgment, that if either of you know any just cause why you may not lawfully be joined together in marriage, you do now confess it."

Under an alternative form in the book the parties do not have each to make a declaration but only reply to a question:

> C "Do you, N., take this woman, N., to be your wedded wife; and do you, in the presence of God and before this congregation (or, these witnesses), promise and covenant to be to her a loving, faithful, and dutiful husband, until God shall separate you by death?
>
> "I do."

D Owing to the state of the deceased it would be natural that Mr. Winter should use this form.

In their Lordships' opinion, this form, if carried out, would be a compliance with the proviso. There is some conflict of evidence as to what happened and there are some gaps in the evidence. The learned Chief Judge in upholding the validity of the marriage relied on the presumption of validity as stated E in 19 Halsbury's Laws of England (3rd Edn.), p. 813, para. 1324:

> "Where there is evidence of a ceremony of marriage having been gone through, followed by the cohabitation of the parties, everything necessary for the validity of the marriage will be presumed, in the absence of decisive evidence to the contrary, even though it may be necessary to presume the grant of a special licence."

F

It was submitted that the presumption as so worded could not apply with full force to this case where cohabitation preceded as well as followed the ceremony. There is no substance in this as the presumption is laid down clearly in *Piers* v. *Piers* (4) ((1849), 2 H.L. Cas. 331), and in that case the parties had, as here, cohabited and had children for many years before the ceremony. It is clear G that a balance of probabilities is insufficient to rebut the presumption. Various epithets have been used, but their Lordships accept the word in the passage cited by the learned judge:—the evidence must be decisive.

It would need very strong evidence to justify a conclusion that Mr. Winter did not conduct the service in accordance with the form in his book. It was plainly to all concerned a marriage ceremony. Mr. Gill remembered Mr. Winter H "speaking about just cause, etc.". He saw the bride and bridegroom holding hands, though it may be this was not essential. There was no ring. He did not hear the deceased say anything. Mrs. Winter said that the deceased answered audibly. Mrs. Hill (as their Lordships are holding she became), gave evidence which was consistent with the deceased not realising what was happening. She said she did not hold hands and took no part in the service. There is, I therefore, a conflict of evidence but, in their Lordships' opinion, there is no sufficiently satisfactory or decisive evidence to establish the invalidity of this ceremony. The result of Mr. Winter's good intention is very unfortunate for Mrs. Hill and the children. Their Lordships would like to associate themselves with the concluding observations of the learned judge*.

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* "I must admit that my sympathies are entirely with Mrs. Hill and her children for whom I verily believe the old gentleman intended to provide from his bounty and I only hope that adequate support and maintenance will be forthcoming for Mrs. Hill the widow and her children apart from Mrs. Hill's legal rights on an intestacy."

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. Their Lordships think the appellant was justified in bringing this appeal in a difficult case and that the costs of each side should come out of the estate.

Appeal dismissed.

Solicitors: *Rashleigh & Co.* (for the appellant); *Minet, May & Co.* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

EALING BOROUGH COUNCIL *v.* JONES.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Ashworth, JJ.), January 19, 20, 1959.]

Town and Country Planning—Enforcement notice—Appeal against notice—"Person aggrieved"—Whether local planning authority can be aggrieved—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6 *c.* 51), *s.* 23 (4), (5).

A local planning authority whose enforcement notice under s. 23 of the Town and Country Planning Act, 1947, has been quashed by a magistrates' court on appeal under s. 23 (4), no order for costs having been made against the authority, is not a "person aggrieved" by the decision of the magistrates' court within s. 23 (5) and has no right of appeal under that sub-section.

Appeal allowed.

[As to the meaning of the words "person aggrieved" in enactments, see 25 HALSBURY'S LAWS (3rd Edn.) 293, para. 569, note (h).

For the Town and Country Planning Act, 1947, s. 23 (4), (5), see 25 HALSBURY'S STATUTES (2nd Edn.) 525.]

Cases referred to:

(1) *Sevenoaks Urban District Council* v. *Twynam*, [1929] 2 K.B. 440; 98 L.J.K.B. 537; 141 L.T. 566; 93 J.P. 189; Digest Supp.

(2) *R.* v. *London Quarter Sessions, Ex p. Westminster City Council*, [1951] 1 All E.R. 1032; [1951] 2 K.B. 508; 115 J.P. 350; 2nd Digest Supp.

(3) *R.* v. *London County Keepers of the Peace & JJ.*, (1890), 25 Q.B.D. 357; sub nom. *R.* v. *London JJ., Ex p. Fulham Vestry*, 59 L.J.M.C. 146; 63 L.T. 243; 55 J.P. 56; 26 Digest 460, *1760.*

(4) *R.* v. *Nottingham Quarter Sessions, Ex p. Harlow*, [1952] 2 All E.R. 78; [1952] 2 Q.B. 601; 116 J.P. 397; 3rd Digest Supp.

Appeal.

This was an appeal by way of Case Stated by the Appeal Committee of Middlesex Quarter Sessions. On Dec. 12, 1957, the respondent, Ealing Borough Council, the local planning authority, served on the appellant, Mr. John James Jones, an enforcement notice relating to the use of a site in Ealing for the parking of motor vehicles. Mr. Jones appealed to the magistrates' court at Brentford against the notice. The local planning authority alleged that the use of the site for the parking of motor vehicles was contrary to planning control. Mr. Jones maintained that the use for that purpose was a use before the appointed day and that accordingly no planning permission was required. On Feb. 14, 1958, the justices held that the use was not a new use but existed before planning control and accordingly quashed so much of the enforcement notice as related to the use of the land for the purpose of parking vehicles. No order was made as to costs. The local planning authority appealed against the magistrates' decision to the Appeal Committee of Middlesex Quarter Sessions

A before whom Mr. Jones contended that the local planning authority was not a person aggrieved within the provisions of the Town and Country Planning Act, 1947, s. 23 (4), (5). On Mar. 19, 1958, the appeal committee allowed the appeal. The question stated for the opinion of the High Court was whether they were right in holding that they had jurisdiction to hear the appeal.

B *B. J. Shaw* for the appellant, Mr. J. J. Jones.
W. G. Wingate for the respondent, Ealing Borough Council.

LORD PARKER, C.J., after stating the facts, continued: Section 23 of the Town and Country Planning Act, 1947, provides, as is well known, for the serving of enforcement notices on the owner or occupier of land where the local planning authority considers that the user is in breach of planning control.
C Sub-section (4) of that section provides:

> "If any person on whom an enforcement notice is served under this section is aggrieved by the notice, he may, at any time within the period mentioned in the last foregoing sub-section, appeal against the notice to a court of summary jurisdiction . . ."

D Pausing there, it will be seen that the powers of the court of summary jurisdiction are severely limited because the sub-section goes on to provide:

> ". . . and on any such appeal the court—(a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such
E permission was granted have been complied with, shall quash the notice to which the appeal relates; . . ."

It is not necessary to read any more of the sub-section. Then by sub-s. (5) it is provided:

> "Any person aggrieved by a decision of a court of summary jurisdiction
F under the last foregoing sub-section may appeal against that decision to a court of quarter sessions."

Accordingly, two points arise, first, whether the words "any person" in sub-s. (5) are words which in their context cover the local planning authority; and secondly whether, assuming that they are capable of including the local planning authority, the words "any person aggrieved" cover the case of a
G local planning authority whose enforcement notice has been quashed on the ground that the alleged development was a development for which no permission was required.

As to the first, whether a local planning authority can come within the expression "any person" in this Act, we have been referred to a number of sections where, it is true, a local planning authority is always specifically referred
H to in contrast to a person. On the other hand, it is to be observed that "any person" in s. 23 (5) is used in a general term as opposed to the words in sub-s. (4) "If any person on whom an enforcement notice is served". It is also relevant to observe that the local planning authority under the statute may have to go to court and sue. An instance of that is s. 24 itself when one would expect that, if costs were given against the local planning authority, it would be able to
I say that it was an aggrieved person. For myself, I find it unnecessary to come to a final conclusion on that point, and I will assume for the purposes of this appeal that the words "any person" are capable in the section of including a local planning authority.

Coming, therefore, to the second question whether the local planning authority can be said to be aggrieved in the present case, I would like to make two general observations. First, I would like to voice a protest that Parliament continues to allow this expression to come into Act after Act of Parliament. As long ago as 1929, LORD HEWART, the Lord Chief Justice, referred to the fact that these

words were so often used and that if one looked at the cases one could find some cases going one way and some cases going another. Notwithstanding that, the words continued to creep in after 1929 and continue to do so today. This is another case where Parliament has failed to make clear what was really intended by those words.

The second general observation that I would like to make is that so far as I know, and so far as I understand counsel in the case know, this is the very first case in which a local planning authority has claimed that it has the right to appeal to quarter sessions under s. 23. That does not mean that it may not have the right. As LORD HEWART, C.J., pointed out in the case to which I have already referred, *Sevenoaks Urban District Council* v. *Twynam* (1) ([1929] 2 K.B. 440 at p. 443):

> "But as has been said again and again there is often little utility in seeking to interpret particular expressions in one statute by reference to decisions given upon similar expressions in different statutes which have been enacted alio intuitu. The problem with which we are concerned is not, what is the meaning of the expression 'aggrieved' in any one of a dozen other statutes, but what is its meaning in this part of this statute?"

Accordingly, for my part I only look at the cases to which we have been referred to see if there are general principles which can be extracted which will guide the court in approaching the question as to what the words "person aggrieved" mean in any particular statute.

It seems to me to be easier to say what will not constitute a "person aggrieved" than it is to say what "person aggrieved" includes. It is clear from the cases that a person aggrieved is not a person who is disappointed or annoyed at the decision, as was said by LORD GODDARD, C.J., in *R.* v. *London Quarter Sessions, Ex p. Westminster City Council* (2) ([1951] 1 All E.R. 1032 at p. 1033; [1951] 2 K.B. 508 at p. 511). Another case which had some, though not very direct, bearing on the matter was, he said, *R.* v. *London County Keepers of the Peace & JJ.* (3) ((1890), 25 Q.B.D. 357), where the question was whether the prosecutor in a quasi-criminal case, a matter affecting a highway, was a person aggrieved, and the court held that a prosecutor was never a person aggrieved. It was put that he might be annoyed at finding that what he thought was a breach of the law was not a breach of the law.

It seems to me also to be clear that a person is not aggrieved when that person being a public body has been frustrated in the performance of one of its public duties. The argument was advanced in that same case, on behalf of the Westminster City Council that the council had a public administrative duty to perform in the regulation of the streets; and that, having been interfered with in the execution of that duty by the decision of the magistrate, they were persons aggrieved by his order within the meaning of s. 64 of the London County Council (General Powers) Act, 1947. It was submitted that Parliament intended that the words "person aggrieved" in the section should be read in their widest sense, and that they would clearly include persons who were frustrated in the performance of a public duty. That argument was not acceded to in that case (*R.* v. *London Quarter Sessions, Ex p. Westminster City Council* (2)), and accordingly I am satisfied that a mere annoyance because what was thought to be a breach of planning control turned out not to be a breach of planning control, and equally, the mere fact that this local authority charged with certain duties under the Town and Country Planning Act, 1947, has been frustrated in the performance of what it thought was its public duty, are not enough of themselves to make the local planning authority an aggrieved person. Approaching it from the other end: what is included in the words "aggrieved person"? If costs have been awarded in any case against a local authority it is clear I think on the authorities that the local authority would be an aggrieved

A person as the result of the decision having involved an order for costs. Equally, if the result of the decision has been to put some legal burden on the public body concerned, that has been held to make them a person aggrieved, and in that connexion I would only mention the case which has been referred to, *R.* v. *Nottingham Quarter Sessions, Ex p. Harlow* (4) ([1952] 2 All E.R. 78) where this court held that the decision of the magistrates that an owner was B not obliged to provide a dustbin involved this, that the council (ibid., at p. 80):

> " . . . is left with a legal burden which, if the order of the court of summary jurisdiction had not been made, the council would have discharged ";

in other words, the burden would have fallen on them to provide a dustbin.

C In the present case there has been no question of costs. In the second place, in my view the effect of the decision has not been to put a burden in the sense of a financial burden on the local planning authority. It is true that it may be affected in some way by the decision in regard to rateable values, and it may be it will be affected if it chooses hereafter to take steps under s. 26, which I suppose would involve compensation, but in my view those are too D remote contingencies to enable one to say within the principles laid down that the local planning authority is a person aggrieved.

Finally, I confess that looking at the statute alone one cannot help feeling that if Parliament had intended the local planning authority to be able to appeal it would have said so clearly. As ASHWORTH, J., pointed out in the course of the argument, by s. 100 (1) the Minister himself can if he thinks it is E expedient serve an enforcement notice, " and any notice so served by the Minister shall have the like effect as a notice served by the local planning authority ". Accordingly, if the argument for the local planning authority here is correct one would have what I confess is the surprising result that the Minister himself could be said to be a person aggrieved by the decision of the court of summary jurisdiction. In my judgment the Appeal Committee of F Middlesex Sessions were wrong in law and this appeal should be allowed.

DONOVAN, J.: I agree. If one came to the expression " person aggrieved by the decision " without reference to judicial authority one would say that the words meant no more than a person who had the decision given against him; but the courts have decided that the words mean more than that and have held that the word " aggrieved " is not synonymous in this context with G the word " dissatisfied ". The word " aggrieved " connotes some legal grievance, for example, a deprivation of something, an adverse effect on the title to something, and so on, and I cannot see that that is so here. The local planning authority has simply been told that it cannot enforce the discontinuance of the present use of this land by the appellant. It cannot do so, that is, by means of an enforcement notice under s. 23 of the Town and Country Planning Act, H 1947. It has been told, in other words, that the appellant here has and always has had the right to go on using the land in the way in which he at present uses it and so for the present the development plan must be modified. I say " at present " because there are provisions whereby the planning authority can in effect overcome the magistrates' decision, that is, under s. 26 and s. 27 of the Act. The local planning authority is not necessarily, therefore, even frustrated, I and I think that the existence of this alternative power of control tends to support the view that Parliament did not think it necessary to confer on planning authorities a right of appeal from a magistrate's decision. It is quite true that compensation may have to be paid if the planning authority does exercise its powers under s. 26 but that burden would flow not immediately at any rate from the magistrates' decision but from a subsequent administrative decision of the local planning authority.

Counsel for the respondent says that planning authorities have important public duties and that that tends to support the view that they have a right

M

of appeal from the magistrates' decision. I agree that the matter is important, but when this Act was passed in 1947 numerous decisions of the court were available to show that the expression was ambiguous. In those circumstances, one might reasonably think that if Parliament wanted to confer a right of appeal because this matter was so important it would have used words which placed the matter beyond all doubt, as it has done, for example, in s. 61 and s. 64 of the Income Tax Act, 1952, where the position of the subject and the public authority in relation to an appeal from an inferior tribunal is made perfectly clear. There is force in the argument that almost invariably in this Act the local planning authority is called by that name and the better view is that Parliament would have done so in s. 23 (5) of the Act of 1947 if it had intended the local planning authority to have a right of appeal from the magistrates. Like LORD PARKER, C.J., I am also impressed by the point made by ASHWORTH, J., during the argument on s. 100 (1).

ASHWORTH, J.: I have arrived at the same conclusion and I have nothing that I can usefully add.

Appeal allowed.

Solicitors: *A. V. Hawkins & Co.*, Harrow (for the appellant); *Town clerk*, Ealing (for the respondent).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

FOWLER *v.* LANNING.

[QUEEN'S BENCH DIVISION (Diplock, J.), December 18, 19, 1958, January 19, 1959.]

Trespass—Trespass to the person—Intention or negligence—Burden of proof—Whether necessary to prove that act intentional or negligent.

An action for trespass to the person does not lie if the injury to the plaintiff, although the direct consequence of the act of the defendant, was caused unintentionally and without negligence on the part of the defendant; this principle applies both to trespass to the person committed on the highway and to trespass to the person committed in any other place (see p. 297, letter F, post). The onus of proving negligence, where the trespass is unintentional, lies on the plaintiff whether the trespass is committed on the highway or elsewhere (see p. 297, letter I, post).

Dicta of BLACKBURN, J., in *Fletcher* v. *Rylands* ((1866), L.R. 1 Exch. at p. 286) and BRAMWELL, B., in *Holmes* v. *Mather* ((1875), L.R. 10 Exch. at p. 268) applied. *Stanley* v. *Powell* ([1891] 1 Q.B. 86) followed.

By a writ the plaintiff claimed damages for trespass to the person committed by the defendant at Corfe Castle in the county of Dorset on Nov. 19, 1957. In his statement of claim the plaintiff alleged that " on Nov. 19, 1957, at Vineyard Farm, Corfe Castle in the county of Dorset the defendant shot the plaintiff. By reason of the premises the plaintiff sustained personal injuries and has suffered loss and damage "; particulars of the plaintiff's injuries were then set out. By his defence the defendant denied the allegations of fact and objected that the statement of claim disclosed no cause of action on the ground that the plaintiff had not alleged that the shooting was either intentional or negligent.

Held: the statement of claim disclosed no cause of action against the defendant, because in an action for trespass to the person the onus of proof of the defendant's intention or negligence lay on the plaintiff and the plaintiff either must allege that the shooting was intentional on the part of the defendant, or must allege that the defendant was negligent, stating the facts alleged to constitute the negligence (see p. 298, letter B, post).

[Editorial Note. In *Morriss* v. *Marsden* ([1952] 1 All E.R. 925 at p. 928, letters A-B), STABLE, J., concerned in that case with a defence of automatism or acting in a trance, said that proof of intention was essential to the tort there alleged, which was tort of trespass to the person. Negligence was not relevant to be considered on the facts of that case, and thus the decision may be regarded as concurring, qua the element of intention, with the first proposition stated previously. As to trespass to the person involving intention or negligence, see 33 HALSBURY'S LAWS (2nd Edn.) 30, para. 53; and for cases on the subject, see 43 DIGEST 431-436, *557-631.*

Reference is made in the judgment to the views of text-writers; for these, see WINFIELD ON TORT (6th Edn.), p. 248, SALMOND ON TORTS (12th Edn.), p. 311, CLERK AND LINDSELL ON TORTS (11th Edn.), p. 50, and POLLOCK ON TORTS (15th Edn.), p. 129.]

Cases referred to:

(1) *Scott* v. *Shepherd*, (1773), 2 Wm. Bl. 892 (96 E.R. 525); 3 Wils. 403 (95 E.R. 1124); 43 Digest 433, *597.*

(2) *M'Alister* (*or Donoghue*) v. *Stevenson*, [1932] All E.R. Rep. 1; [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; Digest Supp.

(3) *Covell* v. *Laming*, (1808), 1 Camp. 497; 170 E.R. 1034; 43 Digest 373, *8.*

(4) *Leame* v. *Bray*, (1803), 3 East, 593; 102 E.R. 724; 43 Digest 420, *429.*

(5) *Day* v. *Edwards*, (1794), 5 Term Rep. 648.

(6) *Williams* v. *Holland*, (1833), 10 Bing. 112; 6 C. & P. 23; 3 Moo. & S. 540; 2 L.J.C.P. 190; 131 E.R. 848; 36 Digest (Repl.) 173, *930.*

(7) *Read* v. *Lyons* (*J.*) *& Co., Ltd.*, [1946] 2 All E.R. 471; [1947] A.C. 156; [1947] L.J.R. 39; 175 L.T. 413; 36 Digest (Repl.) 83, *452.*

(8) *Weaver* v. *Ward*, (1616), as reported in Hob. 134; 80 E.R. 284; 43 Digest 373, *4.*

(9) *Hall* v. *Fearnley*, (1842), 3 Q.B. 919; 3 Gal. & Dav. 10; 12 L.J.Q.B. 22; 114 E.R. 761; 43 Digest 435, *627.*

(10) *Butterfield* v. *Forrester*, (1809), 11 East, 60; 1 Man. & G. 571, n.; 103 E.R. 926; 36 Digest (Repl.) 177, *939.*

(11) *Knapp* v. *Salsbury*, (1810), 2 Camp. 500; 170 E.R. 500; 2 Digest (Repl.) 318, *181.*

(12) *Gibbons* v. *Pepper*, (1695), 1 Ld. Raym. 38; 4 Mod. Rep. 404; 2 Salk. 637; 91 E.R. 922; 43 Digest 441, *690.*

(13) *Wakeman* v. *Robinson*, (1823), 1 Bing. 213; 8 Moore, C.P. 63; 1 L.J.O.S. C.P. 70; 130 E.R. 86; 43 Digest 373, *9.*

(14) *Byrne* v. *Boadle*, (1863), 2 H. & C. 722; 3 New Rep. 162; 33 L.J.Ex. 13; 9 L.T. 450; 159 E.R. 299; 36 Digest (Repl.) 73, *387.*

(15) *Fletcher* v. *Rylands*, (1866), L.R. 1 Exch. 265; 35 L.J.Ex. 154; 14 L.T. 523; 30 J.P. 436; *affd.* sub nom. *Rylands* v. *Fletcher*, (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70; 36 Digest (Repl.) 282, *334.*

(16) *Holmes* v. *Mather*, (1875), L.R. 10 Exch. 261; 44 L.J.Ex. 176; 33 L.T. 361; 39 J.P. 567; 43 Digest 431, *567.*

(17) *River Wear Comrs.* v. *Adamson*, (1877), 2 App. Cas. 743; 47 L.J.Q.B. 193; 37 L.T. 543; 42 J.P. 244; 36 Digest (Repl.) 166, *890.*

(18) *Gayler & Pope, Ltd.* v. *Davies* (*B.*) *& Son, Ltd.*, [1924] 2 K.B. 75; 93 L.J.K.B. 702; 131 L.T. 507; 36 Digest (Repl.) 109, *540.*

(19) *Stanley* v. *Powell*, [1891] 1 Q.B. 86; 60 L.J.Q.B. 52; 63 L.T. 809; 55 J.P. 327; 43 Digest 431, *568*.
(20) *National Coal Board* v. *Evans (J. E.) & Co. (Cardiff), Ltd. & Maberley Parker, Ltd.*, [1951] 2 All E.R. 310; [1951] 2 K.B. 861; 2nd Digest Supp.
(21) *Walmsley* v. *Humenick*, [1954] 2 D.L.R. 232; 3rd Digest Supp.
(22) *United Australia, Ltd.* v. *Barclays Bank, Ltd.*, [1940] 4 All E.R. 20; [1941] A.C. 1; 109 L.J.K.B. 919; 164 L.T. 139; 2nd Digest Supp.
(23) *Smith* v. *Selwyn*, [1914] 3 K.B. 98; 83 L.J.K.B. 1339; 111 L.T. 195; 1 Digest 63, *516*.

Preliminary point of law.

The plaintiff, Thomas Winston Fowler, by his writ in an action against the defendant, William George Lanning, claimed " damages for trespass to the person committed by the defendant at Corfe Castle in the county of Dorset on Nov. 19, 1957 ". In his statement of claim the plaintiff alleged that " on Nov. 19, 1957, at Vineyard Farm, Corfe Castle in the county of Dorset the defendant shot the plaintiff. By reason of the premises the plaintiff sustained personal injuries and has suffered loss and damage "; there then followed particulars of the injuries sustained by the plaintiff which included injuries necessitating the removal of his left eye. By his defence the defendant denied that he ever shot the plaintiff, and objected that the statement of claim was bad in law and disclosed no cause of action against him on the ground that the plaintiff did not allege that the shooting was either intentional or negligent. In fact, the shooting occurred at a shooting party. By an order dated July 31, 1958, it was ordered that the point of law raised by the defendant in the defence should be heard and disposed of before the trial of the issues of fact in the action. The defendant appealed against the order to a judge in chambers but the appeal was dismissed by an order dated Oct. 2, 1958.

Ingram Poole for the defendant, the applicant.
H. E. L. McCreery for the plaintiff, the respondent.

Cur. adv. vult.

Jan. 19. **DIPLOCK, J.**, read the following judgment:

" The distinction between actions of trespass on the case, and trespass vi et armis should be most carefully and precisely observed, otherwise we shall introduce much confusion and uncertainty . . ."

So said De Grey, C.J., in 1773 in *Scott* v. *Shepherd* (1) ((1773), 3 Wils. 403 at p. 411). It must gratify the ghosts of generations of special pleaders that today, nearly a century after the passing of the Supreme Court of Judicature Act, 1873, I should be invited to decide whether such a distinction still exists where an unintentional injury to the person of the plaintiff arises directly from an act of the defendant, and should be invited to decide the point on the modern equivalent of demurrer.

The writ in this case claims damages for trespass to the person committed by the defendant at Corfe Castle, in the county of Dorset, on Nov. 19, 1957. The statement of claim alleges laconically that at that place and on that date " the defendant shot the plaintiff ", and that by reason thereof the plaintiff sustained personal injuries and has suffered loss and damage. By his defence the defendant, in addition to traversing the allegations of fact, raises the objection

" that the statement of claim is bad in law and discloses no cause of action against him on the ground that the plaintiff does not allege that the said shooting was intentional or negligent."

An order has been made that this point of law be disposed of before the trial of the issues of fact in the action. That order is binding on me, and, in disposing of it, I can look no further than the pleadings. I must confess that at first glance at the pleadings I felt some anxiety lest I was being invited to decide

A a point which has long puzzled the professors (see the article by PROFESSORS GOODHART AND WINFIELD, (1933), 49 Law Quarterly Review 359; POLLOCK ON TORTS (15th Edn.), p. 129; SALMOND ON TORTS (12th Edn.) p. 311; WINFIELD ON TORT (5th Edn.), p. 213), only to learn ultimately that, just as in *M'Alister* (*or Donoghue*) v. *Stevenson* (2) ([1932] All E.R. Rep. 1), there was in fact no snail in the ginger beer bottle, so in this case there was in fact no B pellet in the defendant's gun.

The point of law is not, however, a mere academic one even at the present stage of the action. The alleged injuries were, I am told, sustained at a shooting party; it is not suggested that the shooting was intentional. The practical issue is whether, if the plaintiff was in fact injured by a shot from a gun fired by the defendant, the onus lies on the plaintiff to prove that the defendant was C negligent, in which case, under the modern system of pleading, he must so plead and give particulars of negligence (see R.S.C., Ord. 19, r. 4) or whether it lies on the defendant to prove that the plaintiff's injuries were not caused by the defendant's negligence, in which case the plaintiff's statement of claim is sufficient and discloses a cause of action (see R.S.C., Ord. 19, r. 25). The issue is thus a neat one of onus of proof.

D I am much indebted to counsel on both sides for their diligence and erudition in tracing the history of the distinction between trespass vi et armis and trespass on the case before the passing of the Supreme Court of Judicature Act, 1873. I do not think it necessary, however, to examine in detail the earlier controversies alluded to by LORD ELLENBOROUGH in *Covell* v. *Laming* (3) ((1808), 1 Camp. 497) whether trespass lay at all when the injury was unintentional, E even although it was direct. That it did must be regarded as settled in 1803 by *Leame* v. *Bray* (4) ((1803), 3 East, 593), which decided that trespass vi et armis could lie wherever the personal injury complained of arose directly from the act of the defendant himself. The converse proposition that trespass on the case did not lie where the injury was direct, even although it was unintentional, which at first sight appeared to be established in 1794 by *Day* v. F *Edwards* (5) ((1794), 5 Term Rep. 648), had been swept away at least by 1833 when the Court of Common Pleas in *Williams* v. *Holland* (6) ((1833), 10 Bing. 112), distinguishing—if not riding roughshod over—*Day* v. *Edwards* (5) held that an action on the case was an available remedy in such a state of facts. Pausing, therefore, at the convenient date of 1852, when the Common Law Procedure Act was passed, it was well established that where personal injury G was caused to the plaintiff by the direct act of the defendant himself, alternative remedies in trespass to the person and in negligence were available.

What by that date was the essential difference between the two alternative remedies based on identical facts? It is fashionable today to regard trespass to the person as representing the historic principle that every man acts at his peril and is liable for all the consequences of his acts; negligence as repre- H senting the more modern view that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to others (see per LORD MACMILLAN in *Read* v. *J. Lyons & Co., Ltd.* (7), [1946] 2 All E.R. 471 at p. 476).

But whether this was true of trespass in medieval times—and I respectfully doubt whether it ever was—the strict principle that every man acts at his I peril was not applied in the case of trespass to the person even as long ago as 1617. It is true that in that year, in the much-cited case of *Weaver* v. *Ward* (8) ((1616), Hob. 134), which arose out of a shooting accident during an exercise of trained bands, the Court of King's Bench held that a plea that

> " the defendant casualiter et per infortunium et contra voluntatem suam, in discharging of his piece did hurt and wound the plaintiff "

was demurrable. But it would seem that this was because the plea, which was a special plea, was insufficient, because, although it denied intention, it did

not negative negligence on the part of the defendant. It is clear from the report that the court was of opinion that the action of trespass to the person would fail if it should appear that the accident was A

> " inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

This phrase is repeated in many of the later cases. Where it appears, however, it must be read in its historical context and not as if it were being used by judges to whom modern concepts of negligence, contributory negligence, and causation were familiar. An examination of the cases up to 1842 in which this or some similar phrase was adopted shows, I think, that the word " inevitable " was superfluous, and that the phrase meant no more than that the accident could not have been avoided by the exercise of reasonable care on the part of the defendant. In the difficult case of *Hall* v. *Fearnley* (9) (reported in very different terms in (1842), 3 Q.B. 919, and in 12 L.J.Q.B. 22 respectively), LORD DENMAN, C.J., and WIGHTMAN, J., appear to have regarded " inevitable " as something different from absence of negligence on the part of the defendant, but did not suggest that such absence of negligence was not in itself a defence. In any event I can find no trace in the cases from the seventeenth century onwards that a defendant in order to escape liability for unintentional trespass to the person must comply with any higher standard of care than was needed to escape liability if the action were framed in trespass on the case. So, too, it appears to have been taken for granted by the beginning of the nineteenth century that contributory negligence—although not under that name, which is of more recent origin—disentitled the plaintiff to recover whether the action were framed in case, as in *Butterfield* v. *Forrester* (10) ((1809), 11 East, 60), or in trespass to the person, as in *Knapp* v. *Salsbury* (11) ((1810), 2 Camp. 500). B C D E

Apart from the question of onus of proof, which I must now examine, there does not appear by 1852 to have been any difference between the substantive law applicable whether the action were framed in trespass on the case or trespass to the person. Differences as regards pleading were, of course, in those days, vital, but are not relevant for the purposes of the present case in 1959, except in so far as they throw any light on where the onus of proof lay. F

In trespass on the case the onus of proof of the defendant's negligence undoubtedly lay on the plaintiff. Where it lay in trespass is much more difficult to determine. The defence that the accident " was inevitable, and that the defendant had committed no negligence to give occasion to the hurt " was available to the defendant on a plea to the general issue by the end of the seventeenth century: see *Gibbons* v. *Pepper* (12) ((1695), 1 Ld. Raym. 38): and this appears to have been accepted by the Court of Common Pleas as late as 1823: see *Wakeman* v. *Robinson* (13) ((1823), 1 Bing. 213)—a case still cited as authority in the third edition* of BULLEN & LEAKE'S PRECEDENTS OF PLEADINGS in 1868. Since the plea to the general issue merely denied the existence of the necessary ingredients of the tort, this would suggest that in the case of trespass to the person the onus lay on the plaintiff to show that the defendant's act was either intentional or negligent. LORD ELLENBOROUGH, on the other hand, sitting at nisi prius in 1810, had already decided in *Knapp* v. *Salsbury* (11) that such a defence must be specially pleaded, and the Court of King's Bench in 1842 in *Hall* v. *Fearnley* (9) ((1842), 3 Q.B. 919; 12 L.J.Q.B. 22) appears to have come down on the pleading point on the side of LORD ELLENBOROUGH, although the differences between the two reports of this case make it difficult to elicit the ratio decidendi. But although the two last-cited cases destroy the force of any inference as to onus of proof which might be drawn from *Gibbons* v. *Pepper* (12), they do not themselves give rise to the contrary inference. With the growth of special pleading, and in particular after the " general rules " of 1840, there were many matters, the onus of proof of which, if disputed, lay on the plaintiff, which G H I

* See p. 791.

A were not regarded as traversed by a plea to the general issue (see BULLEN & LEAKE'S PRECEDENTS OF PLEADINGS (3rd Edn.) at pp. 699-704).

I do not find the pre-Common Law Procedure Act cases conclusive or, indeed, helpful as to where the onus of proof of the defendant's negligence or absence of negligence lay where the action was founded on trespass to the person and not on trespass on the case. The reported cases turn on points of pleading, a science B on which the legal mind was then wonderfully concentrated, and when, in any particular case, that science had achieved its object in arriving at an issue of fact for the jury in an action of trespass to the person, it could only be very rarely that the question of onus of proof was crucial. Since trespass to the person only lay where the injury to the plaintiff was the direct consequence of the personal act of the defendant, proof that the defendant did the act and that the C plaintiff was thereby injured would normally be prima facie evidence of the defendant's negligence sufficient also to sustain an action on the case in accordance with the common sense view applied at nisi prius long before POLLOCK, C.B., in *Byrne* v. *Boadle* (14) ((1863), 2 H. & C. 722 at p. 725), translated it into Latin as res ipsa loquitur. At the time the case came before the jury, therefore, there can have been little practical difference between trespass and case, even if D in the former the onus of negativing negligence did lie on the defendant while in the latter the onus of proving negligence lay on the plaintiff. But whatever the reason, I can find no trace in the reports that the possibility that the onus of proof might be different in the two classes of cases was a question which ever occurred to the judges of those days, or that their charge to the jury differed according to whether the action were framed in trespass or in case.

E The majority of pre-Common Law Procedure Act cases in which the question of unintentional trespass to the person or to goods was discussed were, it is true, cases of collision on the highway either on land or on water. There is, however, no trace that I can find in the judgments that this was a relevant consideration, or that the law as to trespass vi et armis to the person or to goods was different according to whether the injury took place on a highway or not. Prima facie, F therefore, one would suppose that the onus of proof lay on the same party to the action in either case. If, therefore, it is conceded—as all agree that it must be at any rate today—that in the case of an involuntary trespass to the person on a highway the onus of proving negligence lies on the plaintiff; why should it be otherwise when the involuntary trespass to the person is not committed on a highway? There is, nevertheless, a formidable body of academic opinion—but G not, I think, any binding judicial authority—that highway cases have in the last hundred years become an exception to a previously existing general rule that the onus of proof of absence of negligence on the part of a defendant in a case founded on trespass to the person lies on the defendant himself.

As I have already said, I do not think that the cases prior to the Common Law Procedure Act, 1852, establish that there ever was such a general rule, nor do I H think that the subsequent cases, on analysis, suggest that those judges who were familiar with the procedure before 1852 took the view that there ever had been such a rule. The dictum of BLACKBURN, J., in *Fletcher* v. *Rylands* (15) ((1866), L.R. 1 Exch. 265) is generally regarded as the origin of some modern rule special to highways. But what he said (ibid., at p. 286) in a case which, after all, was about the flooding of coal mines, was not limited to accidents on highways or to I trespass to the person.

> "Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger . . ."

So far he is dealing with highway accidents and with trespass to land as well as with trespass to the person. But he goes on:

"and persons who by the licence of the owner pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what prima facie was a trespass, can be explained on the same principle, viz., that the circumstances were such as to show that the plaintiff has taken that risk upon himself."

Here is no sudden emergence of a rule peculiar to highways, but a rationalisation of what appeared to BLACKBURN, J., to be well-settled law by explaining it on the basis—of which there is no trace to be found in the cases to which he refers—of the voluntary acceptance of risk by the plaintiff. It is to be noted that he refers specifically to warehouse cases, which are not highway cases, and among the other cases alluded to in which "inevitable accident has been held an excuse for what prima facie was a trespass" must be included *Weaver* v. *Ward* (8) ((1616), Hob. 134), the trained band shooting accident. But what is even more germane to the matter which I have to decide is that that great lawyer, who, having been called to the Bar in 1838 and to the Bench in 1859, must have been very familiar with the practice at nisi prius, appears to have regarded it as a commonplace that in all cases in which inevitable accident is an excuse for what prima facie was a trespass the onus of proving negligence lies on the plaintiff.

Ten years later in *Holmes* v. *Mather* (16) ((1875), L.R. 10 Exch. 261 at p. 268), an equally great common lawyer, BRAMWELL, B., stated the same proposition quite generally:

"The result of [the cases cited] is this, and it is intelligible enough: if the act that does an injury is an act of direct force vi et armis, trespass is the proper remedy (if there is any remedy) where the act is wrongful, either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful."

I am aware of the textual criticism to which this passage has been subjected by the learned editor of the current edition of POLLOCK ON TORTS*. But the Law Reports version was, I suspect, then, as now, corrected by the judge. Furthermore, the conclusion stated by BRAMWELL, B., to be the result of the cases up to 1875 accords not only with what my own explanation of them suggests but also with what BLACKBURN, J., had said in 1865. Two years later, in 1877, the speech of LORD BLACKBURN in *River Wear Comrs.* v. *Adamson* (17) ((1877), 2 App. Cas. 743 at p. 767) applied to trespass to property adjoining a navigable water the principle which he had adumbrated obiter in *Fletcher* v. *Rylands* (15) in relation to trespass to property adjacent to a highway. This speech, since it is directed to trespass to land and not to trespass to the person, would, strictly speaking, be irrelevant to the present case were it not for the fact that it seems to have been regarded as authority for the proposition that in all cases of trespass to the person, to goods, or to land, there is a special rule peculiar to highways: see per MCCARDIE, J., in *Gayler & Pope, Ltd.* v. *B. Davies & Son, Ltd.* (18) ([1924] 2 K.B. 75 at p. 82). No doubt there is a special rule as respects trespass to land adjoining a highway; but there is no reason to suppose that LORD BLACKBURN in *River Wear Comrs.* v. *Adamson* (17) was dealing with any other tort than trespass to land, or seeking to modify in relation to trespass to the person the generality of his observations in *Fletcher* v. *Rylands* (15) or those of BRAMWELL, B., in *Holmes* v. *Mather* (16).

This brings me to *Stanley* v. *Powell* (19) ([1891] 1 Q.B. 86), a case of a shooting accident, not on a highway, in which DENMAN, J., held that trespass to the person would not lie in the absence of negligence by the defendant. The action was originally pleaded in negligence, the onus of proof of which undoubtedly

* See the 15th Edn., pp. 131, 132.

A lay on the plaintiff, and the jury had found that there was no negligence—or, I suppose, more accurately, that the plaintiff had not proved any negligence on the part of the defendant. There are phrases in the judgment of DENMAN, J., which can be read as suggesting that his view was that, had the action been framed in trespass to the person, the onus of negativing negligence would have lain on the defendant. But this can hardly have been present to his mind or B he would presumably have ordered a new trial. I regard the decision as neutral on the question of onus of proof.

Stanley v. *Powell* (19), although assailed by some text-book writers, has stood for nearly seventy years. It was approved by all members of the Court of Appeal in *National Coal Board* v. *J. E. Evans & Co. (Cardiff), Ltd. & Maberley Parker, Ltd.* (20) ([1951] 2 All E.R. 310)—an approval which, it may be, was obiter. C I have, however, no doubt that the decision in *Stanley* v. *Powell* (19) is good law.

Little assistance is to be obtained from any later cases. Since *Stanley* v. *Powell* (19) and perhaps as a result of that decision, there appears to be no case in the reports where unintentional trespass to the person has been relied on as distinct from negligence, despite the encouragement of the learned authors of the article on Trespass and Negligence in 1933, 49 Law Quarterly Review D 359, and the continued appearance in successive editions of BULLEN & LEAKE'S PRECEDENTS OF PLEADINGS of a precedent of a pleading in trespass to the person in which neither intention nor negligence is alleged. No doubt in many cases it is the master who is sued for the act of his servant, and here trespass as opposed to case would never lie; but in the sixty-eight years which have passed since *Stanley* v. *Powell* (19) there must have been many cases where the injury to E the plaintiff was the direct consequence of the act of the defendant himself.

I think that what appears to have been the practice of the profession during the present century is sound in law. I can summarise the law as I understand it from my examination of the cases as follows:

(1) Trespass to the person does not lie if the injury to the plaintiff, although the direct consequence of the act of the defendant, was caused unintentionally F and without negligence on the defendant's part.

(2) Trespass to the person on the highway does not differ in this respect from trespass to the person committed in any other place.

(3) If it were right to say with BLACKBURN, J., in 1865* that negligence is a necessary ingredient of unintentional trespass only where the circumstances are such as to show that the plaintiff had taken on himself the risk of inevit- G able injury (i.e., injury which is the result of neither intention nor carelessness on the part of the defendant), the plaintiff must today in this crowded world be considered as taking on himself the risk of inevitable injury from any acts of his neighbour which, in the absence of damage to the plaintiff, would not in themselves be unlawful—of which discharging a gun at a shooting party in 1957 or a trained band exercise in 1617 are obvious examples. For BLACK- H BURN, J., in the passage I have quoted from *Fletcher* v. *Rylands* (15) ((1866), L.R. 1 Exch. at p. 286) was in truth doing no more than stating the converse of the principle referred to by LORD MACMILLAN in *Read* v. *J. Lyons & Co., Ltd.* (7) ([1946] 2 All E.R. at p. 476), that a man's freedom of action is subject only to the obligation not to infringe any duty of care which he owes to others.

(4) The onus of proving negligence, where the trespass is not intentional, I lies on the plaintiff, whether the action be framed in trespass or in negligence. This has been unquestioned law in highway cases ever since *Holmes* v. *Mather* (16) ((1875), L.R. 10 Exch. 261), and there is no reason in principle, nor any suggestion in the decided authorities, why it should be any different in other cases. It is, indeed, but an illustration of the rule that he who affirms must prove, which lies at the root of our law of evidence.

I am glad to be able to reach this conclusion and to know that the Supreme

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* See *Fletcher* v. *Rylands* (1866), L.R. 1 Exch. 265.

Court of British Columbia has recently done the same (*Walmsley* v. *Humenick* (21), [1954] 2 D.L.R. 232) for

> " . . . while admiring the subtlety of the old special pleaders, our courts are primarily concerned to see that rules of law and procedure should serve to secure justice between the parties ":

per VISCOUNT SIMON, L.C., in *United Australia, Ltd.* v. *Barclays Bank, Ltd.* (22) ([1940] 4 All E.R. 20 at p. 32).

If, as I have held, the onus of proof of intention or negligence on the part of the defendant lies on the plaintiff, then, under the modern rules of pleading, he must allege either intention on the part of the defendant, or, if he relies on negligence, he must state the facts which he alleges constitute negligence. Without either of such allegations the bald statement that the defendant shot the plaintiff in unspecified circumstances with an unspecified weapon in my view discloses no cause of action.

This is no academic pleading point. It serves to secure justice between the parties. If it is open to the plaintiff—as counsel for the plaintiff must, I think, contend—on the pleadings as they at present stand to prove that the defendant shot him deliberately, failure to allege such intention deprives the defendant of his right to apply to stay the action pending prosecution for the felony (*Smith* v. *Selwyn* (23), [1914] 3 K.B. 98). I should repeat that there is, of course, in fact no suggestion that the shooting here was intentional, and thus felonious. But if counsel for the plaintiff be right, proof of intention would be open on the pleading in its present form.

Turning next to the alternative of negligent trespass to the person, there is here the bare allegation that on a particular day at a particular place " the defendant shot the plaintiff ". In what circumstances, indeed with what weapon, from bow and arrow to atomic warhead, is not stated. So bare an allegation is consistent with the defendant's having exercised reasonable care. It may be—I know not—that, had the circumstances been set out with greater particularity, there would have been disclosed facts which themselves shouted negligence, so that the doctrine of res ipsa loquitur would have applied. In such a form the statement of claim might have disclosed a cause of action even although the word " negligence " itself had not been used, and the plaintiff in that event would have been limited to relying for proof of negligence on the facts which he had alleged. But I have today to deal with the pleading as it stands. As it stands, it neither alleges negligence in terms nor alleges facts which, if true, would of themselves constitute negligence; nor, if counsel for the plaintiff is right, would he be bound at any time before the trial to disclose to the defendant what facts he relies on as constituting negligence.

I do not see how the plaintiff will be harmed by alleging now the facts on which he ultimately intends to rely. On the contrary, for him to do so, will serve to secure justice between the parties. It offends the underlying purpose of the modern system of pleading that a plaintiff, by calling his grievance " trespass to the person " instead of " negligence ", should force a defendant to come to trial blindfold; and I am glad to find nothing in the authorities which compels the court in this case to refrain from stripping the bandage from his eyes.

I hold that the statement of claim in its present form discloses no cause of action.

Order accordingly. Leave to make immediate amendments to statement of claim granted; consequential amendments to defence to be made within fourteen days.

Solicitors: *Barnes & Butler*, agents for *J. W. Miller & Son*, Poole (for the defendant, the applicant); *Peacock & Goddard*, agents for *Trevanion, Curtis & Walker*, Bournemouth (for the plaintiff, the respondent).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

Re THE YARN SPINNERS' AGREEMENT

[RESTRICTIVE PRACTICES COURT (Devlin, J., Upjohn, J., Pearson, J., Sir Stanford Cooper, Mr. W. L. Heywood, Mr. W. Wallace and Mr. W. G. Campbell), October 27, 28, 29, 30, 31, November 3, 4, 5, 6, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 25, 26, 27, 28, December 1, 2, 3, 1958, January 26, February 2, 1959.]

Restrictive Trade Practices—Reference—Yarn Spinners' Agreement—Minimum price scheme—Whether removal of restriction would deny public substantial benefit—Whether removal of restriction would be likely to have serious and persistent adverse effect on general level of unemployment in area—Restrictive Trade Practices Act, 1956 (4 & 5 *Eliz.* 2 *c.* 68), *s.* 21 (1) (*b*), (*e*).

Restrictive Trade Practices—Court—Practice—Cross-examination of witnesses—When proofs of witnesses to be treated as evidence in the case.

The members of the Yarn Spinners' Association, who formed a section of the Lancashire cotton industry, entered into an agreement to which they subscribed jointly and severally by deeds undertaking to become members of the Yarn Spinners' Association, or by deeds undertaking to become members of the Yarn Spinners' Agreement entered into by Condenser Yarn Spinners or Preparation Yarn Spinners. The objects of the Association were to watch over, safeguard and further the industry. By virtue of the agreement, the members were obliged (subject to the provisions of the agreement) to charge not less than the minimum prices from time to time fixed under the terms of the agreement for yarn, the minimum price of which was controlled by the agreement, and were obliged not to sell any yarn the minimum price of which was controlled by the agreement on any terms and conditions more favourable to a customer or agent than those fixed from time to time under the agreement. Pursuant to the agreement, operating cost marginal rates for yarn coming within the scope of the agreement and charges for ancillary processes, and terms and conditions of sale relating to such yarn, had been fixed by resolutions under the agreement. There were two distinct types of cotton—American type cotton and Egyptian type cotton—and the calculation of the minimum prices fell into two major parts, first, the ascertainment of the " clear cotton cost ", which took into account the mixing cost, and, second, the determination of the appropriate minimum spinning cost margin for the yarn, designed to cover the spinners' conversion costs, i.e., labour, overhead expenses and depreciation, and an allowance for interest on fixed capital. On a reference by the Registrar of Restrictive Trading Agreements under s. 20 (1) and s. 20 (2) (a)* of the Restrictive Trade Practices Act, 1956, the Association sought to support its restrictions under s. 21 (1) (b)†, contending that the shopping public

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* The Restrictive Trade Practices Act, 1956, s. 20, so far as relevant, provides: " (1) The court shall have jurisdiction, on application made in accordance with this section in respect of any agreement of which particulars are for the time being registered under this Part of this Act, to declare whether or not any restrictions by virtue of which this Part of this Act applies to the agreement (other than restrictions in respect of matters described in paras. (b) to (d) of s. 8 (8) of this Act) are contrary to the public interest.

" (2) An application to the court under the foregoing sub-section may be made—(a) in any case, by the registrar; . . ."

† Section 21, so far as relevant, provides:

" (1) For the purposes of any proceedings before the court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied of any one or more of the following circumstances, that is to say—. . . (b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom; . . . (e) that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to have a serious and persistent adverse effect on the general level of unemployment in an area, or in areas taken together, in which a substantial proportion of the trade or industry to which the agreement relates is situated."

which purchased cotton goods enjoyed the following benefits as a result of the restrictions:—(a) a sufficient preservation of the processing capacity and labour force in the industry in meeting fluctuations in demand, in providing variety of goods for the shopping public and in times of national emergency or when particular sources of supply were scarce; (b) the industry was enabled and encouraged to spend money on modernisation thus enabling the public to obtain cheaper or better goods; (c) the prevention of price invasion; (d) the spinners were enabled and encouraged to spin for stock in bad times with the result that when demand revived there would be stock immediately available to fulfil it; (e) as a result of price competition being forbidden, competition was channelled into the maintenance and improvement of quality and services; (f) the prevention of monopoly or near-monopoly conditions being established [of which, however, the court found that there was no danger]; (g) price stabilisation. Alternatively, the Association contended that benefits were conferred on a particular section of the public, the trade purchasers of yarn. The Association also sought to support its restrictions under s. 21 (1) (e)* of the Act, contending that the removal of the restrictions would be likely to have a serious and persistent effect on the general level of unemployment in two groups of areas in which a substantial proportion of the industry was situated. The registrar contended that the restrictions resulted in the following detriments to the public:—(i) the maintenance of a high price for yarn eventually reflected in the price of goods bought by the public; (ii) loss of, or handicap to, the export trade, and (iii) the waste of national resources caused by excess capacity. The Association admitted that, if the minimum price provisions of the agreement were bad, the whole agreement must fail as a practical matter. The court found that, though the theory on which the scheme involving the agreement was said to be based was the avoidance of cut-throat competition resulting from the industry's being one in which short but violent recessions occurred from time to time, yet that was an incorrect analysis in relation to events after 1952, since when a state of recession had not been exceptional. The industry was a contracting industry and the scheme had seriously retarded the natural process of the closing down of mills and the rendering of the industry more compact.

Held: the agreement (that is, the agreement as a whole, in view of the Association's admission stated previously) must be deemed, pursuant to s. 21 (1) of the Restrictive Trade Practices Act, 1956, to be contrary to the public interest for the following reasons—

(i) the Association had not satisfied the court that the removal of the restrictions would deny to the public as purchasers benefits that were substantial (within s. 21 (1) (b)), for such public benefits as resulted from heads (a) and (b) of the classification previously stated were unsubstantial as the industry would still have sufficient capacity to meet all ordinary demands if it became smaller, head (c) resulted in no public benefit and head (e) in negligible public benefit, and heads (d) and (g) were not beneficial to the public when balanced against the alternative of a free market (see, on this last point, p. 317, letters C to G, post).

(ii) though the removal of the restrictions would be likely to have a serious and persistent adverse effect on unemployment (within s. 21 (1) (e)) in areas where a substantial portion of the industry was situated, yet, weighing the public detriment from (principally) waste of national resources by excess capacity in the industry and (to a lesser degree) the maintenance of a high price to the public and loss of export trade against the advantages of avoiding prospective local unemployment and of any benefit to trade purchasers of yarn (assuming that benefit to be within s. 21 (1) (b)), it

* See p. 299, letter I, ante.

would be unreasonable on balance to continue the restrictions (see p. 322, letter B, post), for the industry ought to be made smaller and more compact (see p. 314, letter D, and p. 322, letter A, post).

QUAERE: whether an advantage to trade purchasers, the weavers, was, having regard to s. 21 (2), specific or a benefit enjoyed by the public within s. 21 (1) (b) (see p. 318, letters B to F, post).

Observations on cross-examination of witnesses before the Restrictive Practices Court (see p. 309, letters B to D, post), and on when the proofs of witnesses before the court are to be treated as evidence in the case (see p. 309, letters E to G, post).

[For the Restrictive Trade Practices Act, 1956, s. 21, see 36 HALSBURY'S STATUTES (2nd Edn.) 954.]

Reference.

Pursuant to the Restrictive Trade Practices Act, 1956, s. 20 (2) (a), the Registrar of Restrictive Trading Agreements referred to the Restrictive Practices Court an agreement made between the members of the Yarn Spinners' Association and contained in the Yarn Spinners' Agreement to which all members of the Association had subscribed jointly and severally (a) by deeds undertaking to become members of the Yarn Spinners' Association, and (b) by deeds undertaking to become members of the Yarn Spinners' Agreement entered into by Condenser Yarn Spinners (called "the Condenser Yarn Section") or Preparation Yarn Spinners (called "the Preparation Yarn Section"). By cl. 2 of the agreement, the objects of the Association were to watch over, safeguard and further the business (hereinafter called "the industry") of the members and in particular:

"(a) To afford facilities for ascertaining and to ascertain the views of the industry and to communicate and interchange such views between members and between members in the various sections of the industry and between the Association and the government and government departments of the United Kingdom and elsewhere and with other trades or authorities, organisations and persons on all matters affecting the industry, and to take such action with regard thereto as may be considered advisable.

"(b) To represent and voice the opinion of the members in any negotiations with or applications to any government or government department association body or authority in connexion with any Act for the time being controlling or governing the cotton industry or any part or section thereof or in connexion with any schemes arising or proposed under or in connexion with any such Act.

"(c) To express the views of the members upon or negotiate with any government, government department, association, body or authority whether British or foreign as to the organisation or re-organisation of the industry or as to any Bill, Act, order, scheme or proposal affecting or which may affect the industry or any section of the industry or any industry connected with it or allied to it and generally to represent the industry with regard to any such Bill, Act, order, scheme or proposal and to draft and consider negotiate upon approve promote or criticise the same or anything arising thereunder.

"(d) To co-operate with or be a member of any trade or industrial organisation or body whether statutory or otherwise in such manner as may be thought desirable in matters of mutual interest and to appoint representatives upon the council or executive or governing committee of such organisation or body and to make arrangements with such organisation or body if deemed desirable in the interests of the industry or any section of it.

"(e) To discharge and fulfil or arrange for the discharge and fulfilment of any duties entrusted to the Association by any government or government department with regard to the industry or any section of the industry.

"(f) To act as an advisory and drafting organisation in connexion with

agreements between members or members of sections for the establishment maintenance alteration or amendment of minimum and/or maximum and/or fixed marginal rates or charges for cotton yarn of various counts. A

" (g) To draw up, formulate, advise upon and bring into effect standard forms of contract and trading terms and conditions to be observed by members and their customers, and others dealing with them or any of them.

" (h) To inquire into negotiate upon and watch over marginal rates and to take such action with regard thereto as may be deemed necessary with the government or with any government department or with any organisation or body which has power to deal with the same. B

" (i) To exercise such measure of co-ordination in matters of general policy or matters affecting more than one section in the industry as is necessary or desirable to secure the orderly progress or working of the industry. C

" (j) To take all possible steps deemed necessary to ensure that the earning power of the industry is sufficient to provide for its constant and continuous re-equipment.

" (k) To raise such funds for the purpose of carrying out the objects of the Association as the members may from time to time decide upon and to ensure that all funds so raised are properly applied and used for the objects of the Association. D

" (l) To co-operate with or make agreements on behalf of the members with consumers or suppliers or associations of consumers or suppliers as may be thought desirable in the interests of the members or for the benefit and protection of the members.

" (m) To provide services of an advisory character for the assistance of its members such as statistics as to the state of trade within the industry or within any section of it, information upon home or foreign markets, or upon other matters in order to ascertain in advance the trend of trade in general or the textile trade in particular either within the United Kingdom or abroad and to formulate policy with the object of bringing about and maintaining full employment within the industry. E F

" (n) To promote encourage and further measures calculated to improve the export trade in cotton yarn or cotton cloth or fabrics and to find new markets and assist in expanding existing markets for cotton yarn or cotton cloth or fabrics and to co-operate with any other body or organisation or government department with regard thereto and in particular:—

" (i) To advise upon and endeavour to bring into effect more economical costs of production by simplifying the ranges and numbers of counts to be spun in the various sections of the industry. G

" (ii) To facilitate and encourage bulk runs and/or the standardisation of suitable yarns and cloths and fabrics made therefrom.

" (iii) To encourage exports to particular markets as and when necessary by recommending price variations or concessions and to provide facilities for ensuring that such action as is required for the encouragement of exports may be taken without delay. H

" (iv) To provide for market study, advertising and propaganda.

" (o) To pool information as to the reliability of customers and their record in paying and as to the reliability of suppliers to fulfil their contracts or otherwise. I

" (p) To promote research and other scientific work in connexion with the industry or any section of the industry and to do all things necessary or reasonable in connexion therewith.

" (q) To commence in Great Britain or other countries on behalf of the members such actions or other proceedings as may be thought proper or advisable by the co-ordinating committee in the name of the Association or of the co-ordinating committee or of any person or persons duly authorised by the co-ordinating committee.

" (r) To defend any action or proceedings brought against the Association or the co-ordinating committee or other persons sued on behalf of the Association or the members thereof and to take all steps necessary to conduct such defence and to pay all costs and expenses in connexion therewith.

" (s) To indemnify the co-ordinating committee members officials or other persons sued on behalf of the Association against the result of any action or proceedings brought against them including all costs and expenses incurred relating to such action or proceedings and to indemnify the co-ordinating committee members officials or other persons in respect of any steps taken by them whilst acting in furtherance or purported furtherance of the objects of the Association.

" (t) To do all such other things (including payment of expenses already incurred before the formation of the Association) as may be thought desirable in the interests of the members or the industry."

By cl. 3, when the agreement had been executed by members controlling one hundred per cent. of the spindles controlled by persons, firms and bodies corporate in each section of the industry, a general meeting of all such members was to be convened and, if a resolution was passed by a majority of two-thirds of the members present and voting at such general meeting that the agreement should come into force on a certain date, it would come into force on that date*. By cl. 4 (ii):

" Any member may retire from membership at the end of the initial period or thereafter by giving not less than six calendar months written notice by registered post to the secretary, such notice to date from the day on which it would be received in the ordinary course of post and to expire on any anniversary of the appointed day. With the consent of the co-ordinating committee any notice of retirement may be withdrawn by the member concerned. As soon as practicable after the last day in any period upon which such notices as aforesaid can be given the secretary shall send particulars of the notices actually received by him to the other members any of whom may then retire from membership as from the end of the then current period by giving written notice in manner aforesaid within fourteen days of the receipt by him of the said particulars Provided always that the obligation upon the secretary to send particulars of a notice received by him shall not apply in the case of a notice which in the opinion of the co-ordinating committee is not likely to result in an increase in the amount of cotton spinning carried on by persons other than members. In case of retirement such member shall cease to have any financial interest in or claim on the funds of the Association but shall be bound to pay all subscriptions and levies falling due before his retirement takes effect and to fulfil all his obligations to the Association to the same date."

By cl. 24 it was provided that, inter alia, cl. 25, cl. 26, cl. 27, cl. 28 and cl. 29, dealing with minimum prices, should be in operation and apply to each section during such time as there was no price control of the products of a section under Statutory Rule and Order or other rule, regulation or order having statutory effect, or if there was in force any such statutory control as regards any section during such time as the clauses dealing with minimum prices did not contravene any of the terms and conditions of such statutory control. By cl. 25:

" Each sectional committee may from time to time fix minimum marginal rates at which yarn coming within its particular section shall be sold supplied produced on commission or otherwise dealt in together with charges for any or all the ancillary processes carried out by members and the terms and conditions relating to such minimum marginal rates or charges and in so doing they shall have regard to the consideration affecting other sections and one section with another and to the various types or

* The agreement had been so brought into force.

qualities of yarn within a section. Provided always that all minimum marginal rates for any particular section shall be fixed upon such one of two systems, namely, marginal rates based on a special cotton futures month or margins added to replacement cost of raw cotton as a general meeting of the section may from time to time decide upon, or in the case of new sections on such systems as a general meeting of the section with the consent of the co-ordinating committee may from time to time agree upon. And Provided that no minimum marginal rates or charges for ancillary processes shall be brought into effect by any sectional committee unless and until such minimum marginal rates or charges have been approved by the co-ordinating committee who shall, after giving consideration to the relevant importance of the minimum marginal rates or charges in question, either (a) approve them for notification under cl. 35, or (b) of themselves or jointly with the sectional committee concerned require such minimum marginal rates or charges to be submitted for approval by a general meeting of the relevant section. And Provided further that if the co-ordinating committee do not agree with all or any of the minimum marginal rates or charges fixed by a sectional committee and approved by a general meeting of the section concerned the question shall be referred to the appeal tribunal who shall have power to say whether the decision of the sectional committee concerned or the decision of the co-ordinating committee is correct and shall be brought into force but the appeal tribunal shall have no authority of itself to fix a marginal rate or charge for ancillary processes. On the award of the appeal tribunal being given in favour of either the co-ordinating committee or the sectional committee the minimum marginal rates or charges so decided upon shall be the minimum marginal rates and charges of the section and shall be brought into effect and be binding upon members of the section. For the calling of general meetings of sections for the purpose of approving marginal rates or charges under this clause forty-eight hours' notice shall be given."

By cl. 26:

"Without in any way limiting the general power of fixing minimum marginal rates and charges for ancillary processes and terms and conditions conferred on them under the last preceding clause each sectional committee may from time to time with the approval of the co-ordinating committee exercise the following powers namely:—

"(A) If in their opinion the business of any members in the section in export markets is being adversely affected by the operation of the minimum marginal rates or charges as aforesaid laid down or by prices of foreign competitors they may allow the members concerned to make special specified or general reductions from the minimum marginal rates or charges in force in such manner that there shall be no discrimination whatsoever between one member concerned and another. Each sectional committee shall lay down the methods under which any such reductions may be operated (whether by price reduction or rebates or by any other appropriate method) and they shall take such steps for instance by securing proof that goods have actually been exported as will satisfy them that a proper supervision is exercised over all such transactions and that evasion will be prevented.

"(B) They may draw up and impose a uniform sales contract or series of contracts suitable for the various requirements of the yarn concerned in the section or for the particular market therefor in such manner that no variation or discrimination shall be made as between one member concerned and another in the same class of trade. Any such contract may (i) be in a separate form incorporated by reference into any particular contract, (ii) contain uniform clauses and conditions, (iii) lay down and provide for definite completion dates.

A "(C) They may authorise variations from the normal customers terms and conditions of sale to the effect that a commission shall be paid to any agent if and so long only as such agent has executed and observed a written agreement with a member satisfactory both to the sectional committee and co-ordinating committee providing that such agent shall not deal in competitive yarns for any other person.

B "(D) They may upon application by any member in the section that the operation of this agreement is inflicting hardship upon him (such application to be made in writing to the secretary) allow such particular concession from any minimum marginal rate in operation for such limited period and/or for such volume of business as they shall consider to be fair both to the member concerned and to the other members in the section C in order that the particular hardship may be removed but before making any such decision whether of allowance or refusal the sectional committee shall allow the applicant member to appear before them and state his case but if he does not avail himself of this opportunity the sectional committee shall have power to consider and decide the case in his absence.

"(E) They may make concessions to members whose mills are or have D been stopped as a result of concentration of production by giving such members a preference over other members in such manner as may be thought proper until such time as the mills so stopped have obtained average running or their order books have attained some given decided weight.

"The approval of the co-ordinating committee shall be obtained by the E sectional committee concerned placing all the facts before them and the decision of the co-ordinating committee shall be final and conclusive."

By cl. 27:

"No member may directly or indirectly sell offer for sale quote for dispose of supply produce on commission deliver or invoice any yarn the minimum marginal rate of which is controlled by this agreement or attempt F to do so and no member shall make charges for any ancillary process governed by the agreement or attempt to do so by any contrivance trick or stratagem at any lower marginal rate or charge than or upon any terms and conditions more favourable to a customer or agent than those fixed from time to time by the sectional committee of the section within which such yarn comes or do anything contrary to anything done under G the last preceding clause except under a bona fide contract entered into before such marginal rate charge terms or conditions came into operation and not made with a view of evading the operation of this agreement. No member shall make any rebate concession or allowance on any of the said yarn the effect whereof is to allow or compensate for or effect a reduction in the marginal rate of the said yarn. A member shall be at liberty to H obtain any higher marginal rate or charge if he shall think fit."

By cl. 28:

"Nothing in this agreement shall prevent any member from spinning any kind or quality or count of yarn as he shall in his absolute discretion decide Provided that it is not offered for sale or quoted until samples quality mark and particulars thereof have been deposited and registered under this agree- I ment and a temporary or final minimum marginal rate has been allotted to it as set out below. And Provided also that no counts of any particular quality outside those previously declared or registered for such quality may be dealt in unless the previous consent of the secretary has been obtained and the provisions of the next succeeding paragraph complied with."

By cl. 29:

"If any member intends to change the quality of any yarn spun by him or to introduce a new quality of yarn or extend the range of counts of any

existing quality beyond the counts already registered he shall forward to the secretary samples of such yarn and particulars of its type range counts quality and quality mark. If the secretary considers that the yarn is not already registered he shall deal with the matter as if it was an original supply of samples quality mark and particulars. If he considers that the yarn is already registered he shall after consultation with the member concerned allocate it to such category as he considers proper and the minimum marginal rate terms and conditions applicable to yarn of such category shall forthwith apply temporarily to such yarn until its placing has been varied by a classification committee which shall be constituted by the co-ordinating committee in such manner as they consider proper with due representation upon it of every section of the industry. The classification committee shall have such powers and duties as shall be given to them by the co-ordinating committee.

"Upon such temporary allocation as aforesaid being made by the secretary he shall forward the samples to the classification committee who shall consider and deal with them as soon as possible thereafter."

By cl. 35, notice of any variation in minimum marginal rates, or in the charges for ancillary processes, or in the terms and conditions relating to yarn coming within the terms of the agreement which might be decided on from time to time by any sectional committee, had, after it had been approved under cl. 25, to be sent to each registered member by prepaid post, and proof of posting such notice was to be deemed to be sufficient evidence of service. By cl. 37, members were to allow inspection and examination by an accountant of yarn contracts, yarn contract books, delivery books, yarn credit books, weight books and any other books or documents which the accountant might consider necessary to enable him to decide whether or not a member was carrying out the terms of the agreement. By cl. 39, periodical investigation at the premises of members was to be made by an accountant who had to make written reports as to the result of his investigation.

By their statement of case, the Association contended that the restrictions to which the members of the Association as a whole and the members of each section taken separately were subject, were not contrary to the public interest by virtue of s. 21 (1) (a), (b), (e), (f) and (g) of the Act. During the course of the hearing the Association by their counsel stated (on Nov. 17, at the conclusion of their case) that they would not proceed with their claim to come within s. 21 (1) (a), and on Nov. 28 they abandoned their claim to come within s. 21 (1) (f). At the commencement of the hearing, there was no list of restrictions agreed on between the parties but, for a list subsequently agreed, see p. 323, letter C, to p. 324, letter H, post. By para. 6 of the statement of case, as amended during the hearing, it was contended that the removal of the price restrictions would deny to the public as purchasers, consumers or users of yarn or fabric or other articles made therefrom

"the following specific and substantial benefits or advantages, namely: (a) that the price restrictions have ensured, and only by them can there be ensured in conditions of full employment and the present and foreseeable circumstances of the industry, a sufficient preservation of the processing capacity and labour force of the cotton spinning industry which is of value (i) in enabling increase of demand in seasonal or other fluctuations (characteristic of the textile industry) to be adequately and promptly met (ii) in providing variety development and innovation in goods available to the public, and (iii) in enabling the cotton spinning industry to give the best service in time of national emergency or in times when particular sources of supply are scarce.

"(b) that the operation of the price restriction provides important advantages both to the public and to other sections of the yarn consuming industry

in the constantly recurring periods of rising and falling raw material prices and of recession and revival in the industry namely:—(i) that when the price restrictions are fully in force, increases in such raw material prices are not immediately reflected in increased minimum prices and are therefore delayed in their impact upon fabrics or other products especially by the opportunity afforded to weavers and others to place forward orders at the lower prices. (ii) that at the onset of a recession in demand in any important sector, prices of yarn fall more rapidly and more generally than they would in a fully free market; since both spinners and their customers know that they will ultimately be forced on to the minimum prices which indicate a clear bottom to the market. This results in a tendency to get on to the minimum prices quickly instead of attempting to hold prices steady as long as possible owing to uncertainty as to when the fall will end. (iii) that the price restrictions cause lower prices to be charged for yarn on the revival of demand after recession than would be the case under a fully competitive market because mills are able in periods of recession to remain working instead of closing down, and so to have available sufficient capacity to meet accumulated demand, when demand revives, without the steep rises in price which would occur if (as would happen if the protection of minimum prices were removed) a number of mills had been forced to close in whole or in part. (iv) that the operation of the price restrictions enables weavers and other immediate trade customers to hold lower stocks of yarn relying on their ability to place forward orders on yarn (as aforesaid) if necessary and thereby to save the expense of working and other capital costs, and so serves to make a fabric of a given quality cheaper in the long and short run to the final consumer.

" (c) that competition among the two hundred members, both between themselves alone and between themselves and spinners of fibres that are not subject to the price restrictions, is channelled into the maintenance and improvement of quality and service in manner set out in para. 5 (2) [of the statement of case] which is particularly important in the case of fabrics where durability is not apparent to the final consumer at the time of purchase.

" (d) that the operation of the price restrictions has enabled the cotton spinning industry to undertake extensive expenditure in modernisation and re-equipment, thus enabling the public to obtain a better article for the same price, or the same article for a lower price.

" (e) that the operation of the price restrictions prevents the establishment of monopoly or near monopoly conditions in the cotton spinning industry with the consequent disadvantages or serious risk of, inter alia, ultimate increases in price, denial of variety to the consumer and delays in supply."

By para. 8 of the case it was contended that, having regard to the conditions actually obtaining and reasonably foreseen at the time when the Yarn Spinners' Agreement was referred to the court, the abolition of the price restrictions would be likely to have a serious and persistent effect on the general level of unemployment in the following areas, either separately or taken together, being areas in which a substantial proportion of the cotton spinning industry was situated:—Ashton-under-Lyne (including also Denton, Hyde, Dukinfield, Stalybridge and Mossley), Bolton (including also Farnsworth, Westhoughton and Horwich), Bury (including also Ramsbottom, Heywood and Radcliffe), Chorley (including also Withnell and Coppull), Haslingden (including also Bacup and Rawtenstall), Leigh (including also Atherton), Oldham (including also Chadderton, Failsworth and Middleton), Rochdale (including also Littleborough), Royton (including also Shaw), Todmorden, and Wigan (including also Upholland, Ashton-in-Makerfield, Hindley and Aspull). The cotton spinning industry was a contracting industry with a bad record of unemployment between the wars, and young persons were less inclined to enter it. If they did enter it, and for adverse reasons became redundant, they went quickly to other industries which they regarded as having

more stable prospects and, after their experience, were reluctant to re-enter cotton. A particularly high proportion of the operatives in the industry were elderly persons and married women, who would be unlikely to find other employment, and they depended for their continued employment on the presence of the younger employees, many of whom were in key positions, so that a desertion from the industry by the younger employees would necessitate a closing of mills in whole or in part, which would lead to the older ones not merely becoming unemployed but becoming permanently unemployed. The operation of the price restrictions reduced the need for mills to close temporarily and then endeavour to re-open, so avoiding the risk of forcing younger operatives out of the industry. Such unemployment would then spread to the weaving industry in Lancashire which was largely dependent on the existence of adequate local spinning capacity.

By para. 12 of the answer, the registrar set out the following detriments:— (i) members of the Association who could produce yarn at the lowest cost were, by the operation of the restrictions, deprived of the opportunity of quoting lower prices commensurate with those costs and thus of a principal means of expansion, and of reducing their costs still further by obtaining a larger share of the total demand for their products; (ii) when demand fell, the restrictions protected or were likely to protect the high cost firms from the competition of the low cost firms; (iii) specialisation was prevented or hindered since members were wholly or partly deprived of the opportunity of quoting lower prices for particular types of goods with the object of obtaining a larger share of the total demand for them; (iv) long runs and regular production which made for cheapness and increased efficiency were hindered because spinners could not quote lower prices for large orders; (v) the operation of the restrictions reduced incentives to development of more efficient marketing by particular bargaining suited to circumstances of buyer and seller; (vi) the restrictions relating to terms and conditions of sale prevented purchasers from negotiating terms and conditions suitable to their requirements; (vii) the restrictions as to agents' commission and as to terms and conditions of sale* introduced rigidity in the pattern of distribution and so reduced the variety of services and conditions available to customers; (viii) the restrictions reduced the incentive to enterprise in the industry and discouraged or afforded no encouragement to efficient production; (ix) the restrictions did not allow account to be taken of skilful purchasing of raw cotton and discouraged skilful forward buying especially of small or minor grades; (x) prices fixed for growths of cotton did not represent the market value thereof; (xi) fluctuations in output were aggravated by keeping up prices or delaying reductions in price in times of some recession in demand, thus aggravating also instability of employment in the industry; (xii) the restrictions contributed to the continuance of excessive capacity in the industry. It was in the public interest that the industry's capacity should be adjusted to the level of long-term demand. Though this might involve the closing of the least efficient mills and a reduction of the total number of firms, the long-term result would be the reduction of costs and maintenance of production at a higher level and sales at lower prices than would otherwise be the case; (xiii) members supplied yarn to manufacturers in the United Kingdom who produced a great variety of products for export. Such purchasers paid more for the goods supplied than they would if the restrictions were removed. Thereby the costs of such manufacturers were increased and they competed on the export market on less favourable terms. Moreover, the hindrance to specialisation referred to under (iii) above and the fact that the restrictions relating to terms and conditions prevented purchasers from negotiating terms and conditions suitable to their requirements were handicaps to manufacturers competing for export business. The addition of two per cent. to the home trade prices, which themselves were as a result of the restrictions higher than they would be in their absence, for exports of yarns reduced the competitive power of such exports. The restrictions thus had the effect of reducing the

* See cl. 26 of the agreement, pp. 304, 305, ante.

A volume of earnings of the whole export business; (xiv) it was a detriment to the public at the present time that any arrangement should be maintained which prevented or discouraged any manufacturer from reducing his prices if he was in a position to do so; (xv) it was a detriment that members were not reasonably free to resign from the Association, having regard to cl. 4 (ii) of the Yarn Spinners' Agreement,* which required six months' notice to expire on the anniversary of B the day on which the agreement came into force.

On Nov. 12, 1958, during the course of the hearing and after discussion on the previous day concerning cross-examination, DEVLIN, J., pronounced the following formula with reference to the cross-examination of witnesses:

> " If cross-examining counsel has put his case on any point to one of the C other side's witnesses, he is not under any obligation to put the case on that point again to other witnesses who follow. He may expect that if examining counsel wants to elicit further facts or expressions of opinion on the same point from subsequent witnesses, he will do so in chief. This does not mean that the first witness can automatically be treated as representative. If cross-examining counsel has obtained from him admissions or expressions of D opinion or any other qualifications of his evidence, he can rely upon them in argument notwithstanding that he has not cross-examined other witnesses who deal in chief with the same point; but he is not entitled to assume that such other witnesses would, if cross-examined, have made similar or any qualifications of their evidence in chief."

On Nov. 18, 1958, on the question of at what stage in the proceedings proofs E of witnesses were to be treated as evidence in the case, DEVLIN, J., said proofs were exchanged for the convenience of the parties and so as to enable the court to save time by reading them, but they were not to be treated as evidence in the case until the witnesses were called or they were put in, as they might be, without a witness being called; up to that point they were confidential (see [1958] 3 All E.R. at p. 455 H). If a proof had been before the court and had been read but F the witness was not called, then at the end of the case—either for the respondents or for the registrar, whichever it might be—all the proofs which had been tendered and read by the court should be treated as being in evidence unless an application was made either for cross-examination of the witness or for withdrawal of a proof†. In the latter case the court would have to consider whether it was something that they could regard themselves as having read de bene esse merely, G and, therefore, disregard, or whether that course might possibly do some unfairness to the other side unless they had an opportunity of dealing with the matter in the proof.

Sir Andrew Clark, Q.C., R. O. Wilberforce, Q.C., and *G. W. Tompkin* for the Yarn Spinners' Association.

A. A. Mocatta, Q.C., and *J. R. Cumming-Bruce* for the registrar.

H *Cur. adv. vult.*

Jan. 26. **DEVLIN, J.,** read the following judgment of the court: The respondent in this case is the Yarn Spinners' Association, and the agreement which the court has to consider is one which binds the members of the Association not to sell yarn containing eighty-five per cent. or more of cotton at a price lower than that fixed under the rules of the Association. The spinners who are members I of the Association form a section of the Lancashire cotton industry. The spinning industry is concentrated in a small area about thirty-five by twenty-five miles

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* The terms of cl. 4 (ii) are set out at p. 303, letters D to G, ante.

† After reference had been made to the Restrictive Practices Court Rules, 1957 (S.I. 1957 No. 603), rr. 52-58, with a view to seeing what power the court had to admit evidence not on oath, DEVLIN, J., stated that the court had indicated what they considered to be the most convenient course for dealing with the problem, and whether they had power under the rules and the scope of the rules might have to be argued thereafter, possibly on interlocutory application in some future case.

in extent, stretching from Wigan through Bolton to Oldham, mostly in Lancashire but partly in adjoining counties. The industry is now in the hands of about 225 concerns which employ something over one hundred thousand operatives; exact figures are not available. The spinners are at the base of the cotton industry. They buy imported raw cotton, classified as American or Egyptian types, and can be divided into three groups according to the character of the cotton which they spin. The largest contains the spinners of American type cotton, out of which the coarser yarns are spun; this forms sixty-five per cent. of the industry. Another group, containing twenty per cent. of the industry, spins cotton of Egyptian type, which makes a finer yarn; and the remaining fifteen per cent. spins waste cotton, which is a by-product from the preparation of American and Egyptian cotton. The yarn which is spun by the spinners is called "singles yarn". About a quarter of it passes into the hands of another section of the trade, the doublers, who twist two or more threads of singles yarn into a double yarn for use where something stronger than the ordinary yarn is required. Of all the yarn spun, whether single or double, seventy per cent. passes to the weavers, who are a third section of the trade, about five per cent. is exported and the remaining twenty-five per cent. is used for a great variety of different purposes, such as hosiery and sewing thread. The weavers, who form a considerable part of the cotton industry but with whom this case is not strictly concerned since they are not parties to the Yarn Spinners' Agreement, manufacture from the yarn cloth in an unfinished state, generally known as grey cloth. The cloth is passed on to the next section of the industry, who are the merchant converters. They have it finished—usually on commission—to their own specification, that is to say dyed or bleached or printed, and they then sell it to a garment maker for making up, or to a wholesaler to pass on to a retailer, or for export. The cotton industry is thus what is called a horizontal industry. There are one or two concerns which are responsible for the whole of the processing from the raw material to the finished article. But, as a rule, the processing is done in stages in which the goods pass from one producer to another. There are companies and firms who are concerned with more than one stage; there are spinners who are doublers or weavers, and some who are all three. But, for the most part, the spinners are a separate body whose main customers are the weavers and the doublers. The doublers have an agreement between themselves similar to the one which we are considering; the weavers have no agreement.

The prosperity of the Lancashire cotton industry was built up on a vast export trade and, until 1914, it was steadily expanding. In 1912, eighty-five per cent. of the cotton piece goods spun, woven and finished in Lancashire were exported; by 1938, this percentage had fallen to fifty per cent., and since then it has declined to about twenty-five per cent. Much of the world trade in cotton has been taken from England by India, Pakistan, Japan and Hong Kong; and, indeed, in 1957, twenty per cent. of the cotton piece goods sold in England were imported from these four countries. The spinning industry has shared in the general decline of cotton. In 1937, about 1,350 million pounds of cotton yarn was produced in the United Kingdom; by 1957, production had fallen to 720 million pounds. The number of spindles (that is "mule spindle equivalents" which it is convenient to take as the unit of capacity) has dropped from thirty-nine to twenty-eight million. In this decline, the smaller concerns have suffered most, and the ownership of the industry is now more concentrated than it was; about forty per cent. of the spindle capacity is now held by five concerns, and about two-thirds by thirty. The twenty years from 1937 to 1957 have been a period of ups and downs. During the war, production was severely curtailed; one-third of the spinning capacity was closed down, and production and employment fell to half the pre-war level. The Cotton Control was established and prices were fixed. At the end of the war, a technical committee was set up to investigate and report on prices which should be permitted in the cotton industry so long as it remained under government control. A costings investigation was carried out,

A and in 1948 the committee made its recommendations about the method by which prices should be calculated. When, in April, 1949, price control was removed, the Association asked its members to treat the prices fixed under this report as minimum prices; and it was in this way that the minimum price scheme, which we have to consider, became inaugurated.

When price control was removed in 1949, clothes rationing went also, with B the result that for some time the supply was unequal to the demand. In the early part of 1951, the industry reached its highest post-war peak of activity. The amount of yarn produced in this year was nearly one thousand million pounds. But by the summer of 1951, a recession had begun to develop; and in 1952 the industry had the worst of its post-war years, with a production of under seven hundred million pounds. Thereafter trade gradually improved until there C was another recession in 1955. This continued until the Suez crisis at the end of 1956 caused a revival of demand, which did not, however, last beyond the middle of 1957. The industry has since been, and is now, in a recession comparable with that of 1952.

The decline in the industry has been specially marked in the finer counts or qualities of yarn. A count is the number of lengths of 840 yards of yarn which D go to the pound in weight; therefore, the finer the yarn the higher the count. The machinery in a mill consists of preparation machinery as well as of spinning machinery. The former carries out those processes such as bale breaking, carding and combing, necessary to get the fibre right for spinning. The finer counts take longer to spin than the coarser, but there is not the same degree of difference in the preparation of fine and coarse. Therefore, a mill which is spinning the E finer counts needs more spinning machinery in relation to preparation machinery than one which is spinning the coarser. In planning a mill, it is usual to decide on the range of counts which the mill will normally spin, so that preparation and spinning machinery can be correctly balanced. The middle figure of the range is known as the mill's " balanced count ". Outside the range (unless it can be extended evenly at both ends) the mill cannot make the most economical F use of its machinery. If it were to spin coarser counts, some spinning machinery would be idle; and if it were to spin finer counts, some preparation machinery would be idle. Yarn is sold by the pound weight, and the price varies a great deal according to the quality and count. A not unusual price might be 5s. or 6s. per pound. Most of the yarn consumed by the public reaches it in the form of cotton piece goods, and an increase or decrease in the price per pound of yarn G has a very diminished impact on shop prices. A reduction, for example, of 1d. per pound in the price of yarn to the weaver, would make a difference of not much more than a penny in the retail price of a 19s. 6d. shirt.

The calculation of the minimum prices to be applied under the scheme is inevitably complicated. There are two distinct types of cotton, with many different grades, possible mixtures and counts, and the scheme must cover all H practical variations. In fact, more than seven hundred individual margins are listed in the Association's schedules. The calculation, for any particular yarn, falls into two parts, if we ignore minor complications such as special forms of make-up. The first is the ascertainment of the " clean cotton cost ", which takes into account the mixing cost; that is, the cost of the raw cotton used in the yarn, at the date of a sales contract for yarn, priced in accordance with rules I regulated by the Association, with certain gains and losses involved in processing at this stage, and an allowance for interest on variable working capital. A further element has been added in recent years; namely, a fixed amount of 1½d. per pound designed, it is stated, to cover buying risks arising from the inadequacy of merchanting services in today's cotton market conditions. The second is the determination of the appropriate minimum spinning cost margin for the yarn; this is designed to cover the spinners' conversion costs; that is to say, labour, overhead expenses and depreciation with, in addition, an allowance for interest on fixed capital.

Labour and overhead expenses for the margins are computed by a method based on that adopted by the technical committee which had reported in 1948. Returns from a representative number of mills, showing the actual costs (in pence per pound) for each count of yarn spun by the mills, are tabulated. The upper third of the costs for each count is excluded, and the median costs figure is taken, from the remaining two-thirds, to be standard cost for that count in determining the margin, and this is enforced on all members. The amount included in the margin in respect of depreciation covers depreciation on buildings and machinery. The amount in respect of interest on fixed capital covers interest on land, buildings and machinery and on fixed working capital, which is the non-cotton value (in other words, the conversion cost) of the partly processed yarn on the machines and of the yarn stocks held. The capital cost on which the foregoing depreciation and interest allowances are computed is based on the area, lay-out, building, plant, machinery and equipment which would be required to establish, separately, seven representative modern, freehold, ring-spinning mills of the most economical size and operating method, each of which is balanced on a particular count, namely, 10's, 20's and 32's in American type yarns and 54's, 74's, 100's and 130's in Egyptian type yarns. The cost bases for land and buildings are the 1948 cost values; the basis for machinery and ancillary plant is the estimated 1955 replacement cost.

Thus, the minimum price is an artificial figure calculated on a hypothetical average cost. It does not represent the cost actually incurred by any individual mill and every mill will, therefore, be above or below it by a small or a large margin. A spinner who can consistently purchase raw cotton shrewdly and skilfully when the market is in his favour will be able in this respect to make a profit out of the minimum price; for such a man the 1½d. per pound allowance to cover buying risks will be pure gain. The method of calculating labour and overheads puts the producer who is in the upper third at a disadvantage; if this were the only factor to be taken into account, he ought to be losing several pence on every pound sold at the minimum price. But what he loses in this way he may, perhaps, make up under the provisions for interest and depreciation. His high cost of production may be due to the fact that his buildings and machinery are old. If they were bought at pre-war prices and if their value has already been largely written off, a figure for interest and depreciation calculated on post-war values may easily provide a big enough margin to absorb the higher operational cost and provide a profit.

In theory, the minimum price is designed to tide the spinner over short periods of recession. Since there is no allowance in it for profit over and above interest on capital, one would suppose that the average spinner would not find it worth his while to remain in business for very long on the minimum price. But, as we have shown, without investigating the accounts of each spinner individually, it is impossible to say whether the minimum price gives him a profit or not; and the fact is that, for most of the time since 1952, the majority of spinners have been operating at the minimum price. Indeed, the minimum price has now very nearly become the fixed price. When a spinner succeeds in obtaining a few pence per pound above the minimum price, he refers to it as a premium or surcharge; the figures we have show that the difference between minimum and maximum has never exceeded about 7½ per cent. and on the average it is much smaller, about two or three per cent. Moreover, the premium does not necessarily mean a better market price; it may mean a surcharge to compensate for special work. The greater part of the premiums earned since 1951 by one of the big five combines came from specialty yarns.

We have heard much general argument and evidence about the object of the scheme and its merits and demerits, and also about the principles which underlie minimum price schemes generally. We do not intend to pass judgment for or against minimum price schemes in principle, either in the cotton trade or in any other. We shall confine ourselves to this particular scheme; but we think it

A would be useful, before we get down to the specific contentions made by the Association, that we should state how the scheme has been presented to us generally, and what are the general conclusions which lead us to our specific findings.

The scheme is designed to guard against cut-throat competition such as happened in and after the great slump of 1929–31, and the recurrence of which B is feared by all sections of the cotton trade. The scheme is based on the theory that the spinning industry is one in which there occur from time to time short but violent recessions. In these periods, it is said, some spinners will, unless restrained by common agreement, seek to maintain their output by selling below cost. In the long term this would be suicidal, but some mills will do it and take any price they can get because without cash they would have to close down. C Before 1939, they could have shut down temporarily; their workpeople would have gone into the pool of unemployed and would have come back when things were better. If a mill were to do that now, it would lose its labour—or at least its key labour, the young and the skilled—for ever. So the only alternative to closing down is for it to carry on for whatever price it can get in the hope that, if it can weather the depression, it will make big profits when demand revives. D This is what is meant by cut-throat competition and, it is claimed, it is bad for the industry. If one firm lowers its prices below cost, others will be tempted or compelled to follow suit; and in the battle for diminishing trade the weakest will go to the wall. It is argued that this will not in the long run be in the public interest. At the depth of the depression the public may benefit for a short while from cut prices; but, if the cutting of throats has decimated the industry, it E will be left unequal to normal demands when the recession is over; there will then be a period of shortages, and the mills that have survived will take advantage of them to charge abnormally high prices so as to recoup themselves for their losses. It is in the long run much better for the public, it is argued, that there should be a steady supply of the goods it wants when it wants them and at stable prices; and this benefit or advantage can be assured to the public F only by a minimum price scheme.

We have had to consider whether this is a correct diagnosis of the conditions in the spinning industry and, if so, whether this minimum price scheme is well designed to deal with it. The theory on which the scheme is based seems to presuppose that periods of recession when minimum prices are effective will be exceptional and that the industry will normally be operating above them. This G hardly seems to have been the case since 1952. Most American type yarns—and the American types account for nearly two-thirds of the whole production—were only lifted off the minimum for two short periods, one of eighteen months from January, 1954, to August, 1955, and the other for less than a year after the Suez crisis. Egyptian type yarns, as a whole, did better; they were on the minimum for two substantial periods of a year or more but were off it for about H two-thirds of the whole period; and waste yarns have hardly been on at all. But, looking at the industry as a whole, it is difficult in the face of these figures to regard a recession—if what is meant by a recession is that the demand is not sufficient to push the price off the minimum—as exceptional.

In our judgment, this minimum price scheme is not what is sometimes called I a "stop loss" scheme. It does not operate simply to prevent cut-throat competition and selling below cost when demand is exceptionally poor. By setting the operating cost margin at the middle of the lowest two-thirds, it may well have been thought that, unless the periods when the minimum price was effective were very brief, high-cost producers would inevitably be eliminated. But it has not happened in that way. One way or another the minimum price appears to insure a reasonable return all the time to the majority of spinners. The fact is that the calculation of the prices is so far divorced from actuality that the total effect of the formulae may have been extremely difficult to foresee. It is a

theoretical calculation, and, in the words of the Weavers' Association, which is in a good position to judge, A

> "the actual financial results (practical rather than theoretical) achieved by most spinning firms—even including some with low machinery activity—appear to be disproportionately high."

We are satisfied that, since 1951, on the average the prices obtained for yarn have been higher than they would have been in a free market. Everyone agrees B that spinning is a contracting industry; therefore, reductions in capacity ought broadly to match the falling demand and high-cost producers ought to be closing down. The scheme has not altogether prevented the natural process, but it has seriously retarded it. We are satisfied that there is now a substantial amount of excess capacity in the industry over and above the reserve capacity which it is prudent to keep in being to meet any sudden increase in demand. Since 1952 C the spindle capacity in the industry has been running on the average only to the extent of about seventy per cent. In the United Kingdom in 1956/57 two thousand one hundred hours were worked per spindle per annum; in Hong Kong the corresponding figure was eight thousand one hundred, in the U.S.A. six thousand one hundred, in India five thousand nine hundred, in Japan four thousand nine hundred and in Germany four thousand. We are satisfied that D this excess capacity will not in the foreseeable future be eliminated unless the scheme goes. We are satisfied that the industry can, and ought to, be made smaller and more compact.

These are our general conclusions. But this case, like every other brought under the Restrictive Trade Practices Act, 1956, falls to be determined in accordance with specific findings. By the terms of the Act*, the scheme is E prima facie contrary to the public interest, and this court must so declare, unless the Association can prove the existence of the circumstances defined in one or other of the seven categories in s. 21 (1). The Association contends that the court should be satisfied either of the circumstances set out in para. (b) or of those in para. (e). Similar claims under para. (a) and para. (f) were abandoned in the course of the hearing. F

In para. (b) we must be satisfied that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such. The Association contends that, by virtue of the scheme, a number of benefits is enjoyed by the shopping public which purchases cotton goods. Alternatively, it contends that benefits are enjoyed by purchasers of yarn; these are G all trade purchasers, mainly weavers, and it is submitted that they constitute the yarn buying public. Since the paragraph refers to "any goods", it appears capable of covering both yarn and the cotton goods into which it is made. In his closing speech, counsel for the Association very conveniently grouped the alleged benefits under nine broad heads, and we shall take first those that are said to affect the public at large. The first of these is a sufficient preservation of H the processing capacity and labour force; this is alleged in para. 6 (a)† of the Association's statement of case to be valuable in meeting fluctuations in demand, in providing variety of goods for the shopping public and in times of national emergency or when particular sources of supply are scarce. We have already found that there is excess capacity in the industry. The question is, therefore, whether the abrogation of the scheme would not only destroy the excess capacity, I as we believe it would, but would leave the industry without sufficient reserve capacity to meet a revival in demand. We think that, after an initial period of uncertainty, demand will probably recover from its present very low level. Buyers have allowed their stocks to get so low—partly, no doubt, because of the

* I.e., by s. 21 (1) of the Restrictive Trade Practices Act, 1956, a scheme "shall be deemed to be contrary to the public interest unless the court is satisfied of any one or more of the following circumstances . . ."

† See p. 306, letters H and I, ante.

present uncertainty about the future of the scheme—that we do not believe their commitments will enable them to hold off much longer. But, even allowing for some revival, we think it inevitable that, in the near future, a number of mills will have to close down; there are high-cost producers who we do not believe will be able to carry on without the protection of the scheme. Nevertheless, subject to the initial dislocation which must inevitably follow on the abandonment of the scheme, we see no reason to believe that the industry will be left without sufficient capacity to meet all the ordinary demands of the home market and to maintain, if not increase, its share of the export market. It is, however, claimed that it is not enough that there should be sufficient capacity to meet all ordinary demands; there must be reserve capacity to cope with the fluctuations in demand that occur in the industry. There are, undoubtedly, fluctuations in the demand for yarn. They are not enormous; the economists who gave evidence on behalf of the Association spoke of them as being high in comparison with other industries but not unique; the quarterly figures of production over the last six or seven years show an average fluctuation of ten per cent. either way. This is not a fluctuation in the public demand for cotton goods, which remains quite steady. It is a fluctuation in the demand for yarn, largely due to the horizontal character of the industry. In times of uncertainty, the merchant holds off the market and this starts a recession which accumulates in effect as it goes down the line until the full impact is met by the spinner at the end. This is hard on the spinner, but we believe that it is partly due to the scheme itself. There is no inducement for weavers and merchants to hold stocks if it is known that there is excess capacity in the spinning industry available to fulfil an order as soon as it is given; and there is no inducement to place an order in advance of an anticipated revival if there is no fear of any sharp rise in prices. We are not satisfied that the fluctuations in the industry are so severe as to call for exceptional measures to create and maintain reserve capacity. Every mill will have some reserve capacity of its own. Overtime working and double shift working may not be so easy to operate in the cotton industry as they are in some others; but we do not think that they are at present being used to anything like the extent which they might be. We agree that adequate reserve capacity is desirable; the question is whether concerted action is needed to obtain it. We do not think that it is, and we think that what is necessary can be got without the scheme. We think likewise that, without the scheme, the public will be provided with all the cotton goods in the qualities and varieties which it is likely to demand. Lastly, it is contended that there is a special need for the preservation of capacity in order to meet periods of national emergency. As we have said, twenty per cent. of the British public's demand for cotton goods is satisfied by imports from abroad, chiefly from India or Hong Kong. It is true that the outbreak of war or the action of foreign governments might cut off or curtail these sources of supply. But we cannot speculate about this or about the probable consequences of this type of interference. It has to be remembered that the spinning industry cannot function at all without imports of raw cotton; and no one can say what the national policy would be with regard to these imports or with regard to the quantity of yarn that the country might need. During the last war the capacity of the spinning industry was not extended, but severely reduced. For these reasons, we are not satisfied that the removal of the restrictions would deny to the public any of the benefits alleged in para. 6 (a) of the Association's statement of case.

Under his second head, counsel has listed the benefits which are alleged in para. 6 (d)* of the Association's statement of case, namely, that the operation of the restrictions enables and encourages the industry to spend money on modernisation and that this enables the public to obtain cheaper or better goods. We think that the existence of the " floor " which is created by the scheme, and the feeling of stability and confidence in the future which it gives, does make it

* See p. 307, letter F, ante.

likely that mills will spend money on modernisation and encourages them to do so. Whether there are good grounds for this feeling, we need not say; we are impressed with the volume of evidence which shows that it is, in fact, the attitude of the mills. Modernisation should lower costs and should, therefore, result in some ultimate benefit to the purchasing public. But it will not lower the price to the public until it is done to a sufficient extent to have an appreciable effect on the operating cost margin; and that effect will inevitably be delayed until after the next costs investigation. Moreover, as we have already shown, a reduction in the price of yarn has either to be very substantial in itself or has to be combined with other reductions further down the line before it affects the public's purse. We have come to the conclusion that the advantage to the public in the form of cheaper and better goods to be derived from modernisation resulting from the scheme is not a substantial one and cannot, therefore, be brought within the Act.

The next benefit relied on is that the scheme prevents what is called " price invasion ". As we have said, the machinery in the mill is balanced so that it is most economically utilised when the mill is producing a yarn within a particular range of counts. A change of fashion may diminish the demand for the yarn within that particular range. The mill will then go outside it and seek to attract customers for yarns of a different quality which belong to some other mill's balanced count. The easiest way of attracting new customers is to offer a lower price; the scheme prevents a drop below the minimum and so discourages price invasion. No doubt the ideal arrangement would be if every mill were fully occupied with its own balanced count; but, since that is not possible, we cannot see why price invasion is a bad thing or something which ought to be prevented; it is only one form of normal trade competition.

The next contention is that the scheme enables and encourages spinners to spin for stock in bad times, with the result that when demand revives there will be stock immediately available to fulfil it. Bad times mean presumably those times when the demand is not great enough to absorb the spinners' capacity when yarn is offered at the minimum price. It may be said that any spinner who does not want to sell below cost can spin for stock during such times without the assistance of the scheme. But, here again, from the evidence that we have heard we think that a spinner is more likely to spin for stock if all his competitors are doing likewise and none of them is trying to get for himself what demand there is at cut-throat prices. The benefit to the public which results from spinning for stock is, we think, only one particular aspect of price stabilisation. On the one hand, the agreement in times of recession prevents prices falling below the minimum; on the other hand, it encourages spinning for stock which helps to secure that, when demand revives, there will be no scarcity to send prices sky-high. We shall deal with this contention, therefore, under the general heading of price stabilisation, which comes later.

The next head to be considered is the one pleaded in para. 6 (c)* of the Association's statement of case. It is that when price competition is forbidden, competition is channelled into the maintenance and improvement of quality and service. Competition in quality is, no doubt, a benefit, but the removal of the restriction would not prevent it. If there were no restriction, the spinner would have a choice between giving better quality at the same price or the same quality at a lower price. Under the scheme, he is free to pursue only one of these courses. All that the removal of the restriction would do would be to give him back his freedom of choice. It may be that, if one channel of competition is closed, the volume in the other will be increased. If this increase can be said to confer a benefit at all on the purchasing public, we think that it is negligible.

The next head is that which is pleaded in para. 6 (e)† of the Association's statement of case, that the scheme prevents the establishment of monopoly or

* See p. 307, letter E, ante.

† See p. 307, letter G, ante.

near-monopoly conditions. We do not think that, if the scheme goes, there is any danger of this. Even if the industry were reduced to the five large combines, who now control about forty per cent. of it—and it is not suggested that the reduction would go further than this—it would not necessarily diminish competition; but, in fact, we do not believe that there is any likelihood of so severe a reduction.

We turn now to consider the broad head of price stabilisation The scheme obviously prevents prices from falling, and it is said that it also checks them from rising, by preserving capacity and accumulating stocks in readiness to meet revived demand. It is claimed that, when a recession begins, prices are brought down more quickly than they might otherwise be because it is known in the market that they will be supported eventually by the "floor"; and that, at the end of the recession, they will rise less rapidly because no spinner will wish to put his price too high so long as he has got accumulated stocks to clear. We think that any scheme which imposes a minimum price is bound in this or in other similar respects to contribute towards price stability. Any form of price control will probably make prices more stable than they would be in a free market. If price stability could be obtained without the sacrifice of a free market, it would undoubtedly be a benefit; if it can be looked at in isolation, it is no doubt a benefit. But we do not think that the proper way of considering this point is to admit price stabilisation as a benefit to the purchasing public, and defer for subsequent consideration the question whether the loss of a free market is a detriment to the public generally. We have to look at both sides of the medal. A question, for example, whether a contract for the sale of goods is beneficial is not divisible into two parts; it could not be argued that the acquisition of goods was of itself always a benefit and that the fact that they had been acquired at double the market price, while it might be a detrimental corollary, did not prevent the acquisition from being beneficial. What we have to consider is whether price stabilisation, as an alternative to a free market, is a benefit to the purchasing public in the circumstances of this particular case. We cannot think that, as a general rule, it is a benefit; if we were to hold that, we would be going contrary to the general presumption embodied in the Act that price restrictions are contrary to the public interest. There may be particular cases where price stabilisation confers a peculiar benefit sufficiently great to outweigh the loss of a free market, but this is not one of them. We cannot find that, in the circumstances of this case, stabilising the price of yarn confers any benefit on the purchasing public that is not outweighed by the loss of the chance of reductions in price that might be secured under free competition.

The Association relies in the alternative on benefits said to be conferred by the scheme on a particular section of the public, namely, the trade purchasers of yarn, who are mainly the weavers and doublers. Counsel has listed some of these benefits separately. He relies, in particular, on what has been called "the one-way option" which the weavers have. The result of the excess capacity in the spinning industry is that the weavers can obtain yarn more or less when they want it. In bad times they need not buy stock so as to be prepared for any sudden revival in demand since they can be sure that, when they place an order, it will be met without delay. They can place a large order at the minimum price, take delivery by instalments as they want them; and, if better times come and prices rise, they keep the benefit of the increase for themselves. Another benefit claimed by counsel is that the minimum price relieves the weavers from the evils of competition among themselves; they know that they have to pay a fixed price for the yarn and do not, therefore, cut each other's throats in an attempt to get yarn at a marked-down figure. In addition to these particular benefits, many of the advantages which we have considered above reach the weavers and the other trade purchasers before they reach the public. If, for example, during bad times the spinners spin for stock, it is a direct advantage to the weavers. A reduction in the price of yarn, which may have only a smal.

effect on the cost of a garment to the public, is of much greater and more immediate importance to the trade purchaser; he is benefited by it because either the price of the end product will be reduced, so increasing his sales, or he will be able to retain it as additional profit for himself. Of course, in exchange for these benefits, he loses the advantage of obtaining yarn at the lowest possible price in a free market. But the perpetual buyers' market created by the excess capacity preserved under the scheme is a substantial advantage. It is the view of the Weavers' Association that, on balance, the scheme is advantageous to them, and we see no sufficient reason to dissent from this.

If this point fell to be decided solely on the wording in s. 21 (1) (b), we should have to consider two difficult questions: first, whether the advantage was specific and, secondly, whether it was enjoyed by the public. Prima facie, the trade purchasers of yarn, who form a very small and special section of the community, cannot be described as the public. Counsel for the Association argues, however, that, since they are the only members of the public who purchase yarn, they must constitute the public for the purposes of para. (b). It is clear that they are not outside the definition simply because they are trade purchasers and not retail; that appears from s. 21 (2). " Any goods " in s. 21 (1) (b) does not mean, counsel contends, all the goods that the public purchases, consumes or uses; it means any goods that the Association selects for the purpose of discharging the burden of proof that lies on it. Counsel selected, in the first instance, cotton goods, in relation to which he had to consider the whole shopping public; and, alternatively, he selects yarn, in relation to which he has to consider only trade purchasers. This argument means that, although para. (b) refers to the public as a whole and makes no express provision for any sectional interest being considered, it can be construed so that, in a case such as this, the advantage to only a small fraction of the public is sufficient to bring the case within the paragraph. We doubt whether this was the intent of the draftsman, but we recognise that the grammatical construction of the words may lead to this conclusion. In view of our final conclusion on the facts, we do not find it necessary to decide either of these points of construction and we shall, therefore, assume for the purposes of this case that the benefits and advantages which we have outlined above are specific benefits enjoyed by the public as purchasers. On that assumption, we have to balance these benefits against the detriment to the public generally that arises from the scheme.

But before we perform this balancing operation, we must consider whether we are satisfied that the circumstances described in s. 21 (1) (e) have been proved to exist, since, if we are, they, too, must be put into the balance against the detriment to the public generally. The requirement in para. (e) is that, having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to have a serious and persistent adverse effect on the general level of unemployment in an area, or in areas taken together, in which a substantial proportion of the trade or industry is situated. The Act does not say how, for this purpose, the size of the industry, or of any part of it, is to be assessed; but, as the category deals with employment, it is appropriate to do so by means of the numbers employed in any area, and this is what both parties have done. Spinners and doublers are ordinarily classified together, and it has not been possible to obtain separate figures. The total figure of those employed in spinning and doubling throughout the whole country is about one hundred and forty thousand; of these it is probable that about one-fifth are employed in doubling and the rest in spinning. We are satisfied that the conclusions which we reach about spinners separately would apply also to spinners and doublers taken together; and it is, therefore, convenient to use the figure of one hundred and forty thousand and deal with the probabilities in relation to that figure. The requirement in para. (e) refers to an area, or areas taken together, in which a substantial proportion of the industry is situated. Accordingly, it is open to the Association to select any area or group

of areas, and endeavour, in relation to the area or areas selected, to discharge the burden of proving that the removal of the restriction would be likely to have a serious and persistent adverse effect on the level of employment in those areas. The Association has selected in the first instance eleven areas in which about one hundred thousand employees, or about seventy per cent. of the industry is situated; and, alternatively, has selected four out of the eleven in which about fifty-five thousand employees, or about thirty-eight per cent. of the industry is situated*.

We have been using round figures and shall do so throughout. It is, indeed, quite impossible to make precise calculations. The only way of obtaining precise figures about the number of unemployed is to take the number of persons who are registered at the Labour Exchanges as seeking work. These figures are not, however, quite comprehensive. Married women whose husbands are insured are not obliged to register, and it is estimated that about two-thirds of them do not. If a mill is closed down, it does not follow that everyone who is thrown out of employment thereby will apply to the Labour Exchanges. This is particularly true of married women who, because of their domestic duties, may be unable or unwilling to work in any other mill. It may apply also to the elderly, who, while they would have preferred a job to no job, are not willing to go to another mill and so are retired before their time. We accept counsel for the Association's submission that, while the Ministry of Labour figures afford us a necessary basis and the only one that we have for making calculations about the level of employment, we ought not to disregard these other factors because they are unquantifiable, but should make the best estimate we can of their effect. There is yet another difficulty about the figures of unemployed. They are divided by the Ministry into wholly unemployed and temporarily stopped; the latter category covers persons suspended from work on the understanding that they are shortly to return to their former employment. Workers put on short time are considered to be within this description if they are not working on the day on which the count is taken, which is a Monday. There is at present a great deal of short-time working in the spinning industry; the percentage of the labour force on short time in May, 1958, is calculated at over nineteen per cent., and probably now is substantially greater; in the case of many mills, short-time working is the only alternative to closing down. When there is short-time working in the spinning industry, it is likely that the mill will close for a long week-end, and so the short-time workers will be counted on Monday as temporarily stopped. It may very well be that the Ministry's figures for those temporarily stopped in the industry are largely composed of short-time workers.

Subject to these general observations about the value of the figures, we take as our basis the Ministry's figures relating to the eleven areas in October, 1958. There were then in all industries six hundred thousand insured workers, of whom over twenty-five thousand were unemployed, eleven thousand wholly and fourteen thousand temporarily stopped. Thus, the general level of unemployment in these eleven areas then stood at 4.3 per cent. In the spinning and doubling industry in these areas there were one hundred thousand insured workers, of whom nearly twelve thousand were unemployed, under two thousand wholly unemployed and ten thousand temporarily stopped. These round figures (they are not all absolutely up to date; in some cases it has had to be assumed that 1957 figures are substantially unaltered) are good enough as a working basis, since the factors which we have to apply are even more incalculable than the figures. How many mills will close down if the scheme goes? How many would have closed down any way? What proportion of those who lose their jobs altogether are short-time workers already classed as unemployed? How many will get work elsewhere, and how long will it take? We can make no specific finding on any of these points, and can only state in general terms the

* See p. 307, letter I, ante, as regards the eleven areas.

sort of considerations relating to them which have influenced us in determining whether or not the words of para. (e) apply. A

The first question is how many mills are likely to close. This cannot be answered with any precision. The Association's case was that the high-cost producers would struggle to remain in for as long as they could, thus initiating the period of cut-throat competition; the Association was not willing to allow much for the possibility that, if the scheme went, a number of mills would realise that they had no future and would give up at once. It is impossible to say how it will happen, but we are satisfied that, one way or the other, either at once or over a measurable period, a substantial number of mills will close down. The next question is how many mills would be likely to have closed down anyway even if the scheme continued. Notwithstanding the scheme, mills have been closing down; in the last five years, about sixty have closed down, one or two during the hearing of these proceedings. We are satisfied that this process would have continued in any event; but we are also satisfied that the removal of the scheme would accelerate it considerably and also put out of business a number of mills which might have stayed on for very much longer. B C

It is likely that the mills which go out of business will be those in which there is at present a good deal of short-time working. It may be that the first effect of the ending of the scheme would be to transfer a large number of unemployed workers from the category of temporarily stopped to that of wholly unemployed. While we keep this in mind as a matter of statistics, we do not lose sight of the fact that it is a much more serious thing to be wholly unemployed than to be on short time. What proportion of those thrown out of work are likely to get a job again within a reasonable time, either in the cotton industry or elsewhere? It has never been the Association's case that the whole, or anything like the whole, of those thrown out of work would become permanently unemployed. Indeed, its case is the opposite; it is that, when a mill closes down, it loses for ever so much of its labour that it would not be possible for it to re-open again. The skilled men and the young men, it is conceded, may be expected to get work elsewhere. But the labour force in the industry contains a large proportion of female and elderly labour. The chances of their re-employment in the industry are not good if the abrogation of the scheme means, as we anticipate it will, that the industry will become more compact. As regards employment in other industries, female labour is not usually so mobile as male; and elderly labour is not so attractive to other employers. The proportion of female labour registered (it is not possible to say how many are married) in the industry is two-thirds, which is a good deal higher than the average. The proportion of labour over fifty years of age is forty-four per cent. for males and twenty-eight per cent. for females (compared with twenty-eight per cent. and twenty-three per cent. respectively in industry generally). The registrar relies on a comparison between the present position and that which existed in the depression of 1952. Certainly the figures now do not look on paper as bad as they did in June, 1952. Then the spinning and doubling labour force was higher—one hundred and ten thousand—and it had forty-seven thousand unemployed, of whom forty-four thousand were temporarily stopped. By August, 1953, this unemployment had substantially gone; those displaced were either back in the industry or absorbed in other industries. But counsel for the Association stresses that conditions are now different. In 1952 the general level of unemployment was lower than it is now; there will be much less room for taking back workers in the industry itself when demand revives, and there is not such a good chance as there was in 1952 of the surplus labour from the spinning industry being absorbed into other industries. D E F G H I

These are the considerations which we have to bear in mind, and we state the following assumptions in order to illustrate the sort of figures with which we have to deal. If we were to estimate that, in the eleven areas, the abrogation of the scheme would cause doublers to be thrown out of work in the same proportion

as spinners; if we were to assume that twenty per cent. of the spinners and doublers employed in the eleven areas were to be thrown out of work and further to assume that only half of them obtained employment elsewhere; and if we were to allow the considerations relating to unregistered persons, such as married women, and to short-time workers to cancel each other out, that is, if the Association's case is not to be strengthened by including in the unemployment figures those who fall outside the statistics, but also is not to be weakened by the consideration that some of the increase in the figures of wholly unemployed may mean only a transfer from the temporarily stopped: there would be left a figure of ten thousand which would raise the general level of unemployment in the eleven areas from 4.3 per cent. to 5.9 per cent. If similar assumptions were made in relation to the four areas, the general level of unemployment in them would be raised from 5.2 per cent. to 7.8 per cent. We have stated these as illustrative assumptions and not as findings, because there is not sufficient certainty about any of these matters to enable us to compute the anticipated effect even in round figures. We are required to act without certainty and on the balance of probabilities and to arrive at a general conclusion in the terms used in the Act. We find that the closing of mills consequent on the abrogation of the scheme to be expected in the eleven areas as well as in the four will have a serious adverse effect on the general level of unemployment in those areas. We find, though with even greater doubt and hesitation, that that effect will be persistent.

We must now consider the detriments to the public relied on by the registrar as resulting from the scheme*. They are pleaded in his answer under a number of heads. We think that all those that matter can be placed in three groups; first, the maintenance of a high price for yarn eventually reflected in the price of goods bought by the public; secondly, loss of, or handicap to, the export trade; thirdly, the waste of national resources caused by excess capacity. As to the first, we are satisfied that the price of yarn could be lower than it is. We agree that there will not be any appreciable lowering of the price of cotton goods unless the cost in the intermediate processes also comes down; but we think that a lowering of the price of yarn may well start reductions which could mount up in a way which would, in the end, be of appreciable—though not of great—benefit to the public. There is, therefore, a detriment here. As to the second head, we are satisfied that quite a considerable export business has been lost, not so much in yarn as in cloth, through the rigidity of the scheme and the inability of spinners (without special permission only reluctantly granted) to make even a small concession in price to help in securing export business. Exports of yarn and cloth do not form a large part of the country's export trade; but they are not insignificant, and we think that anything which appreciably hinders or diminishes the export trade must be regarded as a public detriment. As to the third head, counsel for the Association has submitted that waste of national resources is too remote an effect of the scheme to be classed as a public detriment. We do not agree. Excess capacity in any industry means short-time working and idle plant. It is in the public interest that labour and capital should be employed as productively as possible, and we consider, therefore, that the excess capacity in the cotton industry is a public detriment.

Against these detriments we have found two sets of circumstances to be balanced. We give little weight to those that come under s. 21 (1) (b); having regard to the detriments we have enumerated, we are quite clear that a restriction which secures benefits only to a small class of trade purchasers is unreasonable. The effect on the general level of unemployment is much graver. But whether it be in relation to the four or the eleven areas, the effect is localised; the price of its avoidance would have to be paid nationally. It would be paid not solely or primarily in the price of cotton goods or in the loss to export trade. Though

* See p. 308, letter C, ante.

both these are substantial, we have in mind chiefly the waste of national resources in the form of excess capacity. So long as the scheme lasts, concentration of the industry will be postponed; it will not be until the excess capacity has been got rid of that the industry can be made into a more compact entity, a re-organisation which we believe will ultimately be beneficial not merely to the nation and the consuming public, but to the industry itself and those employed in it. We have decided that, on balance, it would be unreasonable to continue the restrictions in the scheme in order to avoid the degree of local unemployment which we fear. We find that the Association has not made out a case under s. 21 as a whole.

The Association admits that if the clauses enforcing the minimum price are bad, the whole agreement must fail; and, accordingly, our judgment means that the agreement is contrary to the public interest, and we so declare. We recognise that this declaration may come at an unfortunate time while, according to the evidence, the general level of unemployment has been rising, and we have, therefore, given especially careful and anxious consideration to this part of the case, realising, as we do, that any unemployment may cause great hardship to those who suffer from it. If, in the past six years, competition among the spinners had operated freely, or even if the minimum price had been set at a lower level, the excess capacity might have been got rid of gradually without serious disturbance of the labour market. The scheme has held back the outflow from the industry and it is inevitable that, when the dam is breached, the flood should be greater than the normal flow. But we are clear that, once we have reached a conclusion of fact, it is our duty to disregard the consequences of our verdict. Apart from our discretion in the matter of an injunction, the Act gives us no power to modify the consequences of our findings; and, indeed, we have not attempted to consider whether, in the present situation, any modification would be desirable.

We have, however, considered a suggestion made by counsel for the Association on the last day of the hearing that the court should, before entering judgment against the Association, offer them an opportunity of amending the scheme by inserting an overriding proviso that the minimum price was not in any event to exceed the average actual cost of production of the six lowest cost producers, plus some specified element for interest and depreciation. Section 20 (5) of the Act says that where an agreement is varied after the commencement of the proceedings, the court may make a declaration, either in respect of the agreement as at the commencement of the proceedings or in respect of the agreement as varied, or both. This proviso would clearly be applicable to a variation set up in the pleadings; it would be much more difficult to apply it to a variation that is adumbrated in the course of argument. In any event, we could not give judgment on the agreement as varied unless the effect of the variation had been fully considered and we had heard all the relevant evidence and argument. We do not exclude the possibility that, in a case where the proposed amendment is purely textual, or its effect obvious and admitted, we might be able to deal with it on the lines suggested by counsel. We do not say that we would, for if any such case arose, we should have to consider carefully what was within our powers. But the amendment adumbrated in this case is far-reaching. We do not know what the effect would be of the alteration from the median of the lowest two-thirds to the average of the six lowest figures, and the alterations to the provisions for interest and depreciation remain to be specified. It is inevitable that there would have to be a further investigation of the figures and that we should have to hear further evidence and argument. We cannot deal with a variation of this magnitude until after it has been made and then only in accordance with the procedure laid down in the Act.

[The court, having been informed by counsel for the parties that it was hoped to agree on the final form of judgment and to identify the restrictions which, as a result of the judgment, were to be declared to be contrary to the public interest, adjourned the case until Feb. 2.]

Feb. 2. *J. R. Cumming-Bruce:* The parties have arrived at agreement on the undertaking that the Association are prepared to enter into and are agreed on a form of order which they put forward for the consideration of the court. They have also agreed on a list of restrictions. The court is asked to make a declaration in respect of the restrictions that they are contrary to the public interest. The registrar formally makes an application under s. 20 (3)* of the Act, and the Association undertakes for itself and on behalf of the members of the Association to give the registrar not less than twenty-eight days' notice of any intention to bring either this scheme or a similar scheme into force in the future, in order to enable the registrar to make a further application for an order under s. 20 (3), if, on receipt of such notice from the Association, he is minded so to do.

DEVLIN, J.: Yes.

Declaration accordingly.

[The following is the list of agreed restrictions:—(i) Not to offer or supply to the home trade any yarn at a price lower than the price ascertainable from the registered documents numbered 6 and 7† except under a contract entered into before such price came into operation; (ii) Not to charge for applying spinning processes or processes ancillary to spinning at a price inclusive of a charge for spinning or ancillary processes at or including any lower charge than that fixed from time to time by the appropriate sectional committee of the Association except under a contract entered into before such charge came into operation; (iii) Not to charge for applying spinning processes or processes ancillary to spinning or offer or supply yarn at a price inclusive of a charge for spinning or ancillary processes at or including any lower charge than the rate set out in or ascertainable from the registered document numbered 6†; (iv) Not to supply yarn on terms and conditions more favourable to a customer or agent than those fixed from time to time by the appropriate sectional committee of the Association except under a contract entered into before such terms or conditions came into operation; and in particular not to supply any yarn on terms providing for any rebate concession or allowance on any yarn, the effect of which is to allow or compensate for or effect a reduction in the marginal rate of that yarn; (v) Not to supply yarn except on the registered standard terms and conditions of the Association; (vi) Not to supply yarn unless samples, quality mark and particulars thereof have been deposited and registered under the Yarn Spinners' Agreement and a temporary or final marginal rate has been allotted to it or set out in cl. 29‡ of the agreement; (vii) Not to supply yarn at any discount from net prices; (viii) Not to supply yarn to the home trade through an agent on terms or conditions providing that the net amount received by the member after payment of commission is reduced below the price ascertainable from the registered documents numbered 6 or 7† unless there is a written agreement between the member and the agent under which the agent undertakes not to sell competitive yarn on behalf of any other person and a copy of the relevant clause in that agreement has been lodged with the secretary of the Association; (ix) Not to supply yarn to the home trade through an agent (other than a sole agent)

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* Section 20 (3) provides:

"Where any such restrictions are found by the court to be contrary to the public interest, the agreement shall be void in respect of those restrictions; and without prejudice to the foregoing provision the court may, upon the application of the registrar, make such order as appears to the court to be proper for restraining all or any of the persons party to the agreement who carry on business in the United Kingdom—(a) from giving effect to, or enforcing or purporting to enforce, the agreement in respect of those restrictions; (b) from making any other agreement (whether with the same parties or with other parties) to the like effect."

† These documents related to restrictions as to minimum prices and conditions and terms of sale.

‡ See pp. 305, 306, ante.

on terms or conditions providing that a net amount received by the member after payment of commission is reduced to less than an amount equal to the price ascertainable from the registered documents numbered 6 and 7*, less one per cent. thereof; (x) Except as stated at (a)-(d) below not to supply yarn to a customer outside the United Kingdom at a price lower than the home trade price ascertainable from the registered documents numbered 6 and 7* increased by two per cent. and further increased by the cost of export cases (when used), packing, insurance, and carriage paid by the member and still further increased by any commission exceeding two per cent. where an agent is employed and paid by the member—exception (a) In any case where the terms of a tender invited by an overseas government or government agency specify that the offer must be firm for a period not exceeding thirty days from the closing date of the tender, the operating cost price in force on the day on which the tender is submitted is to be charged; exception (b) In any case where an offer of a specific weight has been made to a named customer abroad on a given date and acceptance is received not later than the end of the next normal business day the price stated on the offer may be charged; exception (c) In any case where an offer of a specific weight of a stated count and quality of grey single cotton yarn has been made to a merchant for export without further processing and a certificate of the Association accountants confirming acceptance of the merchant's offer has been received within three normal business days following the date of the offer a quantity of that yarn not exceeding a quantity stated on the certificate may be supplied at the price offered; exception (d) The price at which American and Egyptian type yarns of counts 78's and finer are exported may be calculated by including in the price the appropriate spinning cost margin for a yarn not more than four counts coarser than the delivered wound count contracted for; (xi) Not to wind single yarn on commission for any person except on terms or conditions providing that the waste loss is borne by that person; (xii) Not to supply an American or Egyptian type yarn containing more than ten per cent. in any mixing of factors samples, salvage cotton, box bales or other types of unquoted or ungraded cotton for which an equivalent mark cannot be determined until grading for any such cottons has been obtained from the Association; (xiii) Not to supply a condenser or preparation type yarn containing raw cotton or more than five per cent. in any mixing of waste cotton for which an equivalent class or description cannot be determined or is unquoted unless a grading for any such raw cotton or waste cotton has been obtained from the Association; (xiv) Not to reduce the charge for spinning cotton from American type raw cotton owned by a third party by more than 1·11d. per lb. where waste is to be retained by the spinner; (xv) Not to supply single cotton yarn for direct export in yarn form to customers in certain countries on more favourable credit terms for net payment in sterling or in equivalent U.S. dollars than those stated in respect of each country in that document; (xvi) Not to supply single cotton yarn for direct export in yarn form against a bill of exchange on credit terms more favourable than those laid down in respect of cash or letter of credit transactions in the registered document numbered 6† unless the stamp duty expenses and discount charges are included in the amount of the bill; (xvii) Not to supply yarn by export in home trade packages except on conditions requiring the return of the packages " Carriage paid to British port ".]

Solicitors: *John Taylor & Co.*, Manchester (for the Yarn Spinners' Association); *Treasury Solicitor.*

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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* See second footnote on p. 323, ante.

† The relevant part of which dealt with maximum permissible credit terms for net payment in sterling or equivalent U.S. dollars at the official forward rate for the due date.

GENERAL NURSING COUNCIL FOR ENGLAND AND WALES *v.* ST. MARYLEBONE CORPORATION.

[HOUSE OF LORDS (Lord Morton of Henryton, Lord Tucker, Lord Cohen, Lord Keith of Avonholm and Lord Somervell of Harrow), December 8, 9, 10, 1958, January 28, 1959.]

Rates—Limitation of rates chargeable—General Nursing Council for England and Wales—Organisation concerned with advancement of social welfare—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 *Eliz.* 2 *c.* 9), *s.* 8 (1) (*a*).

Charity—Benefit to community—Nursing authority—Regulation of the profession of nursing in the manner provided by the Nurses Act, 1957 (5 & 6 *Eliz.* 2 *c.* 15)—*Whether charitable object.*

The General Nursing Council for England and Wales, originally formed under the repealed Nurses Registration Act, 1919, existed under and for the objects declared in the Nurses Act, 1957. The functions of the council included the maintenance of a register of nurses, together with a roll of assistant nurses; the regulation of the conditions of admission to and removal from the register and the roll, and, in connexion therewith, the exercising of supervisory and directing powers in regard to training and examination; and the exercising of other ancillary powers. The Act of 1957 also provided penalties for the false assumption of the title of registered or enrolled nurse, and imposed restrictions on the use of the titles of nurse or assistant nurse. On the question whether the council was an organisation "whose main objects are charitable or are otherwise concerned with the advancement of . . . social welfare" within the meaning of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8 (1) (a),

Held: the council was not an organisation whose main objects were "charitable or are otherwise concerned with the advancement of . . . social welfare" within s. 8 (1) (a) of the Act of 1955, for the following reasons—

(i) (per LORD MORTON OF HENRYTON, LORD TUCKER, LORD COHEN and LORD KEITH OF AVONHOLM) the main object of the council was to regulate the profession of nursing in the manner and to the extent set out in the Nurses Act, 1957, viz., primarily, to maintain a register of nurses and a roll of assistant nurses and to make rules governing admission to and removal from these (or, per LORD COHEN, a main object of the council was the enhancement of the qualities and status of nurses) and this object was not charitable.

General Medical Council v. *Inland Revenue Comrs.* ((1928), 97 L.J.K.B. 578) approved; *Royal College of Surgeons of England* v. *National Provincial Bank, Ltd.* ([1952] 1 All E.R. 984) distinguished.

(ii) (LORD COHEN and LORD SOMERVELL OF HARROW dissenting), however wide a meaning was given to "social welfare" or to "the advancement of social welfare", the objects or functions of the council were not concerned with either.

Per LORD KEITH OF AVONHOLM: I cannot accept public benefit as the test of social welfare, though social welfare may be a public benefit (see p. 335, letter B, post).

Decision of the COURT OF APPEAL ([1957] 3 All E.R. 685) affirmed.

[For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

Cases referred to:

(1) *General Medical Council* v. *Inland Revenue Comrs., English Branch Council of General Medical Council* v. *Inland Revenue Comrs.*, (1928), 97 L.J.K.B. 578; 139 L.T. 225; 13 Tax Cas. 819; Digest Supp.

(2) *General Nursing Council for Scotland* v. *Inland Revenue Comrs.*, 1929 S.C. 664; 14 Tax Cas. 645; Digest Supp.
(3) *Inland Revenue Comrs.* v. *Forrest*, (1890), 15 App. Cas. 334; 60 L.J.Q.B. 281; 63 L.T. 36; 54 J.P. 772; 3 Tax Cas. 117; 39 Digest 299, *780*.
(4) *Royal College of Surgeons of England* v. *National Provincial Bank, Ltd.*, [1952] 1 All E.R. 984; [1952] A.C. 631; 3rd Digest Supp.
(5) *National Deposit Friendly Society (Trustees)* v. *Skegness U.D.C.*, [1958] 2 All E.R. 601.

Appeal.

Appeal by the ratepayers, the General Nursing Council for England and Wales, from an order of the Court of Appeal (LORD EVERSHED, M.R., ROMER and ORMEROD, L.JJ.), dated Nov. 26, 1957, and reported [1957] 3 All E.R. 685, reversing an order of DANCKWERTS, J., dated June 27, 1957, and reported [1957] 2 All E.R. 791, that the appellant council was such an organisation as was mentioned in s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, because its main objects were concerned with the advancement of social welfare.

G. D. Squibb, Q.C., and *W. L. Roots* for the appellant council.

Geoffrey Cross, Q.C., and *E. Blanshard Stamp* for the respondent rating authority.

Their Lordships took time for consideration.

Jan. 28. The following opinions were read.

LORD MORTON OF HENRYTON: My Lords, I shall hereafter refer to the appellants as " the council ". The only issue on this appeal is whether the council is entitled to partial relief from rates pursuant to s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. I shall refer to that Act as " the Rating Act of 1955 ". The material part of s. 8 is as follows:

" Provisions as to rates payable by charitable and other organisations.—(1) This section applies to the following hereditaments, that is to say—

" (a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare;

" (b) any hereditament held upon trust for use as an almshouse;

" (c) any hereditament consisting of a playing field (that is to say, land used mainly or exclusively for the purposes of open-air games or of open-air athletic sports) occupied for the purposes of a club, society or other organisation which is not established or conducted for profit and does not (except on special occasions) make any charge for the admission of spectators to the playing field:

" Provided that this section shall not apply to any hereditament to which s. 7 of this Act applies, or to any hereditament occupied by an authority having, within the meaning of the Local Loans Act, 1875, power to levy a rate."

The remaining sub-sections grant certain reductions in the rates chargeable in respect of any hereditament to which the section applies.

The council is a body corporate established by the Nurses Registration Act, 1919, and now has the powers and duties conferred and imposed on it by the provisions of the Nurses Act, 1957, which consolidates the Act of 1919 and certain subsequent Acts. It is common ground between the parties that the powers and duties of the council under the Act of 1957 do not differ in any material respect from its powers and duties at the time when the Rating Act of 1955 became law. It is also common ground between the parties that the council is " an organisation which is not established or conducted for profit ", but it has to be determined,

on this appeal, whether its " main objects " are such as to bring it within s. 8 (1) (a) of the Rating Act of 1955. The council is, and was at all material times, the rateable occupier of premises known as Nos. 17 and 23-25, Portland Place, in the Metropolitan Borough of St. Marylebone. These premises are occupied for the purposes of the council. The respondents, who are the rating authority for that borough, refused to recognise the council as an organisation such as is mentioned in s. 8 (1) (a) of the Act. DANCKWERTS, J., granted the council a declaration that it is such an organisation, but his decision was reversed by the Court of Appeal.

Having regard to the decision of the Court of Appeal in *General Medical Council* v. *Inland Revenue Comrs.* (1) ((1928), 97 L.J.K.B. 578), and to the decision of the Court of Session in *General Nursing Council for Scotland* v. *Inland Revenue Comrs.* (2) (1929 S.C. 664), it was not contended before DANCKWERTS, J., and the Court of Appeal that the council can be regarded as an organisation whose main objects are charitable, and the judgments of DANCKWERTS, J., and the Court of Appeal were solely concerned with the question whether the main objects of the council are " otherwise concerned with the advancement of . . . social welfare ". In this House, it was contended on behalf of the council that its main objects are charitable or, in the alternative, are otherwise concerned with the advancement of social welfare.

My Lords, it is thus apparent that, in order to decide the issue between the parties, it is necessary to decide the following questions:—(i) What are the " main objects " of the council within the meaning of s. 8 (1) (a) of the Rating Act of 1955? (ii) Are these main objects charitable? (iii) If not, are these main objects " otherwise concerned with the advancement of social welfare "? It is, of course, possible that the council has only one main object, but, if it has more than one, it will not be an organisation within s. 8 (1) (a) unless all its main objects come within that paragraph.

In order to answer the questions just stated, it is necessary to consider the provisions of the Nurses Act, 1957, in some detail, since, in accordance with modern custom, there is no preamble to the Act, and the objects of the council can only be ascertained by a study of these provisions. I must, therefore, refer to them in some detail. Section 1 (1) of the Act is as follows:

> " The body established by s. 1 of the Nurses Registration Act, 1919, by the name of the General Nursing Council for England and Wales shall continue in existence by that name and shall have such powers and duties as are conferred and imposed on them by the following provisions of this Act."

Section 1 (2) and Sch. 1 state what the constitution of the council is to be. Section 2 is as follows:

> " (1) It shall be the duty of the council—(a) to maintain, in accordance with rules in that behalf made by them, the register of nurses established in pursuance of the Nurses Registration Act, 1919, which shall consist of—(i) a general part containing the names of all nurses who satisfy the conditions of admission thereto; (ii) a part containing the names of nurses trained in the nursing and care of persons suffering from mental diseases; (iii) a part containing the names of nurses trained in the nursing of sick children; and (iv) such other parts as may be prescribed; (b) to maintain, in accordance with rules in that behalf made by them, the roll of assistant nurses established in pursuance of Part 1 of the Nurses Act, 1943.
>
> " (2) Where a person satisfies the conditions of admission to a part of the register other than the general part, his name may be included in that other part notwithstanding that it is also included in the general part.
>
> " (3) A certificate under the seal of the council duly authenticated stating that a person is, or was at any date, or is not, or was not at any date, duly registered or enrolled shall be evidence in all courts of law of the fact stated in the certificate."

Under s. 3 (1), the council is to

" . . . make rules for regulating the conditions of admission to the register and to the roll respectively and the conduct of any examinations which may be prescribed as a condition of admission thereto and any matters ancillary to or connected with any such examinations, and any such rules shall contain provisions—

" (a) requiring, as a condition of the admission of any person to the register or the roll, that that person shall have undergone the prescribed training, and shall possess the prescribed experience, in nursing; and

" (b) requiring that the prescribed training shall be carried out either in an institution approved by the council in that behalf or in the service of the Admiralty, the Army Council or the Air Council."

The section also provides for the payment to the council, in respect of applications for examination, registration or enrolment, of such fees as the council may, with the approval of the Minister of Health, from time to time determine. In s. 4 there is provision for the registration of nurses trained abroad, and in s. 5 there is provision for a list of persons neither registered nor enrolled, who completed a course of nursing in a satisfactory institution before July 1, 1925. Section 6 deals with the admission to the register of certain persons there specified. Section 7 provides for the council making rules concerning removal from, and restoration to, the register, roll and list. Under s. 10:

" The council shall make rules providing for the issue of certificates to persons registered or enrolled and with respect to the uniform or badge which may be worn by persons registered and persons enrolled respectively."

Section 11 to s. 16 inclusive deal with the training of nurses. It is, I think, sufficient to set out s. 11 (1) to (3):

" (1) The Minister shall by order constitute, in accordance with Sch. 2 to this Act, a committee (in this Act referred to as an ' area nurse-training committee ') for each hospital area; and before making an order under this sub-section with respect to any such area the Minister shall consult with the council.

" (2) It shall be the duty of the area nurse-training committee for a hospital area—

" (a) to have constant regard, as respects persons engaged in the area in the training of nurses, to the methods employed by those persons of training nurses;

" (b) to promote, with a view to securing the improvement of methods employed in the area of training nurses, research and investigation into matters relating to the training of nurses, and to render to the council reports of the results of research and investigation promoted by the committee;

" (c) to advise and assist—(i) hospital management committees appointed by the regional hospital board for the area; (ii) boards of governors of teaching hospitals situated in the area; and (iii) any other authority or person engaged in the area in the training of nurses who makes a request in that behalf to the committee; in the preparation and carrying out of schemes for the training of nurses in accordance with any requirements of the council for the time being in force with respect to the training to be undergone by persons as a condition of their admission to the register or the roll; and

" (d) to advise and, if requested by the council so to do, to assist the council in matters relating to the approval by the council, for the purposes of the training rules, of institutions situated in the area.

" (3) An area nurse-training committee may, if authorised by the council so to do, conduct on their behalf any examination prescribed by rules made by the council under s. 3 of this Act or specified in a scheme adopted under the next following section."

No provision in this group of sections requires or enables the council itself to train nurses. By s. 15, all expenses incurred by an area nurse-training committee with the approval of the council are to be defrayed by the council, but with this should be read s. 26, which provides that:

> "All expenses incurred by the council with the approval of the Minister which are attributable to defraying expenditure incurred by area nurse-training committees (other than expenditure incurred by such committees in conducting examinations on behalf of the council) shall be defrayed by the Minister out of moneys provided by Parliament, and all other expenses incurred by the council under this Act shall be defrayed by the council."

Section 23 enables the council to charge fees for certain services to nurses and others. Section 27 provides for penalties for false assumption of the title of registered or enrolled nurse, and s. 28 imposes penalties for the use of the title "nurse" by anyone who is not a duly registered nurse or assistant nurse. Section 30 confers on the council power to

> ". . . make rules for prescribing anything which by this Act is required or authorised to be prescribed and generally for making provision with respect to any matters with respect to which the council think that provision should be made for the purpose of carrying this Act into effect."

Rules have in fact been made under the provisions of that section, but no rule made by the council under the Act can come into operation unless and until it is approved by the Minister of Health.

I would accept, as a convenient summary of the provisions of the Act, the words of the Master of the Rolls (LORD EVERSHED) ([1957] 3 All E.R. at p. 687):

> "It is, in our judgment, sufficient and sufficiently accurate to state that the purposes and functions of the council were and are to maintain a register of nurses, together with a roll of assistant nurses; to regulate accordingly the conditions of admission to and removal from the register and the roll, and, in connexion therewith, to exercise supervisory and directing powers in regard to training and examinations; and to exercise such other powers and duties as are ancillary to and consequent on the foregoing. The income of the council appears to be derived, in part, from fees which the council are authorised to charge on applications for examination and registration or enrolment and the like, and, as to the rest, from moneys directly or indirectly provided by Parliament."

In considering what are the main objects of the council, in the light of all the provisions of the Act, and whether these objects are charitable, it is right to turn first to *General Medical Council* v. *Inland Revenue Comrs.* (1) and *General Nursing Council for Scotland* v. *Inland Revenue Comrs.* (2), already mentioned. In the former case, the Court of Appeal held that the General Medical Council was not "established for charitable purposes only" within s. 37 (1) (b) of the Income Tax Act, 1918. Counsel for the council in the present case, submitted that the *General Medical Council* case (1) was distinguishable on its facts from the present case; alternatively, that it was wrongly decided. My Lords, I shall not detain you by endeavouring to summarise the provisions of the statute which established the General Medical Council. Suffice it to say that, although there are certain differences between its provisions and the provisions of the Nurses Act, 1957, the two cases are, to my mind, indistinguishable as regards the main object of the bodies incorporated by these Acts respectively.

In the *General Medical Council* case (1) SARGANT, L.J., said (97 L.J.K.B. at p. 587):

> "I think myself that the whole scheme of this legislation is to regulate the profession of medical men, who in consequence have certain privileges conferred upon them by the legislation, and that it is in the first instance

as a professional measure that the legislation is to be regarded. No doubt, as I have said, the result of that strict qualification and supervision will be to the public advantage. Exactly the same thing might be said of the regulations which govern the admission of qualified persons to the ranks of solicitors and barristers, or any other scientific profession. I agree with the Master of the Rolls that a very great deal is to be learnt from the judgments in *Inland Revenue Comrs.* v. *Forrest* (3) ((1890), 15 App. Cas. 334) with regard to the Institution of Civil Engineers, and particularly in the distinctions which are drawn there by LORD WATSON between that case and the case with regard to the Writers to the Signet*. It seems to me that here we clearly have an institution or society which is of the same nature as the society known as Writers to the Signet, and that it differs from the Institution of Civil Engineers."

I agree with these observations, and, in my view, they can properly be applied to the council in the present case. I think that the council, formed as it is to exercise statutory powers and discharge statutory duties, has only one main object, namely, to regulate the profession of nursing in the manner and to the extent set out in the Nurses Act, 1957. The *General Medical Council* case (1) was, in my opinion, rightly decided, and the object which I have just stated is not a charitable object, giving to the word " charitable " its meaning in law, as established in many cases.

It follows from the view which I have just expressed that I cannot accept some of the expressions of opinion by the learned judges of the Court of Session in the *General Nursing Council for Scotland* case (2) as to the purposes for which that council was established, although I do not doubt that the court was right in following the *General Medical Council* case (1), and holding that the General Nursing Council for Scotland was not established " for charitable purposes only ". Before I leave the question of charity, I ought to refer to *Royal College of Surgeons of England* v. *National Provincial Bank, Ltd.* (4) ([1952] 1 All E.R. 984). In that case, this House held that the college was in law a charity, because its object was " the due promotion and encouragement of the study and practice of the art and science of surgery ", words which appeared in the recitals to its charter. The case is thus clearly distinguishable from the present case.

I now turn to the last question arising on this appeal. Having regard to my opinion that the sole main object of the council is to regulate the profession of nursing, in the manner and to the extent set out in the Nurses Act, 1957, that question must now be restated as follows:—Is that object, which is not charitable in the legal sense " otherwise concerned with the advancement of . . . social welfare "? My Lords, this is, to my mind, a question of great doubt, and I have found it difficult to choose between the two lines of argument so ably presented in this House; but in the end I find myself in agreement with the views which are about to be expressed on this point by my noble and learned friend, LORD KEITH OF AVONHOLM.

I would answer this last question in the negative, and would dismiss the appeal.

LORD TUCKER: My Lords, in order to succeed in this appeal the appellant council has to establish that it is an organisation whose main objects are charitable or are otherwise concerned with the advancement of social welfare. It was conceded by counsel in the courts below that, in view of the decision of the Court of Appeal in *General Medical Council* v. *Inland Revenue Comrs.* (1) ((1928), 97 L.J.K.B. 578), he could not argue that the main objects of the council were charitable, but he formally took the point in order to enable him to contend in this House that the last-named case was wrongly decided. In my opinion, it was not open to him in these circumstances to invite your Lordships to distinguish the present case from that of the General Medical Council, and I did not understand him to do so. I would add, however, that, having examined the facts in

* *Society of Writers to the Signet* v. *Inland Revenue Comrs.* (1886), 2 Tax Cas. 257.

each case, I am satisfied that there is not sufficient ground for differentiation, nor am I persuaded that the decision in the *General Medical Council* case (1) was wrong.

My Lords, my noble and learned friend on the Woolsack has examined the provisions of the Nurses Act, 1957, and my noble and learned friend, LORD KEITH OF AVONHOLM, whose opinion I have had the advantage of reading, will also give a detailed examination of the Act. I, therefore, content myself with stating that such examination in my view discloses that the main objects of the council are (i) to maintain a register of nurses and roll of assistant nurses, and (ii) to make rules regulating the conditions of admission to the register and roll, neither of which, as distinguished from the ultimate benefits which may be expected to result from the legislation, are to be regarded as charitable.

With regard to the second limb of s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, which, in my view, can only be invoked if and when it has been decided that the main objects of the organisation are not charitable, I agree with the opinion which my noble and learned friend, LORD KEITH OF AVONHOLM, will shortly express.

I would, accordingly, dismiss the appeal.

LORD COHEN: My Lords, the questions which your Lordships have to decide are two—(i) Are the main objects of the appellant council charitable? If not, (ii) Are they otherwise concerned with " the advancement of . . . education or social welfare " within the meaning of s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955? Strictly speaking, it might suffice to answer the second of those questions, but, as both were fully argued before your Lordships, I think it better to express my opinion on both questions.

Counsel for the respondent rating authority submitted that the only main object of the council is the keeping of the register with subsidiary duties of prescribing, training and conducting examinations and that this is not a charitable object. I cannot take so narrow a view of the Act. Looking at it as a whole, I think there were two main objects, on the one hand the enhancement of the qualities and status of nurses and, on the other, the benefit and protection of the public, particularly of the sick. I borrow this statement of the purpose of the Act from the judgment of the Master of the Rolls (LORD EVERSHED) ([1957] 3 All E.R. at p. 689). He did not have to consider the question whether, on this basis, the main objects of the council were charitable, since it was admitted in the Court of Appeal that, having regard to the decision of this court in *General Medical Council* v. *Inland Revenue Comrs.* (1) ((1928), 97 L.J.K.B. 578), and of the Scottish Court of Session in *General Nursing Council for Scotland* v. *Inland Revenue Comrs.* (2) (1929 S.C. 664), the Court of Appeal could not hold that the objects of the council were charitable. Before us, however, counsel for the council submitted that the Scottish case was distinguishable, and that the *General Medical Council* case (1) was wrongly decided and could not be reconciled with the decision of this House in *Royal College of Surgeons of England* v. *National Provincial Bank, Ltd.* (4) ([1952] 1 All E.R. 984). In the last-mentioned case, the majority of their Lordships were able to find that the main object of the college was the improvement of the art and practice of surgery, and that, in so far as these were provisions which might be directed to the enhancement of the status of surgeons or the protection of their professional interests, they were purely ancillary. Their Lordships were, therefore, able to hold that the college was a charity. I was a dissentient in that case, but I accept of course the decision then reached. In the present case, however, I think it is impossible to hold that the enhancement of the qualities and status of nurses is a mere ancillary object of the council. It is, I think, a main object, and it is not charitable. I would answer the first question I have stated in the negative.

But although the enhancement of the qualities and status of nurses is not

a charitable object, it does not necessarily follow that it is not " otherwise concerned with the advancement of . . . education or social welfare ". The Court of Appeal held that it was not, but I am unable to agree with them. On this point, I have had the opportunity of reading in print the speech which will in due course be delivered by the noble and learned lord, LORD SOMERVELL OF HARROW. I agree so fully with him that I shall state quite shortly my reasons for differing from the Court of Appeal. I agree with the Master of the Rolls that not every organisation established for benefiting the public can be treated as one the main objects of which are concerned with the advancement of social welfare. It is not easy to define exactly the meaning of social welfare but I am prepared to agree with counsel for the council that social welfare includes the relief of persons or classes of persons who, by reason of their circumstances, are in special need of relief of a kind analogous to that contemplated by the statute of Elizabeth*. I think that an organisation established for the purpose of assisting in the provision of such relief is an organisation concerned with social welfare within the meaning of s. 8 of the Act of 1955.

Now what is the position of the council? I would adopt the language of the Lord President (LORD CLYDE) in *General Nursing Council for Scotland* v. *Inland Revenue Comrs.* (2), where he said (1929 S.C. at p. 677) the " object was to raise the standard of sick-nursing in Great Britain ". In view of what I have already said, I must, however, qualify his statement by adding that the council has also the object of enhancing the status and qualities of nurses. Now the nursing of the sick is, in my opinion, relief plainly analogous to that contemplated by the statute of Elizabeth and, if the provision of skilled nurses for the nursing of the sick had been the sole object of the council, I cannot doubt that it would have been " otherwise concerned with social welfare " within the meaning of the section. It is said that the professional aspect of the other objective, " the enhancement of the status and qualities of nurses ", excludes the council from the benefit of the section. But the two objects are, as was said by the Master of the Rolls, essentially inseparable. If I had to say which was " primus inter pares ", I should unhesitatingly choose the protection of the public by the provision of skilled trained nurses. Moreover, the council has an educational flavour through its responsibilities in connexion with training and examinations. In these circumstances, it seems to me that both the main objects of the council are concerned with social welfare, and that your Lordships would be placing too narrow a meaning on the wide words of the section if your Lordships were to exclude the council from the relief granted by the section merely because the aspect of good works to which the Master of the Rolls refers is missing from its functions.

I would allow the appeal.

LORD KEITH OF AVONHOLM: My Lords, on the view I take, this case lies within a very short compass. For a time I thought it might be decided on the broad ground that, to use the words of LORD PRESIDENT CLYDE in *General Nursing Council for Scotland* v. *Inland Revenue Comrs.* (2) (1929 S.C. at p. 677), the object of the appellant council " was to raise the standard of sick-nursing ". I have come to the view, however, that that would be to proceed on a false premise. For one thing, the statement is something in the nature of a surmise or speculation. There is nothing in the Nurses Act, 1957, or its statutory precursors, that says this is the object of the council. There may be some, if not many, for all I know, who would say that the standard of sick nursing was as high fifty years ago as it is today. It may be that one result of the Act is to increase the number of persons who reach the standard. But that again may be no more than the result of economic, social and political changes in the structure of society. There are other surmises that are equally possible as, for instance, that the purpose was to improve the status and protect the profession of nurses.

* 43 Eliz. 1 c. 4.

In my opinion, the only way by which the main objects of the council can be ascertained is by looking at the objects as expressed in the Act. It is by the language used that Parliament has expressed its intention and it is with the objects for which the council was immediately and directly constituted that we are, in my opinion, concerned, and not with the results of its activities at second or third hand. When I turn to the Act, I find only two main objects for which the council was constituted. First, it has to maintain a register of nurses, a roll of assistant nurses and the list of persons, neither registered nor enrolled, who, within two years of the passing of the Nurses Act, 1943, were admitted to the list in respect of training in nursing prior to July, 1925. Copies of the register, the roll and the list are to be open for inspection by the public. Its second main function is to make rules for regulating the conditions of admission to the register and to the roll and the conduct of examinations which may be prescribed as a condition of such admission. These conditions are to include prescribed training and prescribed experience in nursing and the prescribed training shall be carried out in an institution approved by the council or in the service of the Admiralty, the Army Council or the Air Council. These rules must be approved by the Minister of Health, and are incorporated in a statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament. These two functions are undoubtedly closely related, and it might be possible to express them as one object, but I am content to take them as two objects. Everything else in the Act affecting the council is, in my opinion, properly incidental to these two main functions.

It may be observed that, though the council prescribes the course and syllabus of training and approves the training institutions, area nurse-training committees are separately constituted by the Minister to concern themselves with the training of nurses and to advise and assist hospital management committees and boards of governors of teaching hospitals and other authorities and persons engaged in the training of nurses in the preparation and carrying out of schemes for such training in accordance with the council's requirements. The cost of training incurred by hospital management committees and teaching hospitals is defrayed by the nurse-training committees, who recover the amount from the council, who, in turn, recover the money from the Minister out of moneys provided by Parliament. In my opinion, the functions of the area nurse-training committees stand apart from those of the council, though they are, of course, helpful to the council in securing the entry of properly qualified nurses to the register and the roll.

It may be further observed that the council, being a statutory body, is strictly confined within its powers as fixed by the statute, and at various points can only act with the approval of the Minister. It must report annually to the Minister as to the discharge of its functions with respect to the training of nurses, and the Minister must lay the report before Parliament. In my opinion the respondent rating authority are right in their submission, as stated in the first reason in their Case, that the council is established for the purpose of exercising statutory powers and carrying out statutory duties relating to the keeping of a register of nurses, if it be remembered that one of these duties is concerned with the training of nurses in so far as the council has to prescribe courses of training and approve training institutions under s. 3 of the Act, in order that nurses may achieve the standards of knowledge and experience necessary for admission to the register or roll.

The question is whether the two objects to which I referred at the outset " are charitable or are otherwise concerned with the advancement of religion, education or social welfare ". The first of these main objects, the registration of nurses, if considered by itself, clearly could not, in my opinion, be regarded as either charitable or concerned with social welfare. But, it is said, the conditions as to training and experience, imposed as a pre-requisite of registration, make the council a charitable organisation, because these conduce to the advancement of

the nursing of sick persons which is a charitable object. But, assuming for the moment that this is a consequence of imposing these conditions, that cannot, in my opinion, be said to be the reason why they were imposed. The reason was to secure that only properly qualified persons should be registered. That clearly was the direct object indicated by the Act. We are not concerned with indirect consequences nor entitled to speculate on what ultimate purposes, if any, Parliament had in view. Apart from this, the hypothesis of the council may, I think, be questioned. In the days when hospitals trained their own nurses, independently of outside regulation, and were treated as charitable institutions, it was not, as I understand it, because they trained nurses for sick nursing that they were treated as charitable institutions, but because they were established for nursing the sick poor. The present case is not like that of *Royal College of Surgeons of England* v. *National Provincial Bank, Ltd.* (4) ([1952] 1 All E.R. 984), where the objects were the due promotion and encouragement of the study and practice of the art and science of surgery. So far as the Nurses Act, 1957, guides us, the council was created to provide a register and roll of nurses and impose rules to secure that they were properly qualified for admission. The Act expressly states in s. 3 (2) (b) as one of its aims, to secure a uniform standard of qualification in all parts of the United Kingdom. I have no doubt the Act was of public benefit, as one must assume most legislation to be. But the question is: Was what the council was created to do and does charitable? I cannot hold that it was. It may be that, at some distance more or less remote, what it does redounds to the interests and benefit of charitable organisations. So is it when a benefactor does something for a charity. But that does not create him a charity. The test of the matter, in my opinion, is to consider the content, or character, of the functions discharged by the council and ask are these charitable. I cannot hold that they are.

I have not referred so far to the sections of the Act which make it an offence for a person not duly registered to take or use the name or title of registered nurse, or for a person not duly enrolled to pass herself off as an enrolled assistant nurse, or for a person to use the name or title of nurse (with certain exceptions) who is neither a registered nurse nor an enrolled assistant nurse. If it is legitimate to look at the effect of the Act at all, as distinct from the actual functions imposed by the Act on the council and their content, it appears to me to be easier to say that one of its results was to raise the professional status of nurses and to protect them in the exercise of their profession, than to say the result was to advance the nursing of sick persons. From this point of view, I think the case is indistinguishable from *General Medical Council* v. *Inland Revenue Comrs.* (1) ((1928), 97 L.J.K.B. 578). I think also that the present case is, as ROWLATT, J. (ibid., at p. 582) (with whom LORD HANWORTH, M.R., was prepared to agree), thought that case was, another instance of an organisation performing administrative functions under Parliamentary authority which, though for the public benefit, can in no sense be regarded as of a charitable nature. I agree with those of your Lordships who think that that case was rightly decided.

I turn now to consider whether the council comes under the other limb of s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, as being an organisation whose main objects " are otherwise concerned with the advancement of . . . social welfare ". The considerations which influenced me on the charitable aspect of the matter seem to me to be equally applicable here. However wide a meaning is given to " social welfare " or to " the advancement of social welfare ", the objects or functions of the council, in my opinion, are not concerned with either. DANCKWERTS, J., taking the view apparently that the council was established in the general public interest, held that it came within the sub-section. It was not established, he said ([1957] 2 All E.R. at p. 795)

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> " for the purpose of raising the professional status of the nurses, but for the purpose of creating a system of registration so as to prevent incompetent nurses being able to victimise the public, and for making sure that the public should receive the services only of competent nurses. That seems to me to be the establishment of a body for the purpose of benefiting the public, and, therefore, for a purpose of social welfare ".

B

But, accepting the hypothesis on which he bases his conclusion, I cannot accept public benefit as the test of social welfare, though social welfare may be a public benefit, and counsel for the council were not able to support this view of the learned judge. I would accept the words of the Master of the Rolls (LORD EVERSHED) where he says ([1957] 3 All E.R. at p. 690):

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> " . . . it is not enough that the objects of the organisation are in some degree related to the advancement of social welfare: they must in a real sense be directed to it."

For the reasons I have given, the objects of the council are not, in my opinion, " directed " to social welfare.

D

If I had felt myself compelled to take a different view, the council would still have been faced with a difficulty. It could not, in my opinion, be said that the mere keeping of a register or roll of nurses was an object concerned with the advancement of social welfare. It would have to be said that this was merely incidental to the one and main object of the council, to secure the proper training of nurses which was an object of social welfare. This, to my mind, would be to

E

put a forced construction on the Act. A more natural construction, I think, would be that the main object is to maintain a register and roll, and that the other was ancillary to that purpose. But, on the assumption that there are two main objects, one of which is concerned with the advancement of social welfare and the other is not, it would be impossible, in my opinion, to say that the " main objects " were concerned with the advancement of social welfare.

F

For the other reasons, however, which I have already stated, I would dismiss the appeal.

LORD SOMERVELL OF HARROW: My Lords, s. 8 (1) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, is framed in words capable of a very wide construction. I cannot think it would be possible to replace them by some other words without altering what Parliament has enacted. I accept

G

what was said by LORD DENNING in *National Deposit Friendly Society (Trustees)* v. *Skegness U.D.C.* (5) ([1958] 2 All E.R. 601 at p. 613):

> " The main objects which are ' otherwise ' concerned must, I think, be objects that are akin to charitable objects—have some kindred quality with charitable objects."

H

In considering the objects or object of the appellant council, one must consider the Act. In considering the substantially similar position of the General Nursing Council for Scotland, LORD CLYDE (Lord President) said in *General Nursing Council for Scotland* v. *Inland Revenue Comrs.* (2) (1929 S.C. 664 at p. 677):

> " If I tried to define the council's purpose in a single sentence, I should say its object was to raise the standard of sick-nursing in Great Britain."

I

In that case, the question was whether the council was a charity. It was held it was not, because the objects included a protection of the calling as well as the education of nurses and improvement of nursing. We have not to consider here whether the council is a charity. Even under the first part of the sub-section it is sufficient if the main object or objects are charitable. I, therefore, get little, if any, assistance from the decision in the case cited or from *General Medical Council* v. *Inland Revenue Comrs.* (1) ((1928), 97 L.J.K.B. 578). I think the question here is whether the objects of the council are for the advancement of

social welfare, in the somewhat limited sense stated above. If so, it does not matter whether those objects are charitable in the legal sense or not. I would assume that the sub-section was framed so that valuation officers could apply it without getting embogged in the technicalities of the law relating to charities.

I would amplify LORD CLYDE'S statement by reference to the Nurses Act, 1957. The council has to prescribe the training and experience, and to regulate the conduct of examinations to be prescribed. The rules provide for a period of three years' training, for a general register, for a register for mental cases, for children's cases and for fever nurses (S.I. 1951 No. 1372, r. 16). There is a syllabus for the preliminary and final examinations (ibid., Sch. 3) which shows the width and amount of knowledge required. The council has to approve the institution in which training is to be carried out, apart from state military hospitals. Section 11 provides for the setting up by the Minister of " area nurse-training committees " which are to prepare and carry out schemes in accordance with any requirements of the council. A person who is not on the register cannot use the name or title of nurse, with a proviso excepting children's nurses.

In my opinion, the advancement of the care of the sick is an advancement of social welfare within s. 8 (1) (a) of the Act of 1955. I agree with DANCKWERTS, J. ([1957] 2 All E.R. at p. 794), that there is nothing in the section or the English language to indicate that only poor persons are to be regarded as a subject of social welfare. It was, of course, in earlier days the poor who suffered most, from the absence of adequate nursing. I would have thought it clear that the primary object was to promote and improve the art and practice of nursing. It may be that this could have been attained without the privilege to which I have referred being conferred on those on the register. I, therefore, accept the finding of the Court of Appeal that there are two main objects. This is a public Act, and I would, myself, have regarded the improvement of nursing as the primary object*. I would, myself, have thought that Parliament improved and protected the status of those who nursed as a means of improving nursing, but I am prepared to accept this improvement and protection as a main object within the sub-section and not as merely subsidiary. I do not get much assistance from the fact that the provisions of the Act can be described as regulating the nursing profession. If a profession is within the social welfare field, its regulation may be the best and only reason for the advancement of social welfare. It will depend on the nature of the regulation. In the present case, and here I differ from the Court of Appeal, I hold that the enhancement of the status of nurses as provided by the Act is, in itself, for the advancement of social welfare. Both main objects, therefore, are within the sub-section. I would, therefore, allow the appeal.

Appeal dismissed.

Solicitors: *Pontifex, Pitt & Co.* (for the appellant council); *Sharpe, Pritchard & Co.* (for the respondent rating authority).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

* The facts and decision in *Royal College of Nursing* v. *St. Marylebone Corpn.* ([1958] 1 All E.R. 129) may perhaps usefully be compared with the present case on this aspect.

R. *v.* CITY OF LIVERPOOL JUSTICES, *Ex parte* W.

[Queen's Bench Division (Lord Parker, C.J., Donovan and Ashworth, JJ.), January 16, 1959.]

Adoption—Girl—Order in favour of sole male applicant—Order not mentioning special circumstances—Duty of justices to consider whether making of order justified by special circumstances—Child's maternal grandmother anxious to have custody—Full facts not stated in guardian ad litem's report to court—Grandmother not made respondent to application—Adoption Act, 1950 (14 *Geo.* 6 *c.* 26), *s.* 2 (2)—*Adoption of Children (Summary Jurisdiction) Rules*, 1949 (*S.I.* 1949 *No.* 2397), *r.* 7, *r.* 9 (*d*), *as substituted by the Adoption of Children (Summary Jurisdiction) Rules*, 1952 (*S.I.* 1952 *No.* 554), *r.* 3.

An illegitimate child, a girl born in 1952, lived with her mother in the maternal grandmother's home until April, 1957. The mother then went to live with L. and took the child with her. In October, 1957, the mother and L. were married. On Mar. 12, 1958, the mother died. On Mar. 14, 1958, L. notified the welfare authority that he intended to make an application to adopt the child, who was still residing with him, and the local authority was appointed her guardian ad litem for the purposes of the application. The local authority's child care officer, who was in charge of the matter, knew that the grandmother disapproved of L., that she wanted to have the custody of the child and was consulting a solicitor for that purpose, but there was no reference to these matters in the report made to the court by the local authority as guardian ad litem pursuant to r. 7* of the Adoption of Children (Summary Jurisdiction) Rules, 1949, and notice of the hearing of the application for the adoption order was not served on the grandmother (as was required by r. 9 (d) in respect of a person who in the opinion of the court ought to be a respondent). On June 16, 1958, a court of summary jurisdiction made an adoption order in favour of L. The order contained no reference to special circumstances or to s. 2 (2) of the Adoption Act, 1950, which provides that an adoption order shall not be made in respect of a female infant in favour of a sole applicant who is a male unless the court is satisfied that there are special circumstances which justify as an exceptional measure the making of the order. On an application by the grandmother for an order of certiorari to quash the adoption order, one of the grounds stated in support of the application for leave was that the justices, in making the order, failed to have due regard to s. 2 (2) of the Act of 1950. The justices did not file any affidavit.

Held: certiorari would be granted because, having regard to the facts that the adoption order did not mention any special circumstances and contained no reference to s. 2 (2) of the Adoption Act, 1950, and that the justices filed no evidence, the proper inference was that they had not considered s. 2 (2).

Semble: certiorari would also lie in this case, being a case within s. 2 (2) of the Act of 1950, because the report to the court pursuant to r. 7 of the Adoption of Children (Summary Jurisdiction) Rules, 1949, was not a full report, as required by the rule, in that it omitted any sufficient statement of the facts concerning the grandmother's claim to have custody of the child.

[**Editorial Note.** The Adoption Act, 1950, is repealed on Apr. 1, 1959, by the Adoption Act, 1958, and s. 2 (2) is then replaced by s. 2 (3) of the latter Act.

As to restrictions on the making of an adoption order in favour of a sole male applicant where the infant is a female, see 21 Halsbury's Laws (3rd Edn.) 231, para. 506.

* The relevant provisions of r. 7 are printed at p. 338, letter I, post.

For the Adoption Act, 1950, s. 2 (2), see 29 HALSBURY'S STATUTES (2nd Edn.) 468.

For the Adoption of Children (Summary Jurisdiction) Rules, 1949, r. 7 and r. 9, as amended by the Adoption of Children (Summary Jurisdiction) Rules, 1952, see 11 HALSBURY'S STATUTORY INSTRUMENTS 181, 182.]

Motion for an order of certiorari.

The maternal grandmother of an infant girl moved for an order of certiorari to remove into the High Court and quash an adoption order made in respect of the infant by justices for the City of Liverpool, sitting as a juvenile court, on June 16, 1958. The infant was an illegitimate child and the adoption order was made in favour of her deceased mother's husband. The grounds for the application were (among other grounds): (a) that the guardian ad litem failed to investigate as fully as possible all the circumstances relevant to the proposed adoption with a view to safeguarding the interest of the infant, contrary to r. 7 of the Adoption of Children (Summary Jurisdiction) Rules, 1949; and (b) that the guardian ad litem or the justices failed to have due and proper regard to s. 2 (2) of the Adoption Act, 1950, in making the adoption order.

J. R. Bickford Smith for the applicant, the infant's grandmother.

J. G. Burrell for the respondent, the infant's guardian ad litem.

LORD PARKER, C.J.: In 1952 a daughter, Ann, was born to Hazel W., the daughter of the applicant. The applicant is the grandmother of Ann. She was an illegitimate child and was brought up by the grandmother and mother in Liverpool until April, 1957, when the mother went to live with a Mr. L. and took Ann with her. In October, 1957, the mother and L. married, but most unfortunately on Mar. 12, 1958, the mother died. Two days later L. gave notice to the welfare authority that he intended to make application to adopt Ann, and Ann continued to reside with him. At about the same time the grandmother—and it is quite clear that there is antagonism between the grandmother and L.—decided that the best course for Ann was to have her made a ward of court. She accordingly applied for legal aid to start the necessary motion for that purpose. Meanwhile, L. served his application for an adoption order, and on June 16, 1958, the matter was heard and an adoption order was made in his favour. The result was that the grandmother could not proceed with her application to have the child made a ward of court, and she started these proceedings.

The vital section of the Adoption Act, 1950, for this purpose is s. 2 (2), which reads:

> "An adoption order shall not be made in respect of an infant who is a female in favour of a sole applicant who is a male, unless the court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order."

It is to be observed that the words are very strong. "An adoption order shall not be made unless . . ." and not only must there be special circumstances but the whole proceeding must be treated as an exceptional measure.

By r. 6 of the Adoption of Children (Summary Jurisdiction) Rules, 1949, it is provided that, where an application is made to a court of summary jurisdiction for an adoption order, a guardian ad litem shall be appointed as soon as practicable. In this case that was done, and the local authority became the guardian ad litem. Rule 7 of the Rules of 1949 reads:

> "It shall be the duty of the guardian ad litem to investigate as fully as possible all circumstances relevant to the proposed adoption with a view to safeguarding the interests of the infant before the court, and to make a report to the court for that purpose . . ."

That provision is quite general. It is the duty of the guardian ad litem to investigate the circumstances in all cases, but I venture to think that, having

regard to s. 2 (2) of the Act of 1950, there is a duty on the guardian to make the most exhaustive investigations and to lay all possible information before the court in such a case, because the court can act only on special circumstances and as an exceptional measure.

To complete the story, a report was put in by a child care officer. The report was dated June 12, 1958, and was signed by the head of the department, and the only reference therein to the grandmother was in these terms:

> "The maternal grandmother seems not always to be clear as to the parentage of the infant, and has on a number of occasions picked up the infant from school and removed her to another part of the country. These happenings occurred whilst the mother of the infant was still alive, and they seem to have rather upset the infant, who is now very frightened of her maternal relations and if she sees them, or thinks she sees them, she runs into the house and hides."

That was the information, and, as far as we know, the sole information, in regard to the grandmother that was given to the justices, whereas in fact, as we now know, the grandmother had been round to see the child care officer on Apr. 9, 1958, and had clearly conveyed the fact that she would like the custody of Ann and that she considered that L. was unsuitable. The child care officer thought that she was aged and confused; that may well be, but at any rate she conveyed that amount of knowledge to him. Further, on Apr. 14, 1958, a telephone call was made to the child care officer. According to the memorandum of the telephone conversation, the call was made by the probation officer, Miss Griffiths, but apparently there had been some confusion because there was no Miss Griffiths who was a probation officer. The person who spoke on the telephone said that the grandmother had called to see her after seeing a solicitor, and that the solicitor might be advising the grandmother or one of her daughters to apply for a custody order. Therefore, the child care officer clearly knew that there was a grandmother, that the grandmother disapproved of L. and wanted custody of the child, and that the grandmother was consulting a solicitor for the purpose. Not one word of that appeared in the report which was laid before the justices.

By r. 9 of the Rules of 1949, as substituted by r. 3 of the Adoption of Children (Summary Jurisdiction) Rules, 1952, it is provided that notice of the hearing of the application for an adoption order shall also be served on

> "(d) any other person, not being the infant, who in the opinion of the court ought to be a respondent to the application . . ."

In those circumstances counsel for the grandmother asks for an order of certiorari. Counsel submitted in the first place, that it was clear that the justices in this case must have overlooked s. 2 (2) of the Act of 1950. He pointed out that, in the statement made pursuant to R.S.C., Ord. 59, r. 3 (2), on the application for leave to apply for an order of certiorari, one of the grounds of the application was:

> "That . . . the justices failed to have due and proper regard to s. 2 (2) of the Adoption Act, 1950, in making the said adoption order."

Despite that, the justices have put in no affidavit, as they are fully entitled to do, explaining that they did consider whether there were special circumstances and what they were. In the absence of any affidavit from the justices to that effect, and having regard to the fact that, in the order which they made, they drew no attention at all to any special circumstances, I think that this court is bound to infer that in this case—and, of course, it is an exceptional case—they omitted altogether to consider the provisions of s. 2 (2) of the Act. As regards the

consideration that the justices made no reference to the special circumstances in the order, I should say, in fairness to them, that they followed meticulously the form of order prescribed by r. 16 of the Rules of 1949 and set out, as form 4, in Sch. 1 to the Rules. The fact, however, remains that there is no suggestion from beginning to end here that the justices ever considered the provisions of s. 2 (2), and there is no reply to the contention raised in the statement giving the grounds for the application for the order of certiorari. A B

Although it is not necessary to say this, it seems to me that there may well be a second ground on which an order of certiorari will lie in this case, and that is, as it seems to me, that the procedure envisaged in a case of this sort was not followed. I am referring to the procedure whereby the guardian ad litem is to make a full report to the court of the circumstances of the case. I cannot treat the report which was put in as in any sense a full report, bearing in mind that this was a case to which s. 2 (2) applied. It is to be observed that, if a full report had been put in referring to the grandmother's visit to the child care officer and to the subsequent telephone conversation, the justices might well have considered that, pursuant to r. 9, as amended, they ought to have the application served on the grandmother. C

For those reasons, it seems to me that the justices exceeded their jurisdiction, and an order of certiorari must go. I should add that nothing that I have said should be taken as going in any way to the merits of the case. It may well be that, on a further application and hearing, the justices would be abundantly justified in saying that L. should adopt the child. On the other hand, they may come to a different conclusion. Nothing that I have said in this case should be taken to pre-judge the issue in any way. D E

DONOVAN, J.: I agree. It may be, as my Lord has indicated, that there may be special circumstances which would justify an adoption order in this case in favour of Mr. L. Like LORD PARKER, C.J., I say no more about that one way or the other. It is purely a matter for the justices. But, under the express provisions of s. 2 (2) of the Adoption Act, 1950, such an order clearly cannot be made unless the court is satisfied that such special circumstances do exist, justifying such an order as an exceptional measure, and I think that the inference here is overwhelming that this provision was overlooked. F

ASHWORTH, J.: I also agree.

Order of certiorari granted.

Solicitors: *Helder, Roberts & Co.*, agents for *John A. Behn, Twyford & Reece*, Liverpool (for the applicant); *Town clerk*, Liverpool (for the respondent guardian ad litem).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

DE DEMKO *v.* HOME SECRETARY AND OTHERS.

[HOUSE OF LORDS (Lord Reid, Lord Goddard, Lord Tucker, Lord Keith of Avonholm and Lord Birkett), January 19, 22, 1959.]

Court of Appeal—Jurisdiction—Original or appellate jurisdiction—Appeal from order of Divisional Court refusing application to discharge fugitive—Whether court had dual jurisdiction both original and appellate—Fugitive Offenders Act, 1881 (44 & 45 *Vict. c.* 69), *s.* 10, *s.* 39.

Extradition—Discharge of fugitive—Application refused by Divisional Court—Whether Court of Appeal had jurisdiction to entertain appeal from decision of Divisional Court—Fugitive Offenders Act, 1881 (44 & 45 *Vict. c.* 69), *s.* 10, *s.* 39.

On an application under s. 10 of the Fugitive Offenders Act, 1881, the Court of Appeal, by virtue of the definition of superior court in s. 39, has original but not appellate jurisdiction.

R. v. *Brixton Prison* (*Governor*), *Ex p. Savarkar* ([1910] 2 K.B. 1056) approved.

The appellant, on the refusal of a Divisional Court of the Queen's Bench Division to grant him relief under the Fugitive Offenders Act, 1881, s. 10*, appealed to the Court of Appeal. By s. 10, the power of relief was given to a " superior court ", which, by s. 39, the definition section of the Act, meant, in England, " Her Majesty's Court of Appeal and High Court ".

Held: the Court of Appeal had no jurisdiction to entertain the appeal.

Decision of the COURT OF APPEAL, sub nom. *Re Baron Kalman de Demko* ([1958] 3 All E.R. 360) affirmed.

[As to the discharge of a fugitive offender by order of a superior court, see 16 HALSBURY'S LAWS (3rd Edn.) 589, para. 1225.

For the Fugitive Offenders Act, 1881, s. 10, s. 39, see 9 HALSBURY'S STATUTES (2nd Edn.) 901, 911.]

Cases referred to:

(1) *Amand* v. *Secretary of State for Home Affairs*, [1942] 2 All E.R. 381; sub nom. *Amand* v. *Home Secretary & Minister of Defence of Royal Netherlands Government*, [1943] A.C. 147; sub nom. *R.* v. *Secretary of State for Home Affairs & Minister of Defence of the Royal Netherlands Government, Ex p. Amand*, 111 L.J.K.B. 657; 167 L.T. 177; 2nd Digest Supp.

(2) *R.* v. *Brixton Prison* (*Governor*), *Ex p. Savarkar*, [1910] 2 K.B. 1056; 80 L.J.K.B. 57; 103 L.T. 473; 24 Digest (Repl.) 1014, *174*.

(3) *Re Henderson*, *Henderson* v. *Secretary of State for Home Affairs*, [1950] 1 All E.R. 283; 24 Digest (Repl.) 1014, *175*.

(4) *Ex p. Woodhall*, (1888), 20 Q.B.D. 832; 57 L.J.M.C. 71; 59 L.T. 841; 52 J.P. 581; 16 Digest 270, *795*.

Appeal.

Appeal by Baron Kalman de Demko from an order of the Court of Appeal (LORD EVERSHED, M.R., SELLERS and PEARCE, L.JJ.), dated Oct. 7, 1958, and reported sub nom. *Re Baron Kalman de Demko*, [1958] 3 All E.R. 360, dismissing an appeal by the appellant from an order of the Queen's Bench Divisional Court (DEVLIN, DONOVAN and ASHWORTH, JJ.), dated July 14, 1958. The Divisional Court refused to grant the appellant relief under the Fugitive Offenders Act, 1881, s. 10, that he should not be extradited to South Africa for trial for alleged fraud and theft in or before 1951, and dismissed his application for a writ of habeas corpus. In the Court of Appeal the Crown took the preliminary objection that the Court of Appeal had no jurisdiction to entertain the appeal. The facts appear in the opinion of LORD REID.

* The terms of s. 10 and the relevant portions of s. 39 are printed at p. 342, letter E, p. 343, letter E, post.

F. H. Lawton, Q.C., and *P. A. W. Merriton* for the appellant. A

The Solicitor-General (*Sir Harry Hylton-Foster, Q.C.*), *Rodger Winn* and *E. J. P. Cussen* for the Secretary of State for Home Affairs and the Governor of Brixton Prison.

J. C. Phipps for the High Commissioner for the Union of South Africa.

Their Lordships took time for consideration. B

Jan. 22. The following opinions were read.

LORD REID: My Lords, the appellant was arrested on Feb. 19, 1958, on charges of fraud and theft alleged to have been committed in the Union of South Africa in or before 1951. He was brought before the chief magistrate at Bow Street C

> " as provided by the Fugitive Offenders Act, 1881, to show cause why he should not be returned to the said Dominion in manner provided by the said Act, on the ground of his being accused of the commission of the following offence within the jurisdiction of the said Dominion "

(I quote from the order of the chief magistrate). The offence was described as " Theft: Converting to his own use a loan of £6,500 from " a certain Mrs. Smith. D The order made was that the appellant should be kept in custody until delivered pursuant to the provisions of the Fugitive Offenders Act, 1881. The appellant made an application under s. 10 of that Act, and also an application for leave to issue a writ of habeas corpus. These applications were heard by a Divisional Court on July 14, 1958. Section 10 of the Act provides: E

> " Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the F expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the court seems just."

DEVLIN, J., said, in delivering the judgment of the court:

> " The matter has therefore been argued before us on the basis that it G would be unjust or oppressive for us to order him to return to stand his trial, and the point has been made that these events and this particular charge occurred seven years ago and that the lapse of time would make it unjust or oppressive that he should now have to go to South Africa to stand his trial. We have heard argument on that on both sides. We have given H consideration to the matters which have been raised, and we are not satisfied on the whole that it would be unjust or oppressive to require the accused to stand his trial now on this matter."

The application for a writ of habeas corpus was also refused.

The appellant then appealed to the Court of Appeal, and the Crown took the preliminary objection that the Court of Appeal had no jurisdiction to hear the I appeal. The appellant did not maintain that he was entitled to appeal against the refusal to issue a writ of habeas corpus, recognising that *Amand* v. *Secretary of State for Home Affairs* (1) ([1942] 2 All E.R. 381) was conclusive authority against the competency of such an application, but he maintained that he was entitled to appeal to the Court of Appeal against the dismissal of his application under s. 10 of the Fugitive Offenders Act, 1881. The Court of Appeal, on Oct. 7, 1958, upheld the Crown's objection to the competency of that appeal, dismissed the appeal with costs, and granted leave to appeal to this House.

Section 31 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, provides:

> "No appeal shall lie—(a) except as provided by the Criminal Appeal Act, 1907, or this Act, from any judgment of the High Court in any criminal cause or matter."

If there was any jurisdiction in the Court of Appeal with regard to applications under s. 10, it would seem to be saved by s. 26 (2) (d) of the Act of 1925. I must, therefore, look at the earlier position. There was a similar provision in s. 47 of the Supreme Court of Judicature Act, 1873:

> "... no appeal shall lie from any judgment of the said High Court in any criminal cause or matter, save for some error of law apparent upon the record ..."

The matter of error of law apparent on the record does not now arise. It is rightly admitted that the appellant's application to the Divisional Court was a criminal cause or matter and, therefore, the appeal to the Court of Appeal could only be competent if there is some statutory provision which excepts applications under s. 10 from the general rule which denies jurisdiction to the Court of Appeal in any appeal relating to a criminal cause or matter.

The appellant argues that such a statutory provision is to be found in the Fugitive Offenders Act, 1881. Section 10 refers to a superior court, and the expression "superior court" is defined in s. 39 as meaning—

> "(1) In England, Her Majesty's Court of Appeal and High Court ...; and
>
> "(2) In Scotland, the High Court of Justiciary; and
>
> "(3) In Ireland, Her Majesty's Court of Appeal and Her Majesty's High Court ... at Dublin; and
>
> "(4) In a British possession, any court having in that possession the like criminal jurisdiction to that which is vested in the High Court ... in England, or such court or judge as may be determined by any Act or ordinance of that possession."

No one has yet been able to suggest even a plausible reason why the definition of "superior court" in s. 39 should contain any reference to the Court of Appeal. The Court of Appeal was established by the Supreme Court of Judicature Act, 1873, and its jurisdiction arises entirely from statute. Its function is to exercise appellate jurisdiction in civil cases. It is true that there are one or two matters of comparatively small importance in which it has been given original jurisdiction, and there is at least one matter, criminal in form, in which it has been given appellate jurisdiction because that matter is civil in substance (s. 27 of the Supreme Court of Judicature (Consolidation) Act, 1925). But there appears to be no matter at all comparable to the present in which it has any jurisdiction at all. Applications under s. 10 are often combined with applications for leave to issue a writ of habeas corpus, and it is common ground that the Court of Appeal has no jurisdiction, either original or appellate, to deal with habeas corpus applications. But some meaning must be found for the reference to the Court of Appeal in s. 39; it must be held to confer on that court jurisdiction of some kind, original or appellate, to deal with applications under s. 10. To hold that the Court of Appeal is given original jurisdiction co-ordinate with that of the High Court does not create any great difficulty. It merely produces the somewhat odd result that an applicant under s. 10 can choose whether to make his application to a Divisional Court or to the Court of Appeal. But to hold that this reference to the Court of Appeal confers an appellate jurisdiction would create much more difficulty. In the first place it would entail a breach of the general rule clearly laid down in the Supreme Court of Judicature (Consolidation) Act, 1925, that the Court of Appeal has no appellate jurisdiction in a criminal cause or matter, and, if it was intended that the Court of Appeal should

have that jurisdiction, one would have expected the intention to be much more clearly stated. Secondly, it would mean that considerable delays would be made possible in a matter which otherwise can and should be speedily disposed of. And thirdly, it would mean that there would be a marked difference between the law in England and Ireland on the one hand and the law in Scotland on the other, because it is quite clear that in Scotland there can be no appeal from the first order of the superior court there. Apart from authority, I would, therefore, say without hesitation that this reference to the Court of Appeal in s. 39 of the Fugitive Offenders Act, 1881, must be held to confer on that court original but not appellate jurisdiction.

When I turn to authority I find that this view is confirmed in *R.* v. *Brixton Prison (Governor), Ex p. Savarkar* (2) ([1910] 2 K.B. 1056). The applicant made application to the High Court for a writ of habeas corpus and he also founded on s. 10 of the Fugitive Offenders Act, 1881. Although the court decided against him on both these matters, the order of the court only referred to the habeas corpus application. The Court of Appeal held that they had no jurisdiction to deal with the habeas corpus application, that the matter of s. 10 not being mentioned in the order was not properly before them in the appeal, but that they had original jurisdiction to deal with an application under s. 10 and that this matter was not res judicata because it was not dealt with in the lower court's order. An application was, therefore, made to the Court of Appeal under s. 10. A preliminary objection to its competency was not upheld, and the application was heard and dismissed.

Counsel for the appellant argued that *Savarkar's* case (2) was wrongly decided and he founded on a passage in the judgment of BUCKLEY, L.J. (ibid., at p. 1079):

> " There is one other point upon which I wish to say a word. It is this: it would be another possible objection to the original motion which, as the result of this judgment, we are going to hear that, where the Act of 1881 refers to the ' Court of Appeal ' as a ' superior court ', it means that court sitting as a Court of Appeal. The learned Solicitor-General has not thought fit to argue that point. I agree with what VAUGHAN WILLIAMS, L.J., has said to the effect that we must for ourselves determine that point in order to hear this motion. As my two brothers think that that point is to be resolved in favour of our hearing the motion, of course that decides the matter. For my own part, I have not heard the matter argued, and will only say that I think it a question of very considerable difficulty whether, when this Act speaks of the ' Court of Appeal ', it does not mean the Court of Appeal sitting as a Court of Appeal. It is unnecessary for me to say more as to this point, because the other members of the court do not think that is the meaning."

I do not think that it is necessary to make further citations from this case. For my part, I can only say that I think that the case was rightly decided, and in subsequent cases it has been accepted without question. In *Re Henderson, Henderson* v. *Secretary of State for Home Affairs* (3) ([1950] 1 All E.R. 283), an application under s. 10 to the Court of Appeal was dealt with without any question being raised as to the competency, and in *Amand's* case (1) reference was made to *Savarkar's* case (2) by both VISCOUNT SIMON, L.C., and LORD WRIGHT. It is true that *Amand's* case (1) does not raise the precise point here, but it is obvious that *Savarkar's* case (2) was considered with some care. VISCOUNT SIMON, L.C., said ([1942] 2 All E.R. at p. 385):

> " As regards the right to appeal, it has been consistently held that there is no right of appeal from the refusal of the writ in extradition proceedings: *Ex p. Woodhall* (4) ((1888), 20 Q.B.D. 832), or in proceedings under the Fugitive Offenders Act, 1881: *R.* v. *Brixton Prison (Governor), Ex p. Savarkar* (2). It will be observed that these decisions, which I accept as correct, involve the view that the matter in respect of which the accused

is in custody may be 'criminal' although he is not charged with a breach of our own criminal law . . ."

LORD WRIGHT twice referred to *Ex p. Savarkar* (2) (see [1942] 2 All E.R. at p. 388) without any indication of doubt on his part that the case had been well decided.

I am, therefore, of opinion that the Court of Appeal reached a correct result in this case, and I move your Lordships to dismiss this appeal with costs.

LORD GODDARD: My Lords, I concur.

LORD TUCKER: My Lords, I agree.

LORD KEITH OF AVONHOLM: My Lords, I agree.

LORD BIRKETT: My Lords, I agree.

Appeal dismissed.

Solicitors: *Beach & Beach* (for the appellant); *Director of Public Prosecutions* (for the Home Secretary and the Governor of Brixton Prison); *Jaques & Co.* (for the High Commissioner for the Union of South Africa).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

PRACTICE DIRECTION.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

Divorce—Decree—Form of decree on ground of adultery.

In accordance with a recent ruling* of the Court of Appeal the President has directed that in future the wording of a decree on the ground of adultery should in every case record the judge's finding in full by stating with whom adultery was found to have been committed.

1. The normal form, for use where adultery is found against a named person who has been served, will recite that the decree is by reason that the wife or husband, as the case may be, has committed adultery:—

"....with the [co-respondent] [party cited] [intervener] [second respondent] A.B."

or "...with A.B. upon whom the [petition] [answer] has been served."

The latter wording will be used for a woman named or party cited in an answer not claiming relief who has not intervened or been made a second respondent.

2. The wording to be used in other cases will be as follows:—

(a) *Where the name of the adulterer is not known*
"...with a man [woman] unknown"

(b) *Where service has not been effected in the normal manner*
(i) when service has been wholly dispensed with
"...with a man [woman] service upon whom has been dispensed with"
(ii) when any form of substituted service has been allowed
"...with a man [woman] upon whom substituted service has been allowed."

(c) *Where adultery was found against the spouse but not against the alleged adulterer*
"...with a man [woman] as against whom the charge was not proved."

B. LONG,
Senior Registrar.

Feb. 3, 1959.

* See *Schlesinger* v. *Schlesinger*, p. 155, ante.

DAVIE *v.* NEW MERTON BOARD MILLS, LTD. AND OTHERS.

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Tucker and Lord Keith of Avonholm), November 27, December 1, 2, 3, 4, 1958, January 28, 1959.]

Master and Servant—Liability of master—Accident to servant—Tool bought from reputable supplier who had bought it from reputable manufacturers—Defect due to negligence in manufacture—Defect not discoverable by employers, but patent to manufacturers.

In 1946 an old-established firm of toolmakers made a drift (a tool consisting of a tapered bar of steel about one foot long) which had a latent defect, viz., excessive hardness of the steel due to negligent heat treatment. In July, 1946, the manufacturers sold the drift to B. & Co., Ltd., reputable suppliers of tools of this kind, from whom, in the same month, the employers of D. bought at a reasonable price a batch of drifts, including this tool. The defect in the drift was not discoverable on inspection and no intermediate examination by the employers between the times of its manufacture and of its use was reasonably to be expected. Between July, 1946, and March, 1953, the drift was seldom, if ever, used, but in March, 1953, D. used it in the course of his employment as a maintenance fitter. Owing to the defect in its manufacture, a piece flew off the drift when it was struck with a hammer by D. in the course of using it, and destroyed the sight of his left eye. There was no negligence in the employers' system of maintenance and inspection and the accident was solely due to the defect in the drift.

Held: the employers were not liable to D. for the injury caused to him by the defective drift, because they had fulfilled their duty to him as their servant, namely, a duty to take reasonable care to provide proper appliances, and were not responsible for the negligence of the manufacturers, who had no contractual relationship with the employers and in manufacturing the tool were not acting as persons (whether servants, agents or independent contractors) to whom the employers had delegated the performance of any duty that it was for the employers to perform.

Mason v. *Williams & Williams, Ltd. & Thomas Turton & Sons, Ltd.* ([1955] 1 All E.R. 808) approved.

Donnelly v. *Glasgow Corpn.* (1953 S.C. 107) overruled.

Wilsons & Clyde Coal Co., Ltd. v. *English* ([1937] 3 All E.R. 628) considered and explained.

Per LORD TUCKER: in my view, it would have made no difference if the drift had been purchased [by the employers] direct from the manufacturers. An employer may, however, render himself liable to his servant for injury suffered by him by reason of a faulty specification prepared by the employer for the manufacturer, or where the manufactured article may require inspection or test after delivery (see p. 369, letter C; cf., p. 357, letter B, pp. 367, 368, post).

Decision of the COURT OF APPEAL ([1958] 1 All E.R. 67) affirmed.

[**Editorial Note.** Purchase by a master from a wholesale or retail merchant, without more, is not an instance of delegation by the master of the performing of his duty to his servant. It is performance by the master himself (see per LORD KEITH OF AVONHOLM at p. 372, letter H, post). This, perhaps, conveniently epitomises the decision.

As to a master's duty to provide suitable appliances, see 25 HALSBURY'S LAWS (3rd Edn.) 511, para. 978; and for cases on the subject, see 34 DIGEST 194-196, *1580-1601.*

As to the liability of third parties to a servant in tort, see 25 HALSBURY'S LAWS (3rd Edn.) 560, para. 1068.]

A Cases referred to:

(1) *M'Alister (or Donoghue)* v. *Stevenson*, [1932] All E.R. Rep. 1; [1932] A.C. 562; 101 L.J.P.C. 119; 147 L.T. 281; 36 Digest (Repl.) 85, *458*.

(2) *Mason* v. *Williams & Williams, Ltd. & Thomas Turton & Sons, Ltd.*, [1955] 1 All E.R. 808; 3rd Digest Supp.

(3) *Donnelly* v. *Glasgow Corpn.*, *Henderson* v. *Glasgow Corpn.*, *Ross* v. *Glasgow* B *Corpn.*, 1953 S.C. 107; [1953] S.L.T. 161; 3rd Digest Supp.

(4) *Priestley* v. *Fowler*, (1837), 3 M. & W. 1; 7 L.J.Ex. 42; 150 E.R. 1030; 34 Digest 71, *479*.

(5) *Smith* v. *Baker & Sons*, [1891] A.C. 325; 60 L.J.Q.B. 683; 65 L.T. 467; 55 J.P. 660; 36 Digest (Repl.) 154, *812*.

(6) *Wilsons & Clyde Coal Co., Ltd.* v. *English*, [1937] 3 All E.R. 628; [1938] C A.C. 57; 106 L.J.P.C. 117; 157 L.T. 406; Digest Supp.

(7) *Fanton* v. *Denville*, [1932] All E.R. Rep. 360; [1932] 2 K.B. 309; 101 L.J.K.B. 641; 147 L.T. 243; Digest Supp.

(8) *Bain* v. *Fife Coal Co.*, 1935 S.C. 681; Digest Supp.

(9) *Angliss (W.) & Co. (Australia) Proprietary* v. *Peninsular & Oriental Steam Navigation Co.*, [1927] 2 K.B. 456; 96 L.J.K.B. 1084; 137 L.T. 727; D 41 Digest 474, *3054*.

(10) *Baird* v. *Addie*, (1854), 16 Dunl. (Ct. of Sess.) 490.

(11) *Bartonshill Coal Co.* v. *Reid*, (1858), 3 Macq. 266; 31 L.T.O.S. 255; 22 J.P. 560; 34 Digest 126, *971*.

(12) *Nisbett* v. *Dixon*, (1852), 14 Dunl. (Ct. of Sess.) 973.

(13) *Ovington* v. *M'Vicar*, (1864), 2 Macph. (Ct. of Sess.) 1066; 34 Digest 197, *n.*

E (14) *Weems* v. *Mathieson*, (1861), 4 Macq. 215; 34 Digest 196, *1604*.

(15) *Weir (or Wilson)* v. *Merry & Cunningham*, (1867), 5 Macph. (Ct. of Sess.) 807; sub nom. *Wilson* v. *Merry*, (1868), L.R. 1 Sc. & Div. 326; 19 L.T. 30; 32 J.P. 675; 40 Sc. Jur. 486; 34 Digest 207, *1697xiv*; 211, *1747*.

(16) *Paterson* v. *Wallace & Co.*, (1854), 1 Macq. 748; 23 L.T.O.S. 249; 34 F Digest 194, *1586*.

(17) *M'Killop* v. *North British Ry. Co.*, (1896), 23 R. (Ct. of Sess.) 768; 33 Sc.L.R. 586.

(18) *Macdonald* v. *Wyllie & Son*, (1898), 1 F. (Ct. of Sess.) 339; 36 Sc.L.R. 262; 6 S.L.T. 209; 36 Digest (Repl.) 138, *1103*.

(19) *Wood & Co.* v. *Mackay*, (1906), 8 F. (Ct. of Sess.) 625; 43 Sc.L.R. 458; G 13 S.L.T. 963; 36 Digest (Repl.) 169, *1405*.

(20) *Ballard* v. *North British Ry. Co.*, 1923 S.C. (H.L.) 43; 36 Digest (Repl.) 142, *1237*.

(21) *Thomson* v. *Cremin*, [1953] 2 All E.R. 1185; 3rd Digest Supp.

(22) *Indermaur* v. *Dames*, (1866), L.R. 1 C.P. 274; 35 L.J.C.P. 184; 14 L.T. 484; *affd.* Ex. Ch., (1867), L.R. 2 C.P. 311; 36 Digest (Repl.) 46, *246*.

H (23) *Dalton* v. *Angus*, (1881), 6 App. Cas. 740; 50 L.J.Q.B. 689; 44 L.T. 844; 46 J.P. 132; 34 Digest 158, *1234*.

(24) *Hughes* v. *Percival*, (1883), 8 App. Cas. 443; 52 L.J.Q.B. 719; 49 L.T. 189; 47 J.P. 772; 7 Digest 300, *240*.

(25) *Gavin* v. *Rogers*, (1889), 17 R. (Ct. of Sess.) 206; 27 Sc.L.R. 123; 34 Digest 198, *p.*

I **Appeal.**

Appeal by James Gibson Davie from an order of the Court of Appeal (JENKINS, PARKER and PEARCE, L.JJ.), dated Nov. 26, 1957, and reported [1958] 1 All E.R. 67, reversing in part an order of ASHWORTH, J., dated Mar. 14, 1957, and reported [1957] 2 All E.R. 38, 384. The appellant lost the sight of his left eye through the breaking of a tool supplied to him by his employers, New Merton Board Mills, Ltd., the first respondents, who had bought it from a reputable supplier who had bought it from the manufacturers, Frank Guylee &

Son, Ltd., the second respondents. ASHWORTH, J., awarded the appellant £2,030 damages with costs against both the first and the second respondents, and awarded the first respondents full contribution against the second respondents in respect of these damages. The first respondents appealed to the Court of Appeal who held that they had used reasonable care and skill in providing the tool and were not liable to the appellant for the injury which it caused to him. The second respondents did not appeal on the question of liability, but they and the appellant served cross-notices of appeal as to various questions of costs. The facts are set out in the opinion of VISCOUNT SIMONDS.

Martin Jukes, Q.C., and *Malcolm Morris* for the appellant.

Marven Everett, Q.C., and *Tudor Evans* for the first respondents, the employers.

The second respondents, the manufacturers, did not appear and were not represented.

Their Lordships took time for consideration.

Jan. 28. The following opinions were read.

VISCOUNT SIMONDS: My Lords, this appeal raises a question of far-reaching consequence. The appellant is by trade a maintenance fitter. In March, 1953, in the course of his employment by New Merton Board Mills, Ltd., whom I will call " the respondents ", at their factory at Merton, he was using a tool known as a drift which had been provided by them. It is a tool which is used for the purpose of separating one piece of metal from another when they have been brought together too tightly to be released by hand. He struck the drift with a hammer and there is no suggestion that there was anything wrong in what he did or the way he did it. But the result was that a splinter flew off the drift into his left eye and caused such serious injury that he lost all useful vision of that eye. The appellant accordingly brought the action out of which this appeal arises against his employers and, at a later stage, joined as defendants the manufacturers of the drift. The following facts were proved or admitted at the trial:—(i) That the drift was made by the manufacturers, an old-established firm of toolmakers, in the year 1946; (ii) That in July, 1946, they had sold it to a company called C. A. Baldwin & Co., Ltd., a reputable firm which sold tools of this kind; (iii) That in response to an order for drifts from the respondents, C. A. Baldwin & Co., Ltd. in the same month delivered a supply which included the fatal drift; (iv) That between July, 1946, and March, 1953, this drift had been seldom, if ever, used; (v) That the appellant properly took the drift from the respondents' store and that the accident occurred as the result of the second blow that he struck it with a hammer; (vi) That the accident was solely due to the excessive hardness of the metal of the head of the drift; (vii) That this excessive hardness was due to negligent heat treatment by the manufacturers; (viii) That it was in apparently good condition and there was no negligence in the respondents' system of maintenance and inspection; (ix) That the respondents bought the drift from a reputable firm of suppliers and paid a reasonable price for it; (x) That no intermediate examination of it between the time of its manufacture and the time of its actual use was reasonably to be expected; (xi) That it was unreasonable to expect an employer to test a drift for hardness before issuing it to his employee; and (xii) No examination short of a test would have revealed the danger existing in this particular drift. Some of these findings and admissions were, no doubt, more relevant to the claim against the manufacturers than that against the respondents. So far as the latter are concerned, it is sufficient to say that to them the defect in the drift was latent and not to be discovered by any inspection they could reasonably be expected to make.

It is with this background that the question thus stated by ASHWORTH, J., who tried the case, must be examined, viz., whether the respondents are responsible to the appellant because the drift was negligently manufactured by the manufacturers. The learned judge held that they were: the Court of Appeal (PARKER and PEARCE, L.JJ., dissentiente JENKINS, L.J.) that they were not.

I interpose, for the sake of clarity, that the learned judge held that the manufacturers also were liable on the principle of *M'Alister (or Donoghue)* v. *Stevenson* (1) ([1932] All E.R. Rep. 1), and gave judgment against both defendants for £2,030 with orders as to indemnities and costs which need not now be considered, and that the Court of Appeal, allowing an appeal by the present respondents, directed that the judgment for the appellant should be entered against the manufacturers only with consequential orders as to costs. The appellant, not being satisfied with judgment against the manufacturers only, brings this appeal by which he seeks to make his employers also liable. It is possible that he or others have an eye on those far-reaching consequences of which I have spoken. But at any rate he is entitled to appeal.

My Lords, in the course of a hearing which lasted many days a great number of authorities were cited. But it appears to me that no cases were cited in which the facts were similar to those now under consideration except two. These were, first, a case heard by FINNEMORE, J., in 1955 (*Mason* v. *Williams & Williams, Ltd. & Thomas Turton & Sons, Ltd.* (2), [1955] 1 All E.R. 808), in which the learned judge held on very similar facts that the employers were not liable and did so in a judgment which, if it was not good law, was notably good sense; it appears that the case was heard at Chester Assizes and he was not embarrassed by the citation of authority. The second case, in which there was by no means the same degree of similarity, was a Scottish case, *Donnelly* v. *Glasgow Corpn.* (3) (1953 S.C. 107). Here the question was fully argued and the employers were held liable. I defer the further consideration of that case.

Before I turn to the examination of the cases by which it may be supposed that guiding authority is given, I would remind your Lordships that this action was founded in tort. The accident, it was said, was caused by the negligence of the respondents, their servants or agents, and their negligence consisted in this, that they failed to provide a suitable drift which could be hammered safely without the risk of pieces flying off. I have deliberately used the language of the statement of claim which has been repeatedly used in these proceedings. It may be relevant to observe that it is not strictly accurate. The accident occurred not through a failure to supply a suitable drift—a failure that could result in nothing—but through the supply of an unsuitable drift. Therein lay their alleged negligence, and I pause to analyse that allegation. It may mean one of two things. First, it may mean that it was the duty of the respondents to supply suitable drifts; they supplied an unsuitable one; they did not do their duty; therefore they were negligent. This is a bare statement of absolute obligation. But, secondly, it may mean that the supply of an unsuitable drift was due to a want of reasonable care on their part. It must then be shown wherein lay the want of reasonable care, and at once the question arises, for whose negligence, acts, I suppose, of omission and commission, the employer is liable in the long chain which ends with the supply by him of a tool to his workman, but may begin with the delving of the raw material of manufacture in a distant continent. In the case before us the chain is long enough. The respondents were not guilty of any negligence, nor was any servant or agent of theirs, nor was the reputable firm who supplied the drifts, but at the end of the chain were the manufacturers. The respondents stood in no contractual relation to them; so little connexion was there between them that it was long in dispute whether the fatal drift had been manufactured by them and delivered by them to the suppliers. But it is for their negligence in manufacture that the appellant would make the respondents liable. Remembering, my Lords, that the essence of the tort of negligence lies in the failure to take reasonable care, I am constrained to wonder how this thing can be. But it is made clear by the powerful dissenting judgment of JENKINS, L.J., that, if such a result cannot commend itself to reason, it yet may find support in authority. I say that it cannot commend itself to reason; for, if indeed it is the law, every man employing another and

supplying him with tools for his job acts at his peril; if someone at sometime has been careless, then, for any flaw in the tools, it is he who is responsible, be he himself ever so careful. I observe that such a view of the law is usually accompanied by a disclaimer of any idea that an employer warrants the fitness of the tool he supplies and do not find the reconciliation easy.

My Lords, in the consideration of the very numerous cases which may be thought to have some bearing on this matter, two things should be borne in mind. In the first place, in England for the hundred years between the decision in *Priestley* v. *Fowler* (4) ((1837), 3 M. & W. 1) and the abolition of the doctrine of common employment, and for a somewhat shorter period in Scotland, the determination to avert, or at least to reduce, the consequences of that decision led to a great deal of artificiality and refinement which would have been otherwise unnecessary. The shadow of it is still on us. But we can at least return to the simple question which is at the bottom of it all: " Has the employer taken reasonable care for the safety of the workman ? ", a question which can only be answered in each case by a consideration of all its circumstances. In the second place, it is well to remember that we are dealing with a case of tort. The same act or omission by an employer may support an action in tort or for breach of an implied term of the contract of employment but it can only lead to confusion, if, when the action is in tort, the court embarks on the controversial subject of implied contractual terms. I would venture a third general observation. Just as the law imposes a certain standard of care on an employer in relation to his workman, so it imposes on the occupier of land a certain standard of care in relation to those who enter on it, and in this regard there were refinements which may now be forgotten. It may well be that the standard of reasonable care in both relations is, in certain circumstances, the same. It may, too, be useful to argue by way of analogy from one to another. But I would deprecate any direct appeal to cases between invitor and invitee for the purpose of determining the measure of responsibility of an employer to his workman. Particularly, I think, it is inept where the question is as to the liability of the employer for acts of a third party, independent contractor or another, of which he had not, and could not reasonably have had, knowledge. To that I now return, for it is in this case the very heart of the matter.

My Lords, let me remind your Lordships that the respondents are liable (if they are liable) for the accident to the appellant because the manufacturers were careless, and for that carelessness they must assume vicarious responsibility. That is a conclusion, said JENKINS, L.J., which the Court of Appeal was constrained on the authorities to adopt. He observed ([1958] 1 All E.R. at p. 81) that that did not

> " entail the substitution of an absolute duty to ensure safety for the duty of reasonable care enunciated in *Smith* v. *Baker & Sons* (5) ([1891] A.C. 325), and accepted passim by the House of Lords in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (6) ([1937] 3 All E.R. 628). The duty remains a duty of reasonable care, but the obligation to take that degree of care per se or per alios is an absolute obligation."

With great respect to the lord justice, I find this a difficult proposition to interpret and apply. If, indeed, it means that the employer is responsible for lack of care shown by anyone in the long chain to which I referred earlier in this opinion, then it is for practical purposes indistinguishable from the standard of absolute obligation which is disclaimed. If it means anything else, if it is necessary to determine who are the alii for whose default the employer is responsible, then the question is once more open. At what stage is the act or omission of a third party something for which the employer is responsible or no longer responsible?

My Lords, I would begin, as did PARKER, L.J., with a reference to the familiar words of LORD HERSCHELL in *Smith* v. *Baker & Sons* (5) ([1891] A.C. at p. 362), in which he describes the duty of a master at common law as the duty

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> " of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk ",

words that are important both in prescribing the positive obligation and in negativing by implication anything higher. The content of the duty at common
B law thus described by LORD HERSCHELL must vary according to the circumstances of each case. Its measure remains the same; it is to take reasonable care, and the subject-matter may be such that the taking of reasonable care may fall little short of absolute obligation. I find nothing in the earlier cases, in either the English or Scottish courts, to which our attention was called, that requires any qualification of this statement, though there are dicta which,
C taken out of their context, might appear to do so.

But, my Lords, as I have said, the difficulty arises not on the primary statement of liability but on the question for whom is the employer responsible. Clearly he is responsible for his own acts, and clearly, too, for those of his servants. To them at least the maxims " respondeat superior " and " qui facit per alium facit per se " will apply. It is the next step that is difficult. The employer is
D said to be liable for the acts of his " agents " and with greater hesitation for the acts of " independent contractors ". My Lords, fortunately we are not troubled here with the word " agent ". No one could say that a manufacturer who makes a tool and supplies it to a merchant who in turn sells it to an employer is in any sense an agent of the latter for providing his workman with a tool. Is he then an independent contractor? It is, perhaps, a striking commentary on the
E artificiality of this concept that it should for a moment be thought possible to regard as an independent contractor with an employer a manufacturer with whom he never contracted, of whom he may never have heard and from whom he may be divided in time and space by decades and continents. It may lead your Lordships to the conclusion that the liability of the employer in such a case can only be sustained if his obligation is absolute. But that ex hypothesi it is not.

F How comes it, then, that JENKINS, L.J., from whom, like his brethren in the Court of Appeal I differ with diffidence, was constrained to hold the present respondents liable? I think that it was largely due to the observations of LORD WRIGHT and LORD MAUGHAM in *Wilsons*' case (6) to which I have more than once referred. That was a case in which (I cite the words of LORD MACMILLAN, [1937] 3 All E.R. at p. 637) it fell to this House to consider and accom-
G modate the spheres of operation in the law of master and servant, of two competing doctrines, the doctrine of vicarious liability and the doctrine of common employment, according to the former of which a master is responsible for the negligence of his servant acting within the scope of his employment, and according to the latter he is not responsible for the negligence of his servant causing injury to a fellow-servant. " Which of these two principles ", said LORD MACMILLAN,
H " is applicable to the present case ". The question at issue was remote from that in the present case. No one now doubts that an employer cannot escape liability by appointing an agent to perform the employer's obligation on his behalf. An attempted departure from this broad principle in *Fanton* v. *Denville* (7) ([1932] All E.R. Rep. 360) had been rejected by the Lord Justice-Clerk (LORD AITCHISON) in *Bain* v. *Fife Coal Co.* (8) (1935 S.C. 681 at p. 693), and this was
I the main subject of debate in *Wilsons*' case (6). I would reinforce what I have said by referring to almost the first words of LORD PRESIDENT NORMAND in the same case (1936 S.C. at p. 894):

> " This court was convened to consider two general questions on an employer's liability to one of his servants for personal injury. The first and broader question is whether the employer must answer at common law on the principle respondeat superior for a defective system of working, negligently provided or permitted to be carried on by a servant to whom

the duty of regulating the system of working has been delegated by the employer." A

That was the only relevant question for decision. It was assumed throughout that the manager whose negligence had caused the accident was a servant of the employer. No question arose either in the Court of Session or in this House who should be regarded as a servant for whose negligence the employer must be held liable. There is an illuminating passage in the judgment of the Lord President (ibid., at p. 901). He refers to the judgment of the Lord Justice-Clerk in *Bain* (8), who there asserted it to be a fundamental doctrine of the law of master and servant that there are certain duties owed by a master to his servant so imperative and vital to safety that the master cannot divest himself of responsibility by entrusting their performance to others, so as to avoid liability in the event of injury arising to the servant through neglect of any of those duties. B C

LORD NORMAND said:

"I agree with this opinion, subject to the explanation, which is to be gathered from the context, that, when delegation to others is spoken of, it is delegation to servants that is meant."

It is legitimate, therefore, to approach *Wilsons'* case (6) with the warning that anything said about the default of any person other than the employer and his servants cannot be regarded as relevant to the decision. Of the noble and learned Lords who took part in that case, I do not think that LORD ATKIN or LORD THANKERTON or LORD MACMILLAN said anything even alio intuitu which could give support to the appellant. I turn then to LORD WRIGHT, on whose observations reliance was placed. I repeat that all that was said was in the setting of the current conflict with the doctrine of common employment and I first note that the learned Lord, after referring ([1937] 3 All E.R. at p. 640) to D E

"those fundamental obligations of a contract of employment which lie outside the doctrine of common employment, and for the performance of which employers are absolutely responsible"

added: F

"When I use the word absolutely, I do not mean that employers warrant the adequacy of plant, or the competence of fellow-employees, or the propriety of the system of work. The obligation is fulfilled by the exercise of due care and skill. But it is not fulfilled by entrusting its fulfilment to employees, even though selected with due care and skill." G

It may be doubted what exactly the noble and learned Lord did have in mind when he used the word "absolutely", but it was on a later passage that learned counsel mainly relied. LORD WRIGHT said (ibid., at p. 641):

"But in truth the employer's obligation, as it has been defined by this House, is personal to the employer, and one to be performed by the employer per se or per alios. If I may take an analogy or instance of a similar personal obligation, I note that the Carriage of Goods by Sea Act, 1924, requires a shipowner to exercise due diligence, or to take reasonable care, to provide a seaworthy ship. The shipowner is almost certainly not an expert naval architect, engineer, or stevedore. So far as I know, it has never been claimed that this obligation is fulfilled by the shipowner taking reasonable care to appoint a competent expert: the shipowner is absolutely held to the fulfilment of the obligation. It is the obligation which is personal to him, and not the performance." H I

The appellant, fastening on these words, applies them by saying that here the employer was under an absolute personal obligation to supply proper tools to the workman which he could not fulfil by purchasing defective tools in the market. I shall endeavour to show that this is, in any case, an illegitimate application of what LORD WRIGHT said. But it must be first observed that the

A analogy is an unfortunate one, for in the earlier case of *W. Angliss & Co. (Australia) Proprietary* v. *Peninsular & Oriental Steam Navigation Co.* (9) ([1927] 2 K.B. 456), the same learned judge had to construe the same section, and I venture to quote a substantial passage of his judgment because it is very apposite to the present case. After referring to the terms of the Act, the learned judge continued (ibid., at p. 460):

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> "The obligation of the carrier to exercise due diligence to make the ship fit is clearly not limited to his personal diligence. The carrier . . . must act by agents or servants . . . The question is: How wide is the category of agents or servants with reference to the obligation now being considered. It is contended by the plaintiffs that, as the primary obligation on the carrier C is to provide a seaworthy ship, the carrier cannot delegate any part of that obligation so as to relieve him of his personal liability, and he must accordingly be accountable for lack of due diligence on the part of the shipbuilders and their workmen, who are to be deemed to be his agents, to make the ship seaworthy and fit, and that, therefore, the defendants must be held liable for the bad workmanship of which I have found the shipbuilder's men D guilty . . . I do not think that this contention is sound."

My Lords, I think, with great respect that when, in *Wilsons'* case (6) the learned judge referred to the analogy of the Carriage of Goods by Sea Act, 1924, he did so with an imperfect recollection of what he had himself decided in the earlier case. And, much as I distrust analogies, I would add that there is a striking resemblance between the shipowner who is held not to be liable for the bad E workmanship, undiscoverable by him, of the shipbuilder's employees and the employer who claims not to be liable for the bad workmanship, equally undiscoverable, of the employees of the manufacturer who supplied at secondhand the tools with which he has provided his workman.

I turn, then, to LORD MAUGHAM. Again I must be allowed to quote at length, for it is almost entirely on the authority of this case that the appellant relies. F LORD MAUGHAM said ([1937] 3 All E.R. at p. 646):

> ". . . it has already been pointed out that the employer's liability is fulfilled by the exercise of due care and skill, and I may be allowed to point out that it is this circumstance which has led, on occasion, to a misapprehension of the true position. An illustration will demonstrate the mistake. G Suppose some new machinery is necessary in a factory, and the employer is absent, or completely unskilled in such things. He necessarily leaves the matter to a manager, let us suppose a highly skilled person, who, however, is negligent in this case. An accident follows, due to a defect in the machine. If the liability of the employer is stated as being an obligation to use his best endeavours to supply and instal good machinery, it may well be said on H his behalf that he left the matter to a highly skilled man, and it may be asked, with force, what more could he do ? I should reply, nothing; but I should add that the premise is incorrect. The possessive pronoun 'his' is that which leads to the error. The proposition would be more correctly stated to be that his duty is to supply and instal proper machinery so far as care and skill can secure this result. He can, and often he must, perform this I duty by the employment of an agent, who acts on his behalf; but he then remains liable to the employees unless the agent has himself used due care and skill in carrying out the employer's duty."

My Lords, it is not necessary to read further. This is the passage on which reliance was placed as indicating that, if the proposition was properly stated, the employer was liable for want of skill and care on the part of anyone in the long chain from manufacture of the tool to its use by a workman. I am satisfied that LORD MAUGHAM meant no such thing, and I find this a convenient place to explain what appears to me the fundamental fallacy in the argument. As I

have tried to show, the contention, as stated in its first form, that the employer A
is liable for the acts of himself, his servants and agents and, subject to whatever limitations might be thought fit, independent contractors, could not lead to success in this action; for the manufacturer could not by any legitimate use of language be considered the servant or agent of, or an independent contractor with, the employer who buys his manufactures in the market. It was then sought to reach the same result by a different road. The employer, it was said, B
was under a duty to take reasonable care to supply his workman with proper plant and machinery. It was assumed that this included tools such as drifts, and I, too, will, without deciding it, assume it. It was then said that the employer could not escape responsibility by employing a third party, however expert, to do his duty for him. So far, so good. That is what LORD MAUGHAM said and I agree. But then comes the next step—but I would rather call it a C
jump, and a jump that would unhorse any rider. Therefore, it was said, the employer is responsible for the defect in goods that he buys in the market, if it can be shown that that defect was due to the want of skill or care on the part of anyone who was concerned in its manufacture. But, my Lords, by what use or misuse of language can the manufacturer be said to be a person to whom the employer delegated a duty which it was for him to perform ? How can it D
be said that it was as the delegate or agent of the employer that the manufacturer failed to exhibit due skill and care ? It is, to my mind, clear that he cannot, and equally clear that LORD MAUGHAM was not contemplating such a case nor using language which was apt to cover it.

I would now refer to *Donnelly* v. *Glasgow Corpn.* (3). In that case, the plaintiffs, the conductor and driver of an omnibus belonging to the defendant E
corporation, suffered personal injuries through an accident which was due to a defect in the chassis of the omnibus. To their claim for damages the corporation pleaded that the defect was a defect of design for the non-discovery of which they could not be blamed, as they relied, and were entitled to rely, on the manufacturers and they were not responsible for any lack of care or skill on the part of the latter. This plea was rejected by the Lord Justice-Clerk F
(LORD THOMSON), The want of care or skill was in that case one step nearer to the employer since there was no intervening supplier, and I note that the learned judge said (1953 S.C. at p. 122) that, if the position in that case had been that the corporation had been able to say that neither they nor their suppliers could have discovered the defect by means of any reasonable inspection, the defence would be relevant. But, even so, I cannot accept the Lord Justice- G
Clerk's reasoning as correct. He summed it up in the words (ibid.): "The supplier and the master are as one." With the greatest respect, this broad generalisation goes too far, for the reasons I have tried to explain.

The case last cited, and particularly the words that I have quoted, lead me to a point not, indeed, necessary to the decision of this appeal but useful as an illustration of my theme. It was said that an employer might, instead of H
purchasing tools of a standard design either from the manufacturer direct or in the market, order them to be made to his own design. If he did so and if they were defective and an accident resulted, it was clear (so the argument ran) that he would be responsible. I agree that he would, if the fault lay in the design and was due to lack of reasonable care or skill on his part. There is no reason why he should not. A more difficult question would arise if the I
defect was not due to any fault in design (for which the employer was responsible) but to carelessness in workmanship. But that is a far cry from the present case and, recognising as I do that in this area of the law there is a borderline of difficult cases, I do not propose to say more than I need. I must, however, refer, since I mentioned it sometime since, to a case tried by FINNEMORE, J., at Chester Assizes. No authority having been cited to him, he said ([1955] 1 All E.R. at p. 809):

A "Employers have to act as reasonable people and take reasonable care, but if they buy their tools from well-known makers, such as the manufacturers in this case are, they are entitled to assume that the tools will be proper for the purpose for which both sides intended them to be used, and will not require daily, weekly or monthly inspection to see that in fact all is well."

B My Lords, a prolonged examination of the authorities could not have led him to a sounder conclusion.

As I have already said, a large number of authorities were cited to us, many of them relating to the liability of an employer, or more often of an occupier of land, for the default of an independent contractor. It may one day fall to the House to explain and, perhaps, to reconcile these cases. It is not the occasion C for that task when the fault lies at the door of one who was not an "independent contractor", however wide a meaning may be given to those words.

One thing more I must say. It was at one time suggested—I do not use a more emphatic word, for learned counsel was rightly discreet in his approach —that the House should take into consideration the fact that possibly or even probably the employer would, but the workman would not, be covered by D insurance, and for that reason should be the more ready to fasten on the employer liability for an accident due neither to his nor to the workman's carelessness. I will only say that this is not a consideration to which your Lordships should give any weight at all in your determination of the rights and obligations of the parties. The legislature has thought fit in some circumstances to impose an absolute obligation on employers. The Factories Acts and the elaborate regu- E lations made under them testify to the care with which the common law has been altered, adjusted and refined in order to give protection and compensation to the workman. It is not the function of a court of law to fasten on the fortuitous circumstance of insurance to impose a greater burden on the employer than would otherwise lie on him.

For these reasons, therefore, which I will sum up by saying that the claim F was against reason, contrary to principle, and barely supported by authority, I would dismiss the appeal with costs.

LORD MORTON OF HENRYTON: My Lords, by his statement of claim in this action, the appellant claimed damages for negligence against both respondents. I shall hereafter refer to him as "the plaintiff" and to the first and second respondents as "the first and second defendants". On Mar. 8, G 1953, the plaintiff, a maintenance fitter employed by the first defendants at their factory, had occasion to separate two metal parts of a machine. The appropriate tool for this purpose was a tapered bar of metal about one foot long, known as a drift. The proper method of using a drift is to hold the pointed end against the junction of the parts to be separated, and to strike the thick end with a hammer. The plaintiff went to a cupboard containing drifts, provided by the H first defendants for the use of their employees, took out a drift and began to work with it; but at the second stroke of the hammer the drift broke, and a piece flew off, struck the plaintiff's left eye and destroyed the sight of it. This drift was made by the second defendants, who are tool makers, at the end of 1946 and was sold by them in the same year to suppliers of tools of this kind, Messrs. Baldwin & Co., Ltd. In July, 1946, the first defendants ordered a supply I of drifts from Baldwin & Co., Ltd., and the drifts delivered to them included the drift which has turned out to be defective.

The plaintiff's action was tried by ASHWORTH, J. That learned judge, having stated the history of the matter and the nature of the defect in the drift, found that the servants of the second defendants had been negligent in the heat treatment of the drift. He continued ([1957] 2 All E.R. at p. 40):

"The problem of liability must be considered on the basis that the [employers] provided for their employee, the plaintiff, a dangerous tool

which had been negligently made by the second defendants. I consider first the question whether in these circumstances the employers are liable. In the first place, it is clear that no negligence can be attributed to any of the employers' own servants or agents. The drift P.2 was apparently in good condition and no allegation was or could be made that the employers' system of maintenance or inspection was at fault. Moreover, the employers bought the drift from a reputable supplier and paid a reasonable price for it. The problem arises in naked simplicity: Are they responsible to the plaintiff because the drift was negligently manufactured by the second defendants? "

The learned judge felt constrained by authority to answer the question so posed in the affirmative. He then held that the second defendants were liable to the plaintiff because their servants were negligent in the manufacture of the drift, which was supplied by the second defendants to Messrs. Baldwin & Co., Ltd., in a condition likely to cause danger to anyone using it. He continued (ibid., at p. 44):

" I also hold that no intermediate examination of the drift between the time of the manufacture and the time of its actual use was reasonably to be expected. It seems to me wholly unreasonable to expect an employer to test a drift for hardness before issuing it to his employee, and no other examination would have revealed the danger existing in this particular drift."

I pause to say that it is plain from the judgment of the learned judge that he did not attribute any negligence to the suppliers, Baldwin & Co., Ltd. The result was that the learned judge gave judgment for the plaintiff against both defendants for £2,030 and costs. The first defendants only appealed from this judgment, and the Court of Appeal, by a majority (PARKER and PEARCE, L.JJ., JENKINS, L.J., dissenting) allowed the appeal, and directed judgment to be entered for the plaintiff against the second defendants only.

The plaintiff now appeals to this House, and the question is whether he, having recovered judgment for £2,030 against the makers of the defective tool, can get judgment against his employers, who were in no way guilty of negligence, either by themselves or by their servants or agents. ASHWORTH, J., and JENKINS, L.J., felt themselves constrained by authority to hold the first defendants liable, but, in my opinion, there is no authority which constrains your Lordships to arrive at such a result.

At common law, a master owes a general duty to his servants to take reasonable care for their safety. The duty, so far as it relates to the providing of appliances for the use of the servants, was defined by LORD HERSCHELL, in terms which have often been quoted, in *Smith* v. *Baker & Sons* (5) ([1891] A.C. 325 at p. 362):

" . . . the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition . . ."

Counsel for the plaintiff contended that the obligation of the master is to take the degree of care thus defined per se or per alios; that the duty is absolute, and can only be discharged by the master if all reasonable care has in fact been taken to ensure the soundness of the tool. Applying this contention to the present case, they say truly that reasonable care was not in fact taken by the manufacturers, and contend that this fact is enough to make the employers liable. This contention appears to be, in effect, a contention that every master warrants the safety of every tool or other appliance provided by him for the use of his employees, and is, therefore, liable if any such appliance turns out to be unsound and an employee sustains injury in consequence. It matters not, say counsel, if the master and his servants or agents have taken all reasonable care to provide proper appliances; if a servant sustains injury because anyone, at any time, has been guilty of a want of reasonable care in regard to the manufacture, maintenance or inspection of the appliances, the master is liable.

My Lords, in my opinion this contention goes far beyond anything warranted by principle or authority. It is well settled that, if a master delegates to another this duty to take reasonable care, he is liable for injury caused through the negligence of that person because it is, in the eye of the law, his own negligence. This is sometimes called the doctrine of vicarious liability, but it has never been extended, by any decision binding on this House, to a case where the master has ordered a standard tool from a reputable supplier, and where, as ASHWORTH, J., held, neither the master himself nor any one of his agents or servants has been guilty of any negligence. I would dismiss the appeal, and my conclusion would have been the same if the first defendants had bought this tool directly from the manufacturers, the second defendants. In that case, also, there would have been no delegation of the master's duty to take reasonable care.

I refrain from any detailed examination of the numerous cases cited in the course of the argument, because I gratefully accept the views expressed, in his survey of the authorities, by my noble and learned friend on the Woolsack. It is, I think, clear that, if ASHWORTH, J., and all the members of the Court of Appeal had felt themselves free to express similar views, there would have been no difference of opinion between them.

LORD REID: My Lords, the facts of this case are very simple. The appellant was a maintenance fitter employed by the respondents. In the course of his work he was using in a proper manner a wedge-shaped tool called a drift which was supplied to him by the respondents; he was hammering it for the purpose of separating two pieces of metal. A chip flew off it and struck his eye so that he lost the sight of that eye. The drift was not safe for use because it was much too hard and brittle, and the cause of this was negligence of the manufacturers of the drift, or their servants. The respondents had bought the tool from a reputable merchant, who had in turn bought it from the manufacturers. The trial judge, ASHWORTH, J., said ([1957] 2 All E.R. at p. 44):

> "I also hold that no intermediate examination of the drift between the time of the manufacture and the time of its actual use was reasonably to be expected. It seems to me wholly unreasonable to expect an employer to test a drift for hardness before issuing it to his employee, and no other examination would have revealed the danger existing in this particular drift."

This finding is not challenged by the appellant.

Accordingly, there was no negligence on the part of the respondents or any of their servants, including the appellant. The appellant's contention is that the respondents are liable to him in damages because of the negligence of the manufacturers or their servants. It is not said that the mere fact that the tool was unsafe and that this caused the accident is enough to make the respondents liable; but it is said that it is enough to make the respondents liable to show that the unsafe condition of the tool was the result of some person's negligence, whether or not there was any relation between the negligent person and the respondents. In some cases the negligent person might be the manufacturer who sold the article direct to the employer. In this case there was no contractual relation between the manufacturer and the respondents, because they bought the tool from a merchant. In other cases the negligent person might be the person who supplied parts or materials to the manufacturer, who, in turn, incorporated them in the article sold to the employer. In some cases the employer, in buying the article, might rely on the reputation of the manufacturer. In other cases he might rely on the reputation of the merchant from whom he bought. That is all said to be immaterial; all that matters is that some person somewhere in the chain was negligent and that that negligence was the cause of the damage.

For this somewhat startling proposition *Wilsons & Clyde Coal Co., Ltd.* v. *English* (6) ([1937] 3 All E.R. 628) is said to be authority. JENKINS, L.J., who dissented in the Court of Appeal, took that case as the starting point of the discussion and I shall do the same. In that case, the accident was caused by failure to provide a reasonably safe system of working. This failure was not known to the board of directors, but was known to their servants to whom they had delegated the management of the mine. The company sought to avoid liability on two grounds: first that an owner not qualified to be a manager is prohibited by statute from taking part in the technical management of the mine, and they, therefore, had no control over, and were not responsible for, the actions which were negligent; and, secondly, that their servants who were negligent were fellow servants of the victims of the accident and, therefore, the doctrine of common employment applied. Both these grounds of defence failed. There was no question of the company being liable for the negligence of some person who was not their servant. I can find nothing in the speeches of LORD THANKERTON or LORD MACMILLAN or in the opinions of the Court of Session which were approved in this House to suggest any intention to deal with the question whether an employer is in any way liable for negligence of any person who is not his servant. The word " agent " is frequently used, but that is because, under the Coal Mines Act, 1911, " agent " is the technical name of the chief servant of the owner, and the company's "agent " was one of their servants who was aware of the defective system. It is true that, in the passage quoted with approval from the opinion of the Lord Justice-Clerk (LORD AITCHISON) in *Bain* v. *Fife Coal Co.* (8) (1935 S.C. 681 at p. 693), he speaks of paramount duties being " entrusted by the master to others." But I think that the context makes it clear that by " others " he meant other servants of the employer.

The appellant relies on passages in the speeches of LORD WRIGHT and LORD MAUGHAM. LORD WRIGHT, in dealing with the limitations of the doctrine of common employment, said ([1937] 3 All E.R. at p. 640):

> " This House held that . . . the statutory duty was personal to the employer, in this sense, that he was bound to perform it, by himself or by his servants. The same principle, in my opinion, applies to those fundamental obligations of a contract of employment which lie outside the doctrine of common employment, and for the performance of which employers are absolutely responsible. When I use the word absolutely, I do not mean that employers warrant the adequacy of plant, or the competence of fellow-employees, or the propriety of the system of work. The obligation is fulfilled by the exercise of due care and skill."

Then he continued the discussion of common employment. So far I can see no sign that LORD WRIGHT had any intention of dealing with an employer's liability for negligence of persons who are not his servants. Indeed, in the first sentence which I have quoted he says expressly that a duty " personal to the employer " must be performed " by himself or by his servants."

The first passage relied on by the appellant begins (ibid., at p. 641):

> " But in truth the employer's obligation, as it has been defined by this House, is personal to the employer, and one to be performed by the employer per se or per alios."

Unless he has changed the meaning of " personal to the employer " in the course of two pages, " per alios " here must mean " by his servants ". Then follows one of the passages which cause difficulty (ibid.):

> " If I may take an analogy or instance of a similar personal obligation, I note that the Carriage of Goods by Sea Act, 1924, requires a shipowner to

A exercise due diligence, or to take reasonable care, to provide a seaworthy ship. The shipowner is almost certainly not an expert naval architect, engineer, or stevedore. So far as I know, it has never been claimed that this obligation is fulfilled by the shipowner taking reasonable care to appoint a competent expert: the shipowner is absolutely held to the fulfilment of the obligation. It is the obligation which is personal to him, and not the B performance."

In the passage which I quoted earlier, Lord Wright explained what he meant by " personal obligation " and " absolutely ". I do not think that he has changed those meanings here. He was concerned to meet the argument that the owner's obligation is fulfilled merely by delegation to a skilled servant whom he has neither the knowledge nor the power to supervise or control. C In choosing this analogy, I think that he must have had in mind his own carefully reasoned judgment in *W. Angliss & Co. (Australia) Proprietary* v. *Peninsular & Oriental Steam Navigation Co.* (9) ([1927] 2 K.B. 456), and, reading the words " personal obligation " and " absolutely " in the peculiar sense which he gives to them in his speech in *Wilsons & Clyde* (6), I see no contradiction between this passage and that judgment.

D The relevant passages in *Angliss* (9) are too long to quote in full. I am not concerned with whether they are correct in law. I only use them to show what Lord Wright must have had in mind in making this reference to shipowners in *Wilsons & Clyde* (6). Having pointed out that the carrier's obligation to exercise due diligence is clearly not limited to his personal diligence, and that he must act by agents or servants, which is the phrase employed in the E Act, he said ([1927] 2 K.B. at p. 460):

> " The question is: How wide is the category of agents or servants with reference to the obligation now being considered. It is contended by the plaintiffs that, as the primary obligation on the carrier is to provide a seaworthy ship, the carrier cannot delegate any part of that obligation so as to F relieve him of his personal liability, and he must accordingly be accountable for lack of due diligence on the part of the shipbuilders and their workmen, who are to be deemed to be his agents, to make the ship seaworthy and fit, and that, therefore, the defendants must be held liable for the bad workmanship of which I have found the shipbuilder's men guilty . . . I do not think that this contention is sound . . . The carrier may G not be the owner of the ship, but merely the charterer; he may not have contracted for the building of the ship, but merely have purchased her, possibly years after she has been built. In the two latter cases the builders and their men cannot possibly be deemed to have been the agents or servants of the carrier and it is illogical that there should be such difference in the carrier's obligations merely because he has bought the ship by the method H of contracting with the builders to build it for him."

Lord Wright then pointed out that, if the carrier were liable for the bad workmanship of the builders he might equally be liable for bad workmanship of sub-contractors or those who supply special articles " which would involve an almost unlimited retrogression." Then he states his conclusion (ibid., at I p. 461):

> " He is to be liable for all such duties as appertain to a prudent and careful carrier acting as such by the servants and agents in his employment . . . But I do not think in any case that the carrier can be held guilty of want of due diligence simply because the builders' employees have put in some bad work which, though concealed, renders the vessel unfit."

Lord Wright's reference in the passage in *Wilsons & Clyde* (6) ([1937] 3 All E.R. at p. 641) to naval architect, engineer or stevedore links up with a passage

in *Angliss* (9) ([1927] 2 K.B. at p. 462), which deals with this matter and concludes: A

> " Again, the need of repairing a ship may cast on the carrier a special duty to see, as far as reasonably possible, by special advisers for whom he is personally responsible, that the repairs adequately make good the defects." B

The rest of LORD WRIGHT'S speech confirms me in my view that he had in mind what he had said in *Angliss* (9). He continues to use the expression " servants and agents ". He says ([1937] 3 All E.R. at p. 642):

> " . . . not a warranty, but a duty to exercise (by himself and his servants and agents) all reasonable care." C

And then he says (ibid., at p. 643):

> " . . . what is the extent of the duty attaching to the employer ? Such a duty is the employer's personal duty, whether he performs, or can perform, it himself, or whether he does not perform it, or cannot perform it, save by servants or agents. A failure to perform such a duty is the employer's personal negligence." D

At the end of his speech he says that the true rules of law on the subject have been stated by the Lord President (LORD NORMAND) and the majority of the Court of Session, and these opinions are in line with what I believe that LORD WRIGHT meant by the passages which I have quoted.

LORD WRIGHT had the nature of the vicarious liability of a shipowner sufficiently in mind to enable him to select this as an appropriate analogy to the vicarious liability of an employer to his servant, and it seems to me impossible that he could at the same time have forgotten his judgment in *Angliss* (9), and equally impossible that he would have said no more than he did in *Wilsons & Clyde* (6) if he had come to think that his judgment in *Angliss* (9) was wrong. He certainly thought that a master (or a shipowner) would, in some cases, be vicariously liable for the negligence of a person who was not in law his servant. But he thought that a shipowner would not be vicariously liable for the shipbuilder's negligence; and by parity of reasoning he must have taken the same view about a master's liability in respect of plant which he had purchased. I cannot avoid the conclusion that, if the facts of the present case had been put before him in 1938, he would have decided in favour of the present respondents. E F G

I find LORD MAUGHAM'S speech rather more difficult to interpret. Having agreed with the other opinions, he only set out, as he says, to add a few observations and it would not appear that he intended to lay down some new doctrine. In the first half of his speech he was clearly only dealing with the negligence of a fellow servant. Then there comes the passage which gives rise to difficulty ([1937] 3 All E.R. at p. 646): H

> " . . . it has already been pointed out that the employer's liability is fulfilled by the exercise of due care and skill, and I may be allowed to point out that it is this circumstance which has led, on occasion, to a misapprehension of the true position. An illustration will demonstrate the mistake. Suppose some new machinery is necessary in a factory, and the employer is absent, or completely unskilled in such things. He necessarily leaves the matter to a manager, let us suppose a highly skilled person, who, however, is negligent in this case. An accident follows, due to a defect in the machine. If the liability of the employer is stated as being an obligation to use his best endeavours to supply and instal good machinery, it may well be said on his behalf that he left the matter to a highly skilled man, and it may be asked, with force, what more could he do ? I should reply, nothing: but I should add that the premise is incorrect. The possessive pronoun ' his ' is that which I

leads to the error. The proposition would be more correctly stated to be that his duty is to supply and instal proper machinery so far as care and skill can secure this result. He can, and often he must, perform this duty by the employment of an agent, who acts on his behalf; but he then remains liable to the employees unless the agent has himself used due care and skill in carrying out the employer's duty. This has sometimes been expressed by saying that the duty is personal to the employer; but the adjective if unexplained is apt to mislead, like the word ' absolute ' and the word 'delegate'. The employer can, of course, and often must, delegate the performance of any of his duties to skilled agents; but it would need an altogether new implied term in the contract between employer and employee before a court could properly hold that this delegation has the result of freeing the employer from his liability. This becomes apparent if we imagine the contract between employer and workman to be written out in full, with all the implied clauses. There would be, for the reasons given by the Lord Justice-Clerk in *Bain* v. *Fife Coal Co.* (8) and by your Lordships, no clause to the effect that the employer was to be freed from his special obligations to the workmen if he delegated them to an agent; and, in the absence of such a clause, the employer would plainly remain liable if the agent was guilty of not using proper care and skill, since, in the contract law of Scotland, as in England, it is impossible to transfer a liability towards the other party to the contract without the consent of that party."

The beginning of this passage—" it has already been pointed out . . ."—must refer to the exercise of due care and skill by servants of the employer because that is all that he had already dealt with. Then his illustration deals with a manager " let us suppose a highly skilled person ". Again he is dealing with a servant. Then he takes up the argument for the employer: " . . . he left the matter to a highly skilled man, and it may be asked, with force, what more could he do? " He still appears to be referring to the manager. Then comes the sentence so often taken out of its context and quoted alone:

> " The proposition would be more correctly stated to be that his duty is to supply and instal proper machinery so far as care and skill can secure this result."

He may have meant to include care and skill by everyone concerned, including the manufacturer, but that does not seem to me very likely, because in the very next sentence he speaks of performing the duty by an agent who acts on the master's behalf, and thereafter he continues to speak of an agent. In using the term " agent ", he may very well have meant a wider class than merely servants, but I can see no sign that he meant to go beyond persons who could properly be said to have been employed by the master to act on his behalf. It appears to me, therefore, to be at least doubtful whether Lord Maugham would have held an employer vicariously liable for the negligence of a manufacturer from whom he had bought plant or machinery.

Counsel for the appellant did not maintain that he was helped by the earlier English authorities, but he relied on certain Scottish authorities. The earliest was *Baird* v. *Addie* (10) ((1854), 16 Dunl. (Ct. of Sess.) 490). This case is of interest because it was decided before the rule of common employment was made part of the law of Scotland by this House in 1858 in *Bartonshill Coal Co.* v. *Reid* (11) ((1858), 3 Macq. 266). A miner was injured by an explosion due to defective ventilation; he sued his employers. They had made a contract with a person not their servant committing to him the care of the ventilation of the mine. The Lord Ordinary (Lord Anderson) said (16 Dunl. (Ct. of Sess.) at p. 493 n):

> " The great point of contention now made is, that if the accident arose from negligence, it was from the negligence of the contractor, for whom the defenders are not responsible . . . . The primary obligation being imposed

on the coalmaster, it is clear that if he employs another to fulfil it, he is liable for any failure or neglect in its fulfilment." A

He said that the contractor fell to be regarded in the light of a servant; the First Division took the same view. The Lord President (LORD M'NEILL) said (ibid., at p. 494):

"As to the inspection of the works, and the notice to the pursuer of danger, it was clearly the duty of the defenders to provide for that; and whoever they devolved it on, was their servant so far as concerns the pursuer." B

I think it may also be useful to quote from the opinion of LORD IVORY in *Nisbett* v. *Dixon* (12) ((1852), 14 Dunl. (Ct. of Sess.) 973 at p. 981) (a case relied on in *Baird* v. *Addie* (10)): C

"This is not the case of one who, being himself employed in one trade, calls in the assistance of another, who exercises a different trade, to do something which lies within his calling: But it is the case of a party calling in another to perform a subordinate part of his own trade. Everything done by the party so called in, is done in a subordinate capacity—on the defender's premises—under their control—and in the execution of their own trade." D

The facts of this case were quite different, but this appears to have been a fuller statement of the principle followed in *Baird* v. *Addie* (10). I attach some importance to this case, because it shows the lines on which the law was developing before its development was interrupted by the introduction of the rule of common employment. That rule made it necessary to find another basis for E the employer's liability, and this was found in the idea of duties personal to the employer. Now that the rule of common employment has gone, it seems to me that, in so far as we are not fettered by binding authorities, we should at least have in mind the older and less artificial line of development.

Next there are two cases in which LORD PRESIDENT INGLIS expressed his opinion. In *Ovington* v. *M'Vicar* (13) ((1864), 2 Macph. (Ct. of Sess.) 1066), a F workman had been killed by the breaking of a chain. His employer paid damages in settlement of a claim by his relatives, and sought to recover the amount of the damages from the manufacturer of the chain, averring that he was not negligent but that the manufacturer was. LORD JUSTICE-CLERK INGLIS said (ibid., at p. 1072):

"The case is put on this simple ground, that the machinery was defective, G and broke, and caused the death of Monaghan. If that be so, if that is the only ground on which the claim is made, then there was no liability on the part of the pursuers to Monaghan's relatives. I entirely concur in the opinion expressed by LORD CAMPBELL, L.C., in the case of *Weems* v. *Mathieson* (14) ((1861), 4 Macq. 215), that there is no warranty in such a case as this, and that a defect of machinery, latent and unknown to the master of a work, H which he neither knows, nor is bound to know, is not sufficient to ground a claim for damages at the instance of a workman or his relatives. I think there must be some culpa on the part of the master before he can be made answerable for injuries sustained by his workmen."

The other members of the Second Division gave similar reasons.

In *Weir (or Wilson)* v. *Merry & Cunningham* (15) ((1867), 5 Macph. (Ct. of I Sess.) 807), the manager of a mine was negligent in having a scaffold erected across a shaft so as to impede ventilation. To avoid the rule of common employment it was argued that this was a case of providing defective apparatus. The Lord President (LORD INGLIS) said (ibid., at p. 811):

"That is not the nature of this case. If such an argument were sound, that would bring the case under the rule of a case which your Lordships very well know, the case of *Weems* v. *Mathieson* (14), which was decided in this Divi-

A sion of the court, and afterwards in the House of Lords on appeal, and from the principle of which I am by no means disposed to differ. I think that wherever the master of a coal-pit, or of any other work, has occasion to purchase and provide a machine or apparatus to be used by his workpeople, or for the protection of his workpeople, he is liable for the insufficiency of that machine or apparatus if it should turn out to be insufficient. But this B is not the providing of a machine or apparatus at all."

It was argued that this showed that the Lord President thought that a master was liable for defective plant whether he or his servants were negligent or not. I do not agree. He was merely making a passing reference to the law applicable in a state of affairs different from that in the case before him and the scaffold, C alleged to be apparatus provided by the master, was obviously defective in that it impeded ventilation. He was not dealing with anything in which there was a latent defect. I think that it is impossible to suppose that he intended to say something different from what he had said in *Ovington* v. *M'Vicar* (13) three years earlier, particularly as he refers to *Weems* v. *Mathieson* (14) in both cases. And in any event, if his words here are to be taken as a complete expression of the law, they mean absolute liability, a position which no one has ever supported. D In this House (L.R. 1 Sc. & Div. 326), Lord Cairns, L.C., referred (ibid., at p. 332) to the master's duty " to furnish them with adequate materials and resources for the work ", and Lord Colonsay referred (ibid., at p. 344) to:

> " the failure to provide or supply the means of providing proper machinery or materials."

E But for the same reasons I do not think that they intended to say that the master would be liable apart from negligence on the part of his servants, and again if their words were taken literally they would mean absolute liability.

I would also refer to another case of this period, *Paterson* v. *Wallace & Co.* (16) ((1854), 1 Macq. 748), where Lord Cranworth, L.C., said (ibid., at p. 751):

F > " It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure when in fact the master knows, or ought to know, that it is not so. And if from any negligence in this respect damage arise, the master is responsible."

Next there was cited *M'Killop* v. *North British Ry. Co.* (17) ((1896), 23 R. (Ct. of Sess.) 768), when Lord M'Laren said with regard to Lord President Inglis' G observation in *Weir (or Wilson)* v. *Merry & Cunningham* (15) (ibid., at p. 771):

> " but his Lordship is careful to distinguish this from the case of machinery or apparatus purchased by the master and which is of faulty construction, because if injury results, this he says is the fault of the master, whose business it is to provide the apparatus."

H In *M'Killop's* case (17), there was no latent defect; the danger was obvious. I do not think that Lord M'Laren misunderstood the Lord President. By " the fault of the master " I think he meant the fault of the master himself and not merely the fault of the negligent servant: he did not mean that providing machinery with a latent defect was the fault of the master. The next case, *Macdonald* v. *Wyllie & Son* (18) ((1898), 1 F. (Ct. of Sess.) 339), affords some support to the I appellant. Builders engaged joiners to erect a scaffold. It was defective and it collapsed and one of the builders' workmen was injured. The defect could have been discovered by a skilled man. It was decided that the mere fact that the fault was that of an independent contractor did not absolve the employer from liability to his servant. Lord Moncreiff and the Lord Justice-Clerk (Lord Macdonald) thought that the employer would not be liable unless, by the exercise of reasonable care, he could have discovered the insufficiency. Lord Moncreiff said (ibid., at p. 347): " in order to render him liable there must be proof of fault or

negligence on his part or those for whom he is responsible." But LORD TRAYNER went much further. He said (1 F. (Ct. of Sess.) at p. 345): A

> " If a master buys a machine, let us say, necessary for the execution of his work, and gives it to his workman, it is the master's machine, not the workman's or manufacturer's. If the machine turns out to be faulty, defective, or otherwise insufficient, the master must answer for it. He may have his relief against the maker or manufacturer, but the injured workman has no claim against the maker of the machine." B

LORD YOUNG's opinion is not quite so clear; he does say (ibid., at p. 344):

> " in the contract of master and servant, apart from special stipulations to the contrary, it is implied that the employer is responsible to his workmen for the condition of the scaffolding which he has provided for them to work upon, and that without any reference to the mode employed by him to erect it." C

But in an earlier passage he says (ibid.):

> " The basis of this action is that the defender was responsible to the pursuer for the scaffolding being in a safe condition, of course excluding the case of some latent defect not discoverable by reasonable care." D

So the appellant can claim the support of LORD TRAYNER and possibly LORD YOUNG, but the other two members of the Division are against him.

I shall also refer to two cases in which LORD DUNEDIN expressed his opinion. In *Wood & Co.* v. *Mackay* (19) ((1906), 8 F. (Ct. of Sess.) 625), he said, when Lord President (ibid., at p. 633): E

> " The stevedore's liability in the action which was raised against him rested on his want of inspection—that is to say, his negligence, and his negligence alone. It did not rest upon the ground that the rope was de facto unfit. It seems to me that that proposition is abundantly clear from two circumstances. In the first place, it is clear from the undoubted law of *Weems* v. *Mathieson* (14), which is a House of Lords decision, and cannot be controverted. F That case laid down in most clear terms what has always been considered as law since then, that, as between a workman and his employer, it is not enough for the workman to say that the employer de facto supplied insufficient material or an insufficient machine. He must show that in doing so he was guilty of some negligence."

And in *Ballard* v. *North British Ry. Co.* (20) (1923 S.C. (H.L.) 43), a case regularly quoted on res ipsa loquitur, he said (ibid., at p. 53): G

> " Thus, there is a class of cases dealing with injury occurring to a servant owing to defective plant, which he was obliged to use and which it was the duty of the employer to supply. In such cases the fact of an accident may easily be a fact from which you may infer that the plant was defective, and it will then be upon the employer to show that the defect was one against H which he could not have guarded."

Down to this point there appears to be no case making an employer liable in respect merely of his plant having a latent defect, or in respect of the negligence of any person other than his servant or someone who, in the circumstances, can be treated as if he were his servant or subordinate. And, apart from LORD TRAYNER'S opinion and possibly LORD YOUNG'S, I have found no expression of I opinion which appears to me to go beyond that. Apparently the principle for which the appellant now contends had never occurred to anyone. But there is a recent case directly in favour of the appellant. In *Donnelly* v. *Glasgow Corpn.* (3) (1953 S.C. 107), the driver and conductor of an omnibus were injured when it overturned as a result of the breaking of a front spring. The defenders admitted that the chassis was defective, but averred that the defect was one which they could not have discovered by any reasonable examination, and that it was due to

A the negligence of the manufacturers from whom they bought the omnibus and on whose reputation they were entitled to rely, this type of chassis having proved satisfactory for many years. This defence was held to be irrelevant. The Lord Justice-Clerk (LORD THOMSON), with whom LORD MACKAY and LORD PATRICK concurred, said (ibid., at p. 122):

B

> "It is admitted by the corporation that the omnibus was defective and they aver that their suppliers were responsible for the defective condition. But on this branch of the law a master cannot escape liability to his servant for defective plant by blaming his agents. The personal responsibility which the law lays on the master in respect of plant covers the activities of any person whom the master employs to provide that plant. The supplier and the
C master are as one. If then the supplier erred, the master is saddled with the results of that error . . . If the position in the present case had been that the corporation had been able to say that neither they nor their suppliers could have discovered the defect by means of any reasonable inspection, the defence would be relevant. But, as I have already said, the corporation agree that the defect was patent to their suppliers, and that in this branch of
D the law means that it was patent to them."

No authority is referred to, but the Second Division were obviously accepting the view of the effect of *Wilsons & Clyde Coal Co., Ltd.* v. *English* (6) which has been prevalent in many quarters. If that view is now held to be wrong, as I think it should be, then this case cannot stand and must be overruled. It cannot stand
E with *Ovington* v. *M'Vicar* (13).

I do not propose to examine the English authorities. I think that they lead to the same conclusion. But, even if it were open on the authorities to reach a conclusion in favour of the appellant, I would think such a conclusion to be wrong in principle. A master's duty to his servant with regard to the safety of plant supplied should, I think, be regarded as a part of the law of tort. Vicarious
F liability is well recognised, and I see no difficulty in principle in extending vicarious liability beyond liability for those who are, strictly speaking, servants, but it would, I think, be going far beyond anything reasonable to extend it to cover a case where there was no relationship whatever between the master and the negligent person or his employer at the time when the negligence occurred. Then I take the other possible way of regarding the master's duty. It was common at
G one time to regard it as depending on the contract of employment, and, indeed, it was this view which was largely responsible for the invention of the rule of common employment. No doubt this view leaves the court much scope, but I think that it has always been recognised that an implied term must at least be reasonable. I could understand that it might be thought reasonable to make the master absolutely liable in certain cases. This has been done extensively by statute. But
H it seems to me wholly unreasonable to make the master's liability depend on the conduct of the servants of some person who may be a complete stranger.

Finally I must notice *Thomson* v. *Cremin* (21) ([1953] 2 All E.R. 1185). A stevedore's labourer was injured in the hold of a ship while discharging grain at Glasgow. Shifting-boards had been set up in Australia where the grain was loaded, and they had been supported by shores. The man's injury was caused by
I the fall of one of these shores. He sued both the shipowner and his employer. His action against his employer failed, but he succeeded against the shipowner on the ground that he was an invitee and that the shipowner had failed in his duty as invitor. There is no necessary connexion between the law of invitor and invitee and the law of master and servant, but, in the passage chiefly relied on by the appellant, LORD WRIGHT referred to *Wilsons & Clyde Coal Co., Ltd.* v. *English* (6), and JENKINS, L.J., attached importance to *Thomson* v. *Cremin* (21) in his dissenting judgment in the present case. The shifting-boards had been fixed by independent contractors in Australia, but the shipowner did not make this a

ground of defence either in his pleadings or in his Case submitted to this House. His case was (first) that there had been no negligence in fixing the boards, (secondly) that he was entitled to rely on a certificate of a government inspector in Australia that regulations had been complied with, and (thirdly) that the cause of the accident was negligence of the other defender the stevedore. The case has a curious history. It was decided by this House in 1941, but it was not reported at the time in either the Law Reports, Session Cases, the Scots Law Times or the All England Law Reports. Probably this was because VISCOUNT SIMON, L.C., said (ibid., at p. 1189): " . . . the decision in this case turns almost entirely on questions of fact . . . ", and LORD PORTER said (ibid., at p. 1193): " . . . the question to be considered in the present case is, I think, one of fact rather than of law . . . " It was reported in Lloyd's List Reports, but that may have been because it was of interest to those concerned with shipping. But later it was regarded in some quarters as laying down law of wide general importance.

It is the speech of LORD WRIGHT that has attracted attention. He began by agreeing with the speech of the Lord Chancellor, and said that he merely added a few supplementary observations on some general matters of principle which seemed to him to be involved. Then he said that the case fell within the general rule enunciated in *Indermaur* v. *Dames* (22) ((1866), L.R. 1 C.P. 274; L.R. 2 C.P. 311). There follows the passage chiefly relied on by the appellant ([1953] 2 All E.R. at p. 1191):

> " The duty of the invitor towards the invitee is, in my opinion, a duty personal to the former, in the sense that he does not get rid of the obligation by entrusting its performance to independent contractors. It is true that the invitor is not an insurer: he warrants, however, that due care and skill to make the premises reasonably safe for the invitee have been exercised, whether by himself, his servants, or agents or by independent contractors whom he employs to perform his duty. He does not fulfil the warranty merely by leaving the work to contractors, however reputable or generally competent. His warranty is broken if they fail to exercise the proper care and skill. This is only an instance of the general rule which was stated by LORD BLACKBURN in another connexion in *Dalton* v. *Angus* (23) ((1881), 6 App. Cas. 740 at p. 829), where he distinguished the case of what has been called the collateral negligence of a sub-contractor from their negligence in failing to perform a duty resting on the principal himself ' who cannot escape from the responsibility attaching to him of seeing that duty performed by delegating it to a contractor.' LORD BLACKBURN again enunciated the same principle in *Hughes* v. *Percival* (24) ((1883), 8 App. Cas. 443 at p. 446). More recently this House, again in a different context of fact, applied this rule in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (6). It is always a question of the extent of the duty incurred. In the present case, the invitee is not concerned with the course which the invitor adopts by way of discharging the duty. He is entitled, when he comes on the invitor's premises, to rely on the warranty that the invitor's duty to him has been performed and to complain if he is injured because the duty has not been properly performed."

That matter was also referred to by VISCOUNT SIMON, L.C., who said ([1953] 2 All E.R. at p. 1188):

> " The shipowner's responsibility for the safety of the structure is not, indeed, absolute, but, on the principle of *Indermaur* v. *Dames* (22), he owes to the invitee a duty of adequate care. If adequate care was not exercised in fitting and securing the shore, it would be no answer (as the appellant's counsel candidly admitted) to say that the shipowner employed an independent contractor at Fremantle to do the work."

I think that it is important to determine just what was decided by this House. The case was decided in favour of the stevedore because of the limited nature of

a master's duty to see to the safety of a servant who is working on another person's premises. It was decided against the shipowner because negligence in securing the shore was found as a fact and the House negatived the only two defences on which he sought to rely if there was negligence which caused the accident—first, that he was entitled to rely on the certificate of a government inspector in Australia and, secondly, that there would have been no danger if the more usual system of discharging grain had been in operation. The shipowner did not seek to avoid liability either in his pleading or in his Case submitted to this House or in argument in this House because of the negligence being that of an independent contractor. So there could be no decision of this House on that matter; it was not submitted for decision. Therefore there could be no ratio decidendi, and any observations on that matter must, in my view, be regarded as obiter dicta. The distinction is not entirely technical, because a judge who has not heard a question argued out before him may be less likely to see the full implications and less likely to be entirely accurate in the language which he uses.

If the shipowner could not establish that the negligent workmanship of the independent contractor was such that it could not have been discovered by due diligence and inspection by himself or his servants then it is easy to understand why his counsel admitted that he could not rely on the fact that the negligence was that of a contractor. The case would be clearly covered by the principle in *Indermaur* v. *Dames* (22), because he ought to have known about the negligent workmanship. On a cursory examination of the record of the case I can find no clear indication whether due diligence would have discovered it. But LORD PORTER at least must have thought that the shipowner's servants ought to have discovered it because he said (ibid., at p. 1196):

> " To fulfil his contract, he requires stevedores to put out the cargo and he must safeguard them against risks of which he knows or ought to know and they do not."

It was on that statement of the law that he decided the case. But LORD WRIGHT, having first said that the case fell within the general rule in *Indermaur* v. *Dames* (22), went on to speak of a warranty by the invitor broken if independent contractors fail to exercise proper care and skill. LORD WRIGHT's language appears to cover a case where a skilled tradesman of repute employed by a householder leaves negligent workmanship so concealed that no reasonable inspection by the householder or by a skilled man employed by him could discover it, and to mean that if an invitee were injured as a result of such negligence the invitor would be liable. I do not propose to discuss whether that can be reconciled with the famous passage from the judgment of WILLES, J., in *Indermaur* v. *Dames* (22) which has been so often approved. That question must remain to be decided in a case which requires it to be decided. It is sufficient in the present case to say that, even if LORD WRIGHT's language be taken literally and even if it were applied to the law of master and servant, it would not help the present appellant, because, using LORD WRIGHT's own language in *Angliss* (9), the manufacturers in this case " cannot possibly be deemed to have been the agents or servants " of the respondents.

The conclusion to which I have come is that an employer, besides being liable to his servant for injury caused by the negligence of his own servants, is in some cases liable in respect of the negligence of others. Where, then, is the line to be drawn? On the one hand it appears that an employer is liable for the negligence of an independent contractor whom he has engaged to carry out one of what have been described as his personal duties on his own premises and whose work might normally be done by the employer's own servant—at least if the negligent workmanship is discoverable by reasonable inspection. On the other hand, for the reasons which I have given, I am of opinion that he is not liable for the negligence of the manufacturer of an article which he has bought, provided that

he has been careful to deal with a seller of repute and has made any inspection which a reasonable employer would make. That leaves a wide sphere regarding which it is unnecessary and it would I think be undesirable to express any opinion here. Various criteria have been suggested and it must be left for the further development of the law to determine which is correct. In my judgment, this appeal should be dismissed.

LORD TUCKER: My Lords, I had written an opinion in which I endeavoured to analyse in some detail the speeches in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (6) ([1937] 3 All E.R. 628). Since doing so, I have read the opinions of my noble and learned friends, VISCOUNT SIMONDS and LORD REID, and it would be mere repetition if I were now to travel over the same ground. I will, therefore, content myself with expressing my agreement with their analyses of that case and their conclusions thereon, and merely add that I can find no justification for interpreting the language used in that case as any authority for extending the responsibility of the employer to cover acts of negligence on the part of anyone who may have constructed his machinery, or some part thereof, so as to cause a latent defect therein undiscoverable by the employer or his manager or other person entrusted by him with the task of selecting or ordering the required machinery. There is nothing in that case to warrant the inference that any such situation was ever under consideration, nor is there anything in the ratio decidendi (as distinct from some isolated passages taken out of their context) which points to this as a necessary and logical result of that decision.

My Lords, I do not think that the introduction of the independent contractor into this discussion presents any difficulty. It may well be that, in some cases, the employer may delegate the performance of his obligations in this sphere to someone who is more properly described as a contractor than a servant, but this will not affect the liability of the employer, he will be just as much liable for his negligence as for that of his servant. Such a contractor is entrusted by the employer with the performance of the employer's personal duty. But this does not mean that every person with whom the employer may have entered into some contractual relationship connected with the manufacture or supply of some machinery, appliance or tool which is ultimately used in his business automatically becomes a person entrusted by the employer with the performance of his common law duty. Still less can the negligence of some person with whom the employer has never been in contact, contractually or otherwise, or of whom perhaps he has never even heard, be imputed to him.

My Lords, in the absence of some decision of this House binding on me which compels me to accept what I regard as such a startling and unwarranted extension of the common law, I do not feel it is incumbent on me to refer to or examine many of the numerous decisions in lower courts cited in the course of argument, none of which, with one exception, do more than contain some observations or dicta which lend some support to the contentions of the appellant. The exception is *Donnelly* v. *Glasgow Corpn.* (3) (1953 S.C. 107), which, for the reasons which have been already stated by your Lordships, I agree cannot stand and should be overruled. I should, however, make reference to the decision of this House in *Thomson* v. *Cremin* (21) which was decided in 1941, but was not reported until [1953] 2 All E.R. 1185. This was a case of invitor and invitee, and I do not consider it necessary to embark on an inquiry into the differences between the duty of an invitor to invitee before the passing of the Occupiers' Liability Act, 1957, and those of an employer to his employees, or to seek to reconcile all that was said in that case with other decisions in this House, but references were made by LORD WRIGHT in his speech in that case by way of comparison to *Wilsons & Clyde Coal Co., Ltd.* v. *English* (6), for the purpose of illustrating the impossibility of the employer escaping liability for his common law obligations by entrusting the performance to servants or agents who act negligently. In so doing, he referred to these obligations as based on warranty, whereas in the

Clyde Coal Co. case (6), he had rejected this as the basis of the duty. Here, again, I do not think it is necessary for the decision of the present case to seek to reconcile these statements. I can find nothing in *Thomson* v. *Cremin* (21) to negative the interpretation which I have put on the decision in the *Clyde Coal Co.* case (6).

In conclusion, I would wish to express my agreement with the majority judgments in the Court of Appeal, save that I would not base my decision on the intervention of the suppliers between the manufacturers and the first respondents. In my view, it would have made no difference if the drift had been purchased direct from the manufacturers who could not be held to be persons entrusted by the first respondents with the performance of their common law duty towards their employees. This is not to say that, in some cases, an employer may not render himself liable to his servant for injury suffered by him by reason of a faulty specification prepared by the employer for the manufacturer, or in cases where the manufactured article may require some inspection or test after delivery. I derive some satisfaction from the fact that FINNEMORE, J., unhampered by the citation of authority and in the light of common sense and the application of the common law as he understood it, arrived at the same result in *Mason* v. *Williams & Williams, Ltd. & Thomas Turton & Sons, Ltd.* (2) ([1955] 1 All E.R. 808).

I would dismiss the appeal.

LORD KEITH OF AVONHOLM: My Lords, I agree, and would add only one or two observations. As my noble and learned friend on the Woolsack has pointed out, the manufacturer of the faulty drift can in no sense be regarded as an independent contractor entrusted by the appellant's employers with performance of the employers' duty to supply proper and adequate tools for use by their servants. I do not propose to enter into cases of independent contractors, of which there are a number, in which the person instructing the work has been held liable to third parties for negligence in performance of the work which the contractors were employed to do. I would only say that the decision of this House in *Thomson* v. *Cremin* (21) ([1953] 2 All E.R. 1185) necessarily proceeded on the view that the shipowner was responsible for the condition of the shores fixed to the shifting boards by the independent contractors in Australia. The contrary was not argued by the appellant's counsel, and it may be that the case is not a binding authority on this House on that point. But, on that hypothesis, the argument for the appellant in that case was that negligence of the independent contractors was not established by the evidence that the work was passed as satisfactory by a government inspector in Australia and that the collapse of the shore in question was due to the negligent operations of the stevedores at the port of discharge. That was a case of invitor and invitee and, in my opinion, has little relevance to the present appeal.

Cases concerned with independent contractors did not mark the limit of the argument for the appellant in this appeal. The first reason stated in his Case for reversing the order of the Court of Appeal is

> " Because the duty owed by a master to his servant to exercise due care and skill in the provision of proper appliances for the use of the servant is not fulfilled when the master obtains for the use of his servants from a reputable supplier appliances which were in fact negligently manufactured and defective and the first respondents [the masters] were therefore guilty of a breach of this duty to the appellant which caused injury to him."

As amplified in argument his counsel stated this proposition thus:

> " The duty of the master is to take reasonable care to provide proper appliances. But the obligation to take that degree of care per se or per alios is absolute. This obligation can only be discharged by the master if all reasonable care has been taken to ensure the soundness of the tools. It is

not enough that the master may have entrusted to someone else the taking of all reasonable care, *or has assumed that someone else had taken*, or would take, all reasonable care to ensure the soundness of the tools." A

The most material words for the purpose of the present case are those which I have italicised. I can find no support for this submission in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (6) ([1937] 3 All E.R. 628). I agree entirely with my noble and learned friends, VISCOUNT SIMONDS and LORD REID, in their analyses of the opinions in that case and could add nothing further. I would say something, however, about some earlier Scottish authority, if only because it seemed to be the keystone on which the appellant's submission rested. His counsel started with a paragraph from GLEGG ON REPARATION ((4th Edn.) p. 384; (3rd Edn.) p. 380) headed: " Duty to supply adequate plant not satisfied by purchase from reputable manufacturer " and which opened with the proposition: B C

" The obligation upon a master to use due care in providing sufficient plant is not satisfied by obtaining it from a merchant or manufacturer of good repute."

The text of the paragraph (without the heading which was introduced by the editor of the second and third editions) is the same as appeared in the second edition as written by Sheriff Glegg himself, and published in 1905. The proposition professes to be supported by a passage from LORD PRESIDENT INGLIS' opinion in *Weir* (*or Wilson*) v. *Merry & Cunningham* (15) ((1867), 5 Macph. (Ct. of Sess.) 807 at p. 811). Its only other support would seem to be in the opinion of LORD TRAYNER in *Macdonald* v. *Wyllie & Son* (18) ((1898), 1 F. (Ct. of Sess.) 339). My noble and learned friend, LORD REID, has examined these and other Scottish cases, and I do not wish to repeat what he has said, with which I agree. I would only add that what LORD PRESIDENT INGLIS said was obiter, and that I have great difficulty in thinking that he meant it to be taken in the absolute and unqualified sense in which it is being read. He seems to relate his words to the decision of this House in *Weems* v. *Mathieson* (14) ((1861), 4 Macq. 215), and a reference to that case shows very clearly that the decision turned on direct lack of care and attention by the master, or those for whom he was responsible, for the safety of his servant in the provision of appliances for suspending, and the manner of suspending, a heavy iron cylinder over the workman's head. Although the Lord President at one point uses the word " guarantee ", I am not satisfied that he meant more than that the employer was under a duty to take reasonable means to satisfy himself so far as possible, by inspection or otherwise, that apparatus bought by, or provided for, him was safe for use by his work people. If he meant more it would be inconsistent, as my noble and learned friend has pointed out, with what the Lord President, when Lord Justice-Clerk, said in *Ovington* v. *M'Vicar* (13) ((1864), 2 Macph. (Ct. of Sess.) 1066 at p. 1072). I would further observe that the paragraph relied on from GLEGG does not seem to be entirely consistent with an earlier paragraph in the same work under the heading " Proof of negligence " ((2nd Edn.) p. 415; (3rd Edn.) p. 364; (4th Edn.) p. 370), which, in my opinion, more accurately states the true legal position. It is there stated: D E F G H

" The existence of a defect in plant or appliances is not of itself evidence of fault on the part of an owner, and is not a ground of liability. In order to recover damages the injured person must show either that the owner knew of the existence of the defect, or, what is more usual, that he neglected to take reasonable precautions to find out whether a defect existed." I

This passage is not confined to liability to strangers as one of the cases cited in support of the proposition—*Gavin* v. *Rogers* (25) ((1889), 17 R. (Ct. of Sess.) 206)—was a case of master and servant.

This statement is, of course, apart from the question of negligence in the doing, or making, of something entrusted by an employer to an independent contractor,

involving delegation of the performance of something which the employer is under a duty to do or provide for his workman. The ambit of the decision in *Wilsons & Clyde Coal Co., Ltd.* v. *English* (6) did not extend beyond delegation of performance of an employer's duty to a servant. The Lord President (LORD NORMAND) in the Court of Session was careful to point that out, and LORD FLEMING expressly reserved the question of the effect of delegation to an independent contractor. None of their Lordships in the House of Lords referred to delegation to an independent contractor, though LORD WRIGHT may have had it in mind in relation not to a contract of service, but to the exercise of due diligence for the seaworthiness of a vessel in a contract of carriage by sea. In *W. Angliss & Co. (Australia) Proprietary* v. *Peninsular & Oriental Steam Navigation Co.* (9) ([1927] 2 K.B. 456), and *Thomson* v. *Cremin* (21), LORD WRIGHT took the opportunity, by way of illustration, of referring to cases in other relationships where an owner or occupier was unable to escape liability to a third party by delegating performance of some operation to an independent contractor. An observation, however, of LORD WRIGHT in *W. Angliss & Co.* (9), though not strictly relevant to this case (being made with reference to obligations of a carrier in a contract of carriage by sea), has, I think, some pertinence to the subject-matter of the present appeal. After pointing out that the carrier must act by servants and agents and posing the question ([1927] 2 K.B. at p. 460): "How wide is the category of agents or servants with reference to the obligation now being considered?" he says with reference to the fault of the shipbuilders (ibid., at p. 461):

> "The carrier may not be the owner of the ship, but merely the charterer; he may not have contracted for the building of the ship, but merely have purchased her, possibly years after she has been built. In the two latter cases the builders and their men cannot possibly be deemed to have been the agents or servants of the carrier and it is illogical that there should be such difference in the carrier's obligations merely because he has bought the ship by the method of contracting with the builders to build it for him. In addition, if the carrier were held liable for the bad workmanship of the builders' men, he might equally be held liable for bad workmanship by the men employed by the various sub-contractors who supply material for the builders, such as steel-workers in furnaces and rolling mills, or who supply special articles such as castings, pumps or proprietary machines, which would involve an almost unlimited retrogression."

These words were spoken with reference to a statutory liability of the carrier, but they are not so remote from the present case where, from one aspect, the problem is to delimit a common law obligation of a master to exercise due diligence for the safety of his servants. Granted that, in certain circumstances, he may be responsible for the negligence of persons who may be described as independent contractors in the performance for him of his common law duties, where does his liability for negligence in the chain of performance end? The answer made by appellant's counsel is: Nowhere, for the only excuse which he accepts is latent defect arising without negligence in manufacture and which could not be discovered by the maker of the instrument in which the defect existed. This need not, and in the present case does not, involve negligence in a chain of delegation and sub-delegation, for here there was nothing but a purchase of a tool from a reputable wholesale supplier of tools. For all practical purposes, the appellant's case involves that an employer is bound to warrant the sufficiency and safety of the tools used by his servants.

The only case that might support such a contention is *Donnelly* v. *Glasgow Corpn.* (3) (1953 S.C. 107). The judgment in that case was not a judgment given after a trial but a decision on relevancy. The pursuer had averred (to paraphrase his averments) that the omnibus in question was of defective design, that its springs were liable to break, that this was known to the defenders, that steps in

the shape of certain devices should have been taken to minimise the effects of such breakages, that such steps could have been taken by the defenders to minimise these effects and that they did nothing. He further, and in any event, averred a duty on the defenders

> "to provide an omnibus in which the pursuer was to carry out his duties as conductor which was safe and fit for him to work and travel in and which was properly constructed for this purpose."

The defenders made averments, inter alia, that the accident was due to the fault of the makers of the omnibus. The Lord Ordinary (LORD MACKINTOSH) held that these averments of the defenders were irrelevant and should not be admitted to probation and otherwise approved of an issue for jury trial. The defenders reclaimed against the Lord Ordinary's interlocutor, and the court refused the reclaiming motion. The Second Division, in refusing the reclaiming motion, proceeded on a ground different from that taken by the Lord Ordinary. They held that the defenders had a duty to provide safe plant for their servant, and could not escape liability for having provided defective plant by blaming the manufacturers of the omnibus. That the Lord Justice-Clerk (LORD THOMSON) (with whom LORD PATRICK and LORD MACKAY concurred) regarded the defenders as saddled with the fault of the manufacturers is clear from a passage where he says (ibid., at p. 122):

> "If the position in the present case had been that the corporation had been able to say that neither they nor their suppliers could have discovered the defect by means of any reasonable inspection, the defence would be relevant. But, as I have already said, the corporation agree that the defect was patent to their suppliers, and that in this branch of the law means that it was patent to them."

No authorities are discussed in the judgment, but it would seem from a reference to the authorities cited by the pursuer's counsel that he was relying on the passage in GLEGG, on LORD PRESIDENT INGLIS' dicta in *Weir* (*or Wilson*) v. *Merry & Cunningham* (15), on *Macdonald* v. *Wyllie & Son* (18), and on *Wilsons & Clyde Coal Co., Ltd.* v. *English* (6). Except for the statement in GLEGG which, I consider, is vouched by inadequate authority, I can find no support for the judgment in *Donnelly* (3). That case was, in my opinion, on the point in issue wrongly decided. The duty of a master in supplying a servant with plant or material cannot, in my opinion, be placed higher than a duty to exercise reasonable care to see that the plant or material is safe for the purpose for which it is intended, and he cannot be liable, except in a proper case of delegated performance, for the negligence of someone other than himself in the provision of that plant or material. I find it unnecessary to consider whether that liability can extend further than one remove in a chain of delegation. Purchase by a master from a wholesale or retail merchant, without more, is not, in my opinion, an instance of delegation. It is performance by the master himself. Casual references may, no doubt, be found among the authorities to a duty by a master to supply safe plant and material for his servant. These, I think, will be found to be merely shorthand phrases, the fuller content of which may be gathered from the context. I may say "I have a duty not to run over anyone on the street" when I mean "I have a duty to exercise reasonable care not to run over anyone on the street."

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *W. H. Thompson* (for the appellant); *E. P. Rugg & Co.* (for the first respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

CORNISH *v.* BROOK GREEN LAUNDRY, LTD. AND OTHERS.

[COURT OF APPEAL (Jenkins, Romer and Pearce, L.JJ.), December 15, 16, 1958, January 23, 1959.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Intention to occupy premises for own business—Lease of landlord expired—Landlord holding over as business tenant—Acceptance of conditional offer to grant lease—Conditions not fulfilled—Whether interest of landlord created within five years ending with termination of current tenancy—Landlord—Competent landlord—Landlord and Tenant Act, 1954 (2 & 3 *Eliz.* 2 *c.* 56), *s.* 30 (1) (*g*), (2), *s.* 44 (1), *s.* 69 (1), *Sch.* 6, *para.* 1.

County Court—Jurisdiction—Application for new business tenancy—Rateable value of premises below £500—Value of property above £500—Incidental question of equitable title of landlord—Landlord and Tenant Act, 1954 (2 & 3 *Eliz.* 2 *c.* 56), *s.* 63 (2) (*a*).

The lessees of No. 23 and No. 23A, Lower Belgrave Street held those premises (which were business premises) under a lease for seven years expiring at Michaelmas, 1956. The lessees occupied No. 23A (which comprised a ground floor and basement), and No. 23 (a ground floor shop and basement) was occupied by a sub-lessee under an underlease expiring three days before the head lease. After the expiration of the lease and sub-lease, the lessees and the sub-lessee continued to occupy their respective premises. On Jan. 18, 1957, the freeholders offered the lessee a lease of both premises for ten and a half years from Michaelmas, 1956, to Lady Day, 1967, at an increased rent, subject to the carrying out by the lessees of specified works on the premises. A form of acceptance was sent to the lessees who sealed and returned it. The lessees suggested to the sub-lessee that the sub-lessee should remain in possession as a monthly tenant pending completion of the negotiations between the lessees and the freeholders. No lease was granted to the lessees although they paid the increased rent. In July, 1957, the sub-lessee served a request for a new tenancy under Part 2 of the Landlord and Tenant Act, 1954, on the freeholders, sending a copy to the lessees. On Sept. 12, 1957, the lessees gave notice of opposition. On Oct. 30, 1957, the sub-lessee applied under Part 2 of the Act of 1954 for a grant of a new tenancy of No. 23, Lower Belgrave Street, joining the lessees; subsequently she added the freeholders as respondents. The lessees opposed the application on the ground (s. 30 (1) (g)) that on the termination of the current tenancy they intended to occupy No. 23 for the purposes of their business. The works referred to in the freeholders' offer made on Jan. 18, 1957, had not been completed by the end of 1957. The county court judge found that the lessees had established a genuine intention to occupy No. 23 for the purposes of their business. The sub-lessee contended that the lessees were debarred by s. 30 (2) from relying on s. 30 (1) (g) as their equity to a new lease had superseded their former interests, and since they were not landlords within s. 44 (1) of the Act of 1954 at the time of the notice of opposition.

Held: a new tenancy should be refused under s. 30 (1) (g) of the Landlord and Tenant Act, 1954, as the lessees were entitled to rely on that ground of landlords' opposition for the following reasons:—

(i) the lessees were not equitably entitled to a new tenancy by virtue of the doctrine of *Walsh* v. *Lonsdale* ((1882), 21 Ch.D. 9) at the relevant date (viz., Sept. 12, 1957, the date of the notice of opposition), since the agreement to grant a new lease to the lessees was then subject to a condition not yet fulfilled (*Inland Revenue Comrs.* v. *Earl of Derby*, [1914] 3 K.B. 1186, approved); and accordingly s. 30 (2)* of the Act of 1954 did not disqualify the lessees from relying on s. 30 (1) (g), as their interest on Sept. 12, 1957,

* The terms of this enactment are printed at p. 380, letter I, post.

had not been purchased or created within five years (see p. 382, letter G, post). A

(ii) the lessees were "landlords" (within s. 44 (1))* and "competent landlords" (within Sch. 6 para. 1) and the interest of the underlessee was a "tenancy" (within s. 69 (1))* by virtue of the prolongation of the lessees' tenancy and of the sub-lessee's under-tenancy effected by s. 24 (1) of the Landlord and Tenant Act, 1954, so that the lessees were landlords within s. 30 (1) (g) of the Act (see p. 384, letter B, and p. 383, letter E, post). B

Per CURIAM: the county court judge had jurisdiction to consider the question whether specific performance of the agreement between the lessees and the freeholders could be decreed, notwithstanding that the property was more than £500 in value, because he could not otherwise perform the duty imposed on him by s. 63 (2) (a) of the Act of 1954, i.e., to exercise the jurisdiction conferred by the Act in cases where the rateable value of the holding did not exceed £500 (see p. 385, letters D to H, post). C

Foster v. *Reeves* ([1892] 2 Q.B. 255) considered.

Appeal allowed.

[As to opposition to new lease on the ground of the landlord's intention to occupy, see 23 HALSBURY'S LAWS (3rd Edn.) 894, para. 1718.

As to meaning of "landlord", see 23 HALSBURY'S LAWS (3rd Edn.) 888, para. 1710. D

As to jurisdiction of county court in proceedings for specific performance, see 9 HALSBURY'S LAWS (3rd Edn.) 157, para. 306; and for cases on the subject, see 13 DIGEST (Repl.) 396, 397, *244-250*.

For the Landlord and Tenant Act, 1954, s. 30, s. 44 (1) and s. 63 (2), see 34 HALSBURY'S STATUTES (2nd Edn.) 414, 427, 440.] E

Cases referred to:

(1) *Walsh* v. *Lonsdale*, (1882), 21 Ch.D. 9; 52 L.J.Ch. 2; 46 L.T. 858; 31 Digest (Repl.) 255, *3905*.

(2) *Lowther* v. *Heaver*, (1889), 41 Ch.D. 248; 58 L.J.Ch. 482; 60 L.T. 310; 31 Digest (Repl.) 91, *2411*.

(3) *Diploma Laundry, Ltd.* v. *Surrey Timber Co., Ltd.*, [1955] 2 All E.R. 922; [1955] 2 Q.B. 604; 3rd Digest Supp. F

(4) *Inland Revenue Comrs.* v. *Derby (Earl)*, [1914] 3 K.B. 1186; 84 L.J.K.B. 248; 109 L.T. 827; 31 Digest (Repl.) 573, *6937*.

(5) *Bolton (H. L.) (Engineering) Co., Ltd.* v. *Graham (T. J.) & Sons, Ltd.*, [1956] 3 All E.R. 624; [1957] 1 Q.B. 159; 3rd Digest Supp.

(6) *Re Bleachers' Assocn., Ltd.'s Leases, Weinbergs Weatherproofs, Ltd.* v. *Radcliffe Paper Mill Co., Ltd.*, [1957] 3 All E.R. 663; 3rd Digest Supp. G

(7) *Foster* v. *Reeves*, [1892] 2 Q.B. 255; 61 L.J.Q.B. 763; 67 L.T. 537; 57 J.P. 23; 13 Digest (Repl.) 396, *245*.

Appeal.

This was an appeal of the first respondents, Brook Green Laundry, Ltd., from an order of His Honour JUDGE BLAGDEN made on May 22, 1958, at Westminster County Court whereby he granted the applicant a new lease of premises known as No. 23, Lower Belgrave Street in the county of London. The county court judge held that the first respondents were precluded by the Landlord and Tenant Act, 1954, s. 30 (2), from opposing the application on the ground of s. 30 (1) (g) of that Act, because the relevant interest by virtue of which the first respondents were landlords of the applicant was an agreement to grant a lease made in 1957 and not the continuation of their expired lease by virtue of the Act of 1954. The applicant served a counter-notice to the effect that the appellants were not competent landlords within the meaning of the Act of 1954. H I

T. M. Eastham and *G. Cohen* for the applicant.

J. Montgomerie for the first respondents to the application.

* The relevant terms of s. 44 (1) and s. 69 (1) are printed at p. 383, letters C and H, post.

The second respondents, the trustees of the London settled estates of the second Duke of Westminster, did not appear and were not represented.

Cur. adv. vult.

Jan. 23. **ROMER, L.J.,** read the following judgment of the court: This is an appeal by the respondents, Brook Green Laundry, Ltd. (hereinafter called "Brook Green"), against an order of His Honour JUDGE BLAGDEN dated May 22, 1958, whereby it was ordered that a new tenancy should be granted to the applicant, Mrs. Cornish, of the premises, No. 23, Lower Belgrave Street, Eaton Square, in the county of London. The tenancy directed by the said order to be granted was to be for a period of ten and a half years less three days from Michaelmas, 1956, at a rent of £250 per annum from that date.

The premises, No. 23, Lower Belgrave Street, consist of a ground floor and basement, and this accommodation has been occupied by Mrs. Cornish and by her mother (a Mrs. Paulin) before her for some fifty years for the purpose of a confectioners, newsagents, stationers and tobacconists shop. The premises immediately adjoining No. 23, and also consisting of a ground floor and basement, are known as No. 23A, Lower Belgrave Street and are and have for some years past been occupied by Brook Green. The owners of the freehold interest in both No. 23 and No. 23A, Lower Belgrave Street are the trustees of the Westminster Settled Estates (hereinafter referred to as "the trustees"). Prior to 1949 Mrs. Paulin held a direct tenancy of No. 23 from the trustees, but in that year the trustees granted a lease to Brook Green of both No. 23 and No. 23A for seven years from Michaelmas, 1949. On May 10, 1950, Brook Green granted an underlease of No. 23 to Mrs. Paulin for the term of their own lease less the last three days. Accordingly, Brook Green's contractual lease of No. 23A expired on Sept. 29, 1956, and the sub-lease of No. 23 (then vested in Mrs. Cornish) expired three days earlier. As, however, Brook Green were using No. 23A for business purposes, they became entitled in respect of their tenancy to the protection of Part 2 of the Landlord and Tenant Act, 1954, as also did Mrs. Cornish in view of her user of No. 23 as a shop. The result of this protection, putting it generally, was to continue both the lease and the sub-lease until they were superseded by new tenancies or determined by appropriate notices served under the Act. Both Brook Green and Mrs. Cornish continued in occupation of their respective premises, and in November, 1956, certain tentative correspondence passed between them or their respective solicitors as to the granting of a further sub-lease to Mrs. Cornish on the assumption that Brook Green would obtain a new head lease from the trustees. Apart from this correspondence, no step was taken by any of the parties concerned until Jan. 18, 1957, when the trustees' solicitors wrote to Brook Green enclosing a formal offer of a new lease. Some of the terms of the offer, which was partly printed and partly written, are of considerable importance in the case, and, so far as material, were as follows:

> "Dear Sirs, 23, Lower Belgrave Street. In answer to your application, we hereby, on behalf of the special executors of the late Duke of Westminster, make the following offer, namely, subject to your first carrying out the works specified in the schedule hereto, without prejudice to the obligation that the rent and covenants under the head lease should be duly paid and performed up to its expiration, a reversionary lease would (subject as after mentioned and to your written acceptance of these terms within the time after specified) be granted to your company of No. 23, Lower Belgrave Street, London, upon the following terms: (1) The term of years to be 10½ years from Michaelmas Day, 1956, to Lady Day, 1967 . . . the rent, as from Sept. 29, 1956, to be £400 a year. (3) The property to be leased subject to all rights, easements and privileges of adjacent or neighbouring premises, and the lease also to contain all such clauses and covenants as are contained in a form marked (blank) dated January, 1957, endorsed No. 23, Lower Belgrave Street and sent herewith

for perusal and return . . . (5) Your company to carry out and complete the works mentioned in the schedule hereto to the satisfaction in all respects of the lessors or their estate surveyor by Mar. 25, 1957, and thereupon and upon payment of the costs above mentioned* the lease to be granted and taken up by your company. (6) These terms (which are not transferable) are open to your company's acceptance in writing, by affixing the company's seal with the usual formalities to the acceptance subjoined and returning this form to us within three weeks from this date."

The schedule of works required were:

"(1) Make good the pieces of broken parapet oversailing course on the front elevation of the premises. (2) Carry out such sanitary works (if any) as may be necessary."

Then the form of acceptance which appears below that and was filled in and dated Feb. 4, 1957, and sealed by Brook Green, was:

"We hereby accept the foregoing offer and agree to carry out the said works, to take up the lease upon tender thereof and to pay the costs as mentioned."

The subsequent history of the matter down to the commencement of the present proceedings sufficiently appears from the correspondence which passed between the solicitors acting respectively for Brook Green (Messrs. Goodman, Derrick & Co.) Mrs. Cornish (Messrs. Beddington, Hughes & Hobart) and the trustees (Messrs. Boodle, Hatfield & Co.), and it will be convenient to refer to the relevant letters. On Feb. 12, 1957, Messrs. Goodman, Derrick & Co. write to Messrs. Beddington:

"Dear Sirs, 23, Lower Belgrave Street. Further to our letter of Nov. 28 last, our clients are in process of negotiating a new head lease of these premises, but the negotiations are not yet complete. In view of the fact that your client's lease will already have expired, we would suggest that she remain in possession for the time being as a monthly tenant but otherwise on the terms of the existing lease."

On Apr. 9, 1957, Messrs. Goodman, Derrick & Co. write to Messrs. Boodle, Hatfield & Co.:

"Dear Sirs, 23, Lower Belgrave Street. Further to our letter of 21st ultimo, our clients have now considered this matter further, and at their request we enclose herewith the original agreement which has been duly signed. The above is forwarded on the understanding, please, that you will let us have the lessors' part of the agreement in exchange, and also the new draft lease."

On May 13, 1957, Messrs. Goodman, Derrick & Co. wrote to Messrs. Beddington:

"Dear Sirs, We refer to our correspondence of February last, and should state that our clients are still in course of carrying out various negotiations in respect of the renewal of their head lease. The head lease will in fact be back dated to the expiration of the old one in September last, and we feel therefore that we should mention to you that any fresh arrangements entered into with your clients should take this into account."

On June 25, 1957, Messrs. Boodle, Hatfield & Co. wrote to Messrs. Goodman, Derrick & Co.:

"We now enclose the draft lease for your final perusal . . . If the schedule of condition mentioned in cl. 3 has now been agreed between the surveyors for our respective clients, you might be so kind as to insert its date and let us have a copy which can be signed by us on behalf of our clients."

* By term (4) of the offer the company were required to pay the costs of and incidental to the negotiation of the lease.

A I gather that on July 4 there was a letter from Messrs. Goodman, Derrick & Co. to Mrs. Cornish with reference to alternative accommodation. On July 8, 1957, Messrs. Goodman, Derrick & Co. wrote to Messrs. Boodle, Hatfield & Co., and in the second paragraph they say:

" In the meantime we enclose herewith a copy of the schedule of condition, which we understand has been agreed by the surveyors to both B parties, and you will no doubt wish to confirm this."

On July 12 Messrs. Beddington wrote to Messrs. Goodman, Derrick & Co.:

" We refer to your letter of the 4th instant and have now taken instructions. Our client feels that she could not carry on her business in the part of the premises occupied by your clients and in these circumstances we C should be glad to have your proposals for a new lease of the premises at present occupied by our client. We have, solely for the protection of our client's interests and not as any hostile step, served notice on the Duke of Westminster as the competent landlord for the purposes of Part 2 of the Landlord and Tenant Act, 1954, and enclose a copy of that notice for your information. When sending the notice to the Duke, we have informed D him that we are in negotiation with you and that the notice is served only for the purpose of protecting the interests of our client."

On Aug. 1, 1957, Messrs. Beddington wrote to Messrs. Goodman, Derrick & Co.:

" We should be glad if we might hear from you on this matter. You will recall that you told us that your client had agreed with the freeholder E terms for the grant of a new lease and it is, of course, desirable that we should similarly conclude terms with you having regard to the period fixed by the Act."

On Aug. 9, 1957, Messrs. Goodman, Derrick & Co. wrote to Messrs. Beddington:

" We refer to your letter of July 12 in this matter. We acknowledge receipt of a copy of a notice served on the Duke of Westminster. We F would suggest, with great respect, that this notice is misconceived. Our clients' tenancy includes the part of the premises occupied by them as well as the part sub-let to your client. As our clients' tenancy is continued automatically by s. 24 (1), and no statutory notice has been served either by our clients or by the head landlords, our clients have a reversion (s. 65 (1)) expectant on your client's tenancy; nor will their tenancy come G to an end within fourteen months or less by effluxion of time or by virtue of a notice to quit already given by the landlord. Our clients are therefore ' the landlord ' under s. 44. If you agree with this point of view, would you let us know whether you want us to treat the notice as if it has been served on our clients or whether you propose to serve a fresh notice. Meanwhile we are instructed to offer your client formally, by way of alternative H accommodation, the accommodation at present occupied by our clients for a term of 10½ years (less ten days) from Sept. 29, 1956, or from such other day as may become appropriate under the provisions of the Act at a rent of £150 per annum exclusive with full interior repairing obligations and otherwise on the same terms as your current tenancy. Our clients propose to occupy the accommodation now occupied by your client."

I On Aug. 19, 1957, Messrs. Beddington wrote to Messrs. Goodman, Derrick & Co.:

" Dear Sirs, We refer to your letter of the 9th instant, but cannot accept your view that our notice is misconceived. . . . Inasmuch as it appears from your letter that your clients now have a new lease of the whole of the premises, we shall be glad if you will say whether they are prepared to grant to our client a new tenancy of the part of the premises comprised in the present tenancy of our client, for the term mentioned in your letter under reply."

On Sept. 12, 1957, Messrs. Boodle, Hatfield & Co. wrote to Messrs. Goodman, Derrick & Co.:

" We now enclose the counterpart of the new lease for sealing on behalf of your client company and we also enclose a note of our charges and disbursements in connexion with the preparation and completion of the lease. . . . You will remember that it was one of the conditions precedent to the grant of the lease that your client should carry out certain works. We have asked the estate surveyor to let us know whether sufficient of these have been completed to enable the lease to be granted and as soon as we have heard from him we will communicate with you again."

On Sept. 17, 1957, Messrs. Beddington wrote to Messrs. Goodman, Derrick & Co.:

" In order to avoid the necessity for the service upon your clients of a formal requisition for information under s. 40 of the Act, we should be obliged if you would tell us the date of the lease or other instrument under which your clients now hold the premises and the term thereof. Having regard to the information which you furnished to us, it would appear to us that the interest of your clients in the premises must have been ' created ' within five years and we should be glad if you would let us know whether you agree."

On Sept. 18, 1957, Messrs. Goodman, Derrick & Co. reply to that letter saying:

" Our clients hold the premises by virtue of an agreement for lease dated Jan. 18, 1957, for a term of 10½ years from Michaelmas Day, 1956, to Lady Day, 1967. We trust this is the information that you require."

On Oct. 30, 1957, Mrs. Cornish made the present application under the Act of 1954 asking for the grant of a new tenancy of No. 23, Lower Belgrave Street pursuant to Part 2 of the Act. Originally the only respondents to the application were Brook Green, but on Feb. 28, 1958, she joined the trustees as additional respondents. The trustees have, however, taken no active part in the proceedings. Paragraph 3 of the amended application is as follows:

" The following are particulars of the termination of the current tenancy: On July 12, 1957, the applicant requested a new tenancy to commence on June 24, 1958, and on Sept. 12, 1957, the first respondents gave notice that they would oppose any application for the grant of a new tenancy."

On Dec. 3, 1957, Brook Green put in an answer opposing Mrs. Cornish's application on the ground that on the termination of the current tenancy they intended to occupy No. 23 for the purpose of their business as a laundry to be carried on by them therein, and on the further ground that they had offered and were willing to provide Mrs. Cornish with, or secure the provision of, suitable alternative accommodation within the meaning of s. 30 (1) (d) of the Act of 1954. Paragraph 3 of the notice of opposition as originally delivered stated that Brook Green were

" tenants under an agreement for a lease having less than fourteen months unexpired at the date of termination of the applicant's current tenancy,"

and stated that their immediate landlords were the trustees, but by amendment dated Mar. 11, 1958, they introduced between the words " under " and " an agreement ", the further words

" a lease continued by virtue of s. 26 of the Landlord and Tenant Act, 1954, or alternatively under ".

Between the date of the commencement of the application and its hearing, there was some further correspondence between the solicitors to the parties, and I will refer to such of the letters as have a bearing on the case. On Jan. 23, 1958, Messrs. Goodman, Derrick & Co. wrote to Messrs. Beddington, and in the course of their letter they said:

" We think it fair to add that, despite the letter of Sept. 18, 1957, counsel has advised that what was therein referred to as an agreement for a lease dated Jan. 18, 1957, was in fact only an offer to grant a lease if certain

A conditions were fulfilled and that the true position may be that the respondents are holding over under the Act pending the execution of the new lease; it should, however, be said that the respondents have for some time paid the higher rent. The document of Jan. 18, 1957, and all relevant correspondence, etc., will of course be disclosed on discovery."

B On Jan. 27, 1958, Messrs. Beddington wrote to Messrs. Boodle, Hatfield & Co. saying:

"On July 12, 1957, we served on behalf of our client, Mrs. S. Cornish, notice under the Landlord and Tenant Act, 1954, claiming a new lease of the above mentioned premises, and on July 25 you informed us that no objection was raised as to the manner in which the notice was addressed. Messrs. Goodman, Derrick & Co. informed us that their clients, Brook Green
C Laundry, Ltd., held an agreement for lease of the whole property whereby their clients were the competent landlords of our client for the purposes of the Act. On Oct. 30, 1957, proceedings were commenced in the Westminster County Court claiming a new lease, which are to be heard on Feb. 13, 1958. The answer of the respondents is upon the footing that they are the competent landlords. Messrs. Goodman, Derrick & Co. now inform us that, as
D the agreement for lease was subject to conditions, it may not amount to such a document as will constitute their clients as the landlords of our client for the purposes of the Act. It appears to us, therefore, that your clients should be added as respondents to the application, and we should be glad to have your observations."

E On Jan. 30, 1958, Messrs. Goodman, Derrick & Co. write to Messrs. Beddington:

"We have already in previous correspondence made known our view that our clients are the competent landlords under the Act; this we think is so whether the true interpretation be that our clients are holding over as business tenants under the Act or whether by virtue of the agreement for lease. In those circumstances we must of course leave it for your clients to
F decide whether or not to add the head landlords as respondents to the application."

On Feb. 5, 1958, Messrs. Boodle, Hatfield & Co. wrote to Messrs. Beddington:

"We duly received and thank you for your letter of Jan. 27, and we confirm our telephone conversation with you yesterday when we explained that it was expected that the proposed new head lease of these premises would
G be granted very shortly. It is correct that the agreement for lease was subject to certain conditions but the only relevant condition refers to the carrying out of one item of external repair to the premises. We have asked the Grosvenor Estate surveyor to advise us as to whether this particular piece of work has now been done and if this is the case, then the lease can at once be granted."

H On Feb. 6, 1958, Messrs. Beddington wrote to Messrs. Goodman, Derrick & Co.:

"You will agree with us that, pending the confirmation of the estate's surveyor that the work has been completed, the question as to who is the competent landlord unfortunately still remains open. It would, we feel sure you will agree, be a waste of time and money to add the Grosvenor Estate
I trustees as respondents to the proceedings if, as it appears likely to be the case, the condition of the agreement for lease is likely to be removed shortly. We, accordingly, suggest that the hearing should be adjourned for a further month in order to allow time for the grant of the lease to your clients whereby the position will be beyond doubt."

On Feb. 17, 1958, Messrs. Boodle, Hatfield & Co. wrote to Messrs. Goodman, Derrick & Co.:

"In view of the desirability of the grant of the new lease to your clients, we had hoped that the estate surveyor would by now have been able to

confirm to us that the works required under the offer of terms had been carried out. He inspected the premises on the 10th instant, however, and found that the broken oversailing course on the main parapet of the front elevation had not yet been made good. Our clients are, however, in the circumstances prepared to agree that the grant of the new head lease should be completed, provided that your clients will give an undertaking in the terms of the enclosed document to the effect that the works required under the offer of terms will be carried out by the 24th June next."

I do not think it is necessary to refer to the actual terms of the undertaking which was enclosed. Finally, on Feb. 26, 1958, Messrs. Goodman, Derrick & Co. wrote to Messrs. Boodle, Hatfield & Co. saying:

"As we have explained to you, the issues in the proceedings between our clients and Mrs. Cornish are such that we have advised them that it would be inadvisable at this stage for them to take up and complete a new lease from your clients and that they should, if possible, delay doing so until after the proceedings have been disposed of. There is no doubt, however, of their intention to complete the lease in due course and to carry out the necessary work referred to in the schedule to the agreement for lease. With regard to the decision by Mrs. Cornish to add your clients as parties to the proceedings, we are, as we have already informed you, emphatically of the view (and we are so advised by counsel) that our clients are the competent landlords for the purpose of the Landlord and Tenant Act, 1954, and that consequently the addition of your clients as parties is entirely misconceived and should not, we suggest, be used in any way to bring pressure upon our clients to complete the lease immediately. In those circumstances we would be very grateful if you would obtain your clients' instructions on the matter and confirm to us that they are prepared to leave the completion of the lease in abeyance for the time being. With regard to the execution of the necessary work, our clients would for similar reasons prefer this to be delayed, but are, if your clients should so insist, prepared to make arrangements for it to be carried out without delay."

As appears from Messrs. Goodman, Derrick & Co.'s letter to Messrs. Beddington, Hughes & Hobart of Jan. 23, 1958, Brook Green had "for some time" paid to the trustees the higher rent of £400 per annum which was mentioned in the offer of Jan. 18, 1957, to which we have earlier referred; we were, however, informed by counsel at the hearing before us that it was not known when Brook Green started to pay this higher rent.

As a result of the evidence which was called at the hearing, the learned judge was satisfied, and so held, first, that the alternative accommodation which Brook Green offered to Mrs. Cornish was in no way suitable to her requirements and, secondly, that Brook Green had established a genuine intention to occupy No. 23 (if Mrs. Cornish's tenancy was terminated) for the purposes of their business. This second finding by the learned judge would accordingly entitle Brook Green to rely on s. 30 (1) (g) of the Act of 1954 as a ground of opposition to Mrs. Cornish's application, provided that they were her "landlords" and not disqualified from relying on it by reason of s. 30 (2). That sub-section is in the following terms:

"The landlord shall not be entitled to oppose an application on the ground specified in para. (g) of the last foregoing sub-section if the interest of the landlord, or an interest which has merged in that interest and but for the merger would be the interest of the landlord, was purchased or created after the beginning of the period of five years which ends with the termination of the current tenancy, and at all times since the purchase or creation thereof the holding has been comprised in a tenancy or successive tenancies of the description specified in s. 23 (1) of this Act."

The learned judge held that this sub-section operated as a bar to Brook Green's

attempt to defeat Mrs. Cornish's application by relying on s. 30 (1) (g), and it would be convenient to consider this aspect of the case before dealing with any other issue. The matter arises in this way. If the interest which Brook Green had in No. 23, Lower Belgrave Street, when, on Sept. 12, 1957, they gave notice that they would oppose Mrs. Cornish's request for a new tenancy, was no more than their interest, continued by virtue of the Act of 1954 as head lessees from the trustees under the lease of 1949, it is clear that such interest was outside the disqualifying provisions of s. 30 (2). It was suggested, however, and the suggestion was accepted by the learned judge, that by reason of the offer of a new lease by the trustees to Brook Green in January, 1957, and Brook Green's acceptance thereof, communicated to the trustees on Apr. 9, 1957, a new interest in No. 23 was created in Brook Green which superseded their previous interest; and that such interest was accordingly within the mischief of s. 30 (2). The applicant's contention on this point depends on the application to the relevant events of 1957 of the principle of equity exemplified by *Walsh* v. *Lonsdale* (1) ((1882), 21 Ch.D. 9). That principle was enunciated by COTTON, L.J., in *Lowther* v. *Heaver* (2) ((1889), 41 Ch.D. 248) in the following terms (ibid., at p. 264):

> " . . . a tenant holding under an agreement for a lease of which specific performance would be decreed stands now in the same position as if the lease had been granted. He is entitled only in equity it is true to a lease, but being entitled in equity to have a lease granted, his rights ought, in my opinion, to be dealt with in the same way as if a lease had been granted to him, and do not depend upon its actually having been granted."

It is quite true that in their letter of Sept. 18, 1957, Brook Green's solicitors informed Mrs. Cornish's solicitors that

> " our clients hold the premises by virtue of an agreement for lease dated Jan. 18, 1957, for a term of 10½ years from Michaelmas Day, 1956, to Lady Day, 1967 ",

and a statement to the like effect appeared in Brook Green's formal opposition before the same was amended. It seems to us, however, that Brook Green and their solicitors were quite mistaken in supposing that at any relevant moment of time they were entitled as against the trustees to what we may for the sake of convenience refer to as the *Walsh* v. *Lonsdale* (1) equity. The offer which accompanied Messrs. Boodle, Hatfield & Co.'s letter of Jan. 18, 1957, to Brook Green was not, perhaps, a model of lucidity, but one thing about it which is quite clear is that the offer of a new lease of No. 23, Lower Belgrave Street, was conditional on Brook Green " first carrying out the works specified in the schedule " to the offer. There was no evidence before the learned judge as to the extent or cost of the works which Brook Green were to do before they could require the trustees to grant them the new lease, but it is conceded that they had not been done by Sept. 12, 1957, when Brook Green notified Mrs. Cornish that they would oppose her application. Accordingly, by that date (which would appear to be the relevant date, see *Diploma Laundry, Ltd.* v. *Surrey Timber Co., Ltd.* (3), [1955] 2 All E.R. 922), Brook Green were not in a position to sue the trustees for specific performance of an agreement to grant them a new lease, for the only agreement which then subsisted between them was subject to the fulfilment by Brook Green of a condition which they had not performed. From this it follows that one of the basic features of the *Walsh* v. *Lonsdale* (1) equity was wanting and Brook Green could not have relied on the equity in any proceedings against the trustees. It is true that Brook Green may have been by September, 1957, and probably were, paying to the trustees the higher rent which was envisaged in the conditional agreement, but that fact could not convert the agreement into an unconditional one. It is also true that some months later in February, 1958, the trustees conditionally agreed to grant Brook Green the new lease even though the stipulated work had not been done; but this to our mind is nihil ad rem, for the trustees' solicitors were, on Sept. 12, 1957, still regarding the

carrying out of the scheduled work as a condition precedent to the granting of a new lease, as appears from their letter of that date to Messrs. Goodman, Derrick & Co. In our opinion the *Walsh* v. *Lonsdale* (1) principle cannot be invoked in cases where an agreement for a lease is subject to a condition precedent which remains unperformed by the proposed tenant and has not been waived by the landlord, and this view is in accordance with the decision of HORRIDGE, J., in *Inland Revenue Comrs.* v. *Earl of Derby* (4) ([1914] 3 K.B. 1186) which was, in our judgment, correct. His Honour JUDGE BLAGDEN in the present case held that Brook Green were at all material times entitled to the benefit of the *Walsh* v. *Lonsdale* (1) equity, and said, in dealing with the point:

> "Brook Green, fearing, and with good reason, that if they went a step further they might be caught by s. 30 (2), have under advice studiously abstained from fulfilling their obligation to repair, pursuant to the agreement under which they hold and, of course, from executing a lease. But in my judgment this comes too late and they have already and irretrievably crossed the Rubicon. Supposing (contrary to the fact) that they had failed to pay rent and were sued for it in the High Court by the Westminster trustees, Brook Green could not justify non-payment of rent by pleading their own failure to repair. The answer, if they tried to do so, would be: 'You can't take advantage of your own wrong and sit there on our land basking in Heaven's frown and seeking to excuse your breach of one of your obligations to us by pleading your breach of another of them. Two blacks do not make a white either in law or in equity, and in any case the latter deems that to be done which ought to have been done'. Clearly their failure fully to perform their part of their agreement does not make them any the less *Walsh* v. *Lonsdale* (1) tenants."

It may well be (though it is unnecessary to decide the point) that if Brook Green had in September, 1957, refused to pay, or to continue to pay, the higher rent reserved by the conditional agreement, the trustees could have sued them for it. Their cause of action, however, if any, would, as it seems to us, have had to be founded on some implied agreement and not on the conditional agreement itself. However that may be, the learned judge's reasoning does not, and, as we respectfully suggest, could not, lead to the conclusion that in September, 1957, Brook Green could have sued the trustees for specific performance of the conditional agreement; and therefore they had no title at that time under the *Walsh* v. *Lonsdale* (1) equity. That being so, Brook Green are not in our judgment precluded by s. 30 (2) of the Act in itself from relying on s. 30 (1) (g), and the next question which arises is whether they are so precluded for any other reason. The applicant says by her cross notice of appeal that they are, on the ground that only a "landlord" can oppose a tenant's application for a new tenancy under the Act and that Brook Green are not a "landlord" within the definition of that term contained in s. 44, or "the competent landlord" as defined in Sch. 6 to the Act. By reason of s. 24 (1) of the Act of 1954, both Brook Green's tenancy from the trustees and Mrs. Cornish's sub-tenancy from Brook Green continued in operation notwithstanding that as a matter of contract they both expired in September, 1956; and as neither tenancy was terminated subsequently in any manner authorised by the Act, the continuation of both tenancies was still effective when in September, 1957, Brook Green gave notice of their intention to oppose Mrs. Cornish's application for a new lease. In *H. L. Bolton (Engineering) Co., Ltd.* v. *T. J. Graham & Sons, Ltd.* (5) ([1956] 3 All E.R. 624) DENNING, L.J., considered the position which arises from the continuation of a tenancy under the Act of 1954 and said (ibid., at p. 626) that in his opinion the right view was "that the common law tenancy subsisted with a statutory variation as to the mode of determination." In *Re Bleachers' Assocn., Ltd.'s Leases, Weinbergs Weatherproofs, Ltd.* v. *Radcliffe Paper Mill Co., Ltd.* (6) ([1957] 3 All E.R. 663) HARMAN, J., adopted DENNING, L.J.'s view and said (ibid., at p. 667) that:

A "... having regard to the language used in the Act of 1954, the term must be thought of as continuing by way of a statutory extension ..."

Accordingly, in the present case the rights and obligations created by the lease of 1949 from the trustees to Brook Green were still in force (subject to the variations effected by the Act) when Mrs. Cornish's request to the trustees was rejected by them, as also were her own rights and obligations under her sub-lease B of 1950. In these circumstances it would seem prima facie that Brook Green continued to be Mrs. Cornish's landlord and entitled as such to oppose her application for a new tenancy. Nor can we find anything in the Act to displace the prima facie view. Section 44 (1) of the Act provides as follows:

> " Subject to the next following sub-section, in this Part of this Act the expression ' the landlord ', in relation to a tenancy (in this section referred C to as ' the relevant tenancy '), means the person (whether or not he is the immediate landlord) who is the owner of that interest in the property comprised in the relevant tenancy which for the time being fulfils the following conditions, that is to say—(a) that it is an interest in reversion expectant (whether immediately or not) on the termination of the relevant tenancy, and (b) that it is either the fee simple or a tenancy which will not come to an D end within fourteen months or less by effluxion of time or by virtue of a notice to quit already given by the landlord, and is not itself in reversion expectant (whether immediately or not) on an interest which fulfils those conditions."

There is nothing in that sub-section which militates against the view that Brook Green continued to be Mrs. Cornish's landlord after September, 1956, for all E purposes, including the purposes of Part 2 of the Act of 1954; and, if they were, then they were her " competent landlord " for the purposes of Sch. 6 to the Act if and so far as that schedule has any relevance. It is, moreover, expressly provided by s. 65 (1) of the Act that:

> " Where by virtue of any provision of this Act a tenancy (in this sub-section referred to as ' the inferior tenancy ') is continued for a period such as F to extend to or beyond the end of the term of a superior tenancy, the superior tenancy shall, for the purposes of this Act and of any other enactment and of any rule of law, be deemed so long as it subsists to be an interest in reversion expectant upon the termination of the inferior tenancy and, if there is no intermediate tenancy, to be the interest in reversion immediately expectant upon the termination thereof."

G The learned judge held that if (contrary to his view) Brook Green were not tenants of No. 23 under the *Walsh* v. *Lonsdale* (1) equity, the interest to which they became entitled under the continuance provisions of the Act of 1954, constituted them Mrs. Cornish's landlords for the purposes of Part 2 of the Act, and we agree with him. The only argument, as we followed it, which was put H forward before us on behalf of Mrs. Cornish in support of the contrary view was founded on the definition of " tenancy " in s. 69 of the Act. That definition, so far as relevant, is:

> " ' tenancy ' means a tenancy created either immediately or derivatively out of the freehold, whether by a lease or underlease, by an agreement for a lease or underlease or by a tenancy agreement or in pursuance of any enact-I ment (including this Act) . . . and references to the granting of a tenancy and to demised property shall be construed accordingly."

The suggestion, as we understood it, was that in the light of this definition Brook Green's continued tenancy was not " created " by the Act of 1954, that accordingly they were not " tenants " of the trustees for the purposes of Part 2 of the Act and therefore were not Mrs. Cornish's " landlords " within the definition contained in s. 44. Therefore, it was contended, they had no locus standi to oppose Mrs. Cornish's application under s. 30. If we have followed the argument rightly, we are quite unable to accept it. If it were right, then in the innumerable

cases (of which the present is an example) where sub-tenancies existed when the Act of 1954 came into force, Part 2 of the Act could have very little effective operation as between the head lessee and his under-tenants. This would appear to be quite inconsistent with the general structure of the Act in this regard, and, in particular, with s. 44 (1) (b), s. 65 and Sch. 6; and we are satisfied that the definition in s. 69 was not intended to exclude tenancies which, if not strictly "created" by the Act, were given a statutory extension of life on the terms prescribed by the Act. In our judgment, therefore, Brook Green were by virtue of their extended tenancy from the trustees the "landlords" of Mrs. Cornish and entitled as such to oppose her application.

On the views above expressed, taken in conjunction with the judge's finding that Brook Green had established to his satisfaction the intention referred to in s. 30 (1) (g), Mrs. Cornish's application for a new lease cannot succeed (see s. 31 (1) of the Act), and the appeal must, in our judgment, be allowed. It, therefore, becomes unnecessary to consider certain other arguments which were addressed to us on the footing that the learned judge was right in holding that Brook Green became tenants of the trustees in 1957 by virtue of the *Walsh* v. *Lonsdale* (1) equity. There are, however, two points which should, we think, be mentioned. The first is a suggestion which was made that Brook Green are precluded from denying the statement in their solicitors' letter of Sept. 18, 1957, that they then held the premises, No. 23, Lower Belgrave Street, by virtue of an agreement for lease. This would amount in effect to a plea of estoppel and does not seem to have been taken before the learned judge. Counsel for Mrs. Cornish did not press it before us, rightly as we think. It is difficult to see how the applicant changed her position on the faith of the statement or was, indeed, prejudiced by it in any way. There was, at all events, no evidence to this effect, and if Mrs. Cornish had desired to establish the point, it was for her to prove it. We think, therefore, that it is not open to her to rely on it now. The second point is with regard to the doubt which the learned judge felt as to his jurisdiction to decide the question whether Brook Green had a *Walsh* v. *Lonsdale* (1) tenancy or not. A county court judge's jurisdiction to entertain actions to enforce specific performance of contracts for the lease of any property is limited to cases in which the value of the property does not exceed £500 (see County Courts Act, 1934, s. 52 (1) (d)). In *Foster* v. *Reeves* (7) ([1892] 2 Q.B. 255) this court had to consider the jurisdiction of a county court judge to entertain an action for rent against a person who was in possession of property, the value of which exceeded £500, under an executory agreement for a lease. By reason of the value of the property the county court judge had no jurisdiction to decree specific performance of the agreement, but he was of opinion that it was a case in which (under the *Walsh* v. *Lonsdale* (1) principle) specific performance would be decreed by the High Court and that, therefore, he was bound to treat the defendant as tenant under the terms of the agreement, and he gave judgment for the plaintiff, the landlord, for the rent for which he was suing. This court, however, affirming the Divisional Court, held in effect that as the county court judge could not decree specific performance of the agreement, he had no jurisdiction to entertain the action for rent. In the course of his judgment LORD ESHER, M.R., said (ibid., at p. 257):

> "If, therefore, we look to the common law alone, this claim cannot be supported. It is said, however, that equity would decree specific performance, and that if so the case is to be treated in every court as if specific performance had been decreed and a lease granted. If that argument is sound, the agreement is effective and the rent due. The answer given to this contention is that a county court has no jurisdiction in such an equitable matter, and cannot take notice of this equitable doctrine. The point is puzzling; but, on the whole, I think the county court judge had no right in this case to give judgment for the plaintiff. The matter could not be brought within the equitable jurisdiction conferred on county courts, and the judge had to deal

with it at common law only. If the debt is an equitable one, and cannot be treated as a common law one, it could not be enforced in the county court."

LORD ESHER, M.R., then went on to say that the judge of county court was in the same position as a judge of a common law court before the passing of the Judicature Acts; and that if such an action as that under appeal had then been brought in a common law court, and the agreement had been put in, it could not have been enforced and the judge could have taken no notice of the equitable doctrine or entertained any inquiry as to its effect. FRY, L.J., and LOPES, L.J., delivered judgments to the same effect. We think that the note in the COUNTY COURT PRACTICE (1958) at p. 72, states sufficiently for present purposes the effect of *Foster* v. *Reeves* (7) as follows:

> " The effect of this decision is that where the value of the premises exceeds £500 the only jurisdiction which the judge can exercise is his common law jurisdiction. He is in the same position as the judge of a common law court would have been in before the Judicature Acts, and, consequently, cannot give effect to the equitable doctrine which was acted on in *Walsh* v. *Lonsdale* (1)."

In the present case the value of No. 23, Lower Belgrave Street, is in excess of £500 and, therefore, a county court judge could not decree specific performance of an agreement to grant a lease of it. The difficulty which the learned judge felt in the present case was whether, having regard to the decision and judgments in *Foster* v. *Reeves* (7), he had power to inquire whether, as the applicant alleged, a *Walsh* v. *Lonsdale* (1) equity had been created between the trustees and Brook Green, even though he was not being asked to enforce it if he came to the conclusion that it had. In our judgment the learned judge was quite right in concluding that he had jurisdiction to entertain the question. By s. 63 (2) of the Act of 1954 it is provided:

> "Any jurisdiction conferred on the court by any provision of Part 2 of this Act . . . shall, subject to the provisions of this section, be exercised,—(a) where the rateable value of the holding does not exceed £500, by the county court; (b) where it exceeds £500, by the High Court."

One of the matters which necessarily arises in applications under Part 2 (as it arose, indeed, in the present case) is whether the relationship of landlord and tenant exists between the respective parties, and unless a county court judge has unfettered jurisdiction to determine that question, it is difficult to see how he can properly exercise the powers which are vested in him by the section. So long as the rateable value of the holding is not in excess of £500, he can, in our judgment, and must, inquire into the existence of a tenancy affecting that holding, whether such tenancy is said to have been created at law or in equity. In our opinion the learned judge expressed the position correctly in his judgment when he said:

> " I am not now asked, as was the county court judge in *Foster* v. *Reeves* (7), to enforce any equitable right, whether to money, specific performance, rectification or anything else. I am merely asked to determine a question as to the nature of the right under which Brook Green holds its premises, and answer that question I must if I am to discharge my duty under s. 63 (2) (a)."

We agree with those observations of the learned judge.

It only remains to say in conclusion that for the reasons which we have earlier stated, this appeal should, in our judgment, be allowed.

Appeal allowed. Application for new tenancy refused.

Solicitors: *Beddington, Hughes & Hobart* (for the applicant); *Goodman, Derrick & Co.* (for the first respondents).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

A

CLAXTON *v.* CLAXTON.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Stevenson, J.), January 19, 1959.]

Magistrates—Husband and wife—Re-hearing—Procedure—Whether judgment directing re-hearing should be read to magistrates' court before they heard evidence.

B

On appeal by a wife from a decision of a magistrates' court dismissing complaints brought by her against her husband for desertion and wilful neglect the Divisional Court directed a re-hearing, basing their decision on inferences of fact and on the effect of the evidence before the magistrates' court. At the re-hearing the magistrates' court declined to have the Divisional Court's judgment read to them on the effect of the evidence at the original hearing before they themselves heard evidence.

C

Held: as the case was one in which the judgment of the Divisional Court had depended solely on fact, and had not proceeded on the basis that there had been any error in law, the magistrates were right in not having the judgment read before trying the case.

D

Per LORD MERRIMAN, P.: in cases involving matters of law magistrates trying a case on re-hearing are under a duty to see in what respect the Divisional Court have held that the first magistrates' court misdirected themselves in law (see p. 387, letter E, post).

[As to principles to be followed by magistrates at the hearing of matrimonial proceedings, see 12 HALSBURY'S LAWS (3rd Edn.) 498, para. 1097.]

E

Application.

This was an application by a wife for directions in relation to a re-hearing before justices of the petty sessional division for Kingston-upon-Hull on Dec. 29, 1958, of a complaint by her against her husband on the ground of desertion and wilful neglect to maintain her. There had been an appeal to the Divisional Court in June and October, 1958, and the court had directed a re-hearing, basing their decision on inferences of fact and interpretation of the evidence before the magistrates' court. The justices at the re-hearing ruled that they would not read the judgment of the Divisional Court before they had drawn their own conclusions from the evidence before them. The facts appear in the judgment of LORD MERRIMAN, P.

F

G

Mrs. E. K. Lane for the wife.
J. S. Taylor for the husband.

LORD MERRIMAN, P.: This was a case in which the stipendiary magistrate for the City of Kingston-upon-Hull had dismissed the wife's complaints of desertion and wilful neglect to maintain. The real fight was on the subject of desertion, whether, as the wife complained, she had or had not been expelled from the matrimonial home by conduct which, putting it in the shortest possible way, was said to be ill-treatment by her mother-in-law, condoned or acquiesced in without any protection afforded to her by the husband. The learned magistrate came to the conclusion that the wife had not made out her complaint, and we had a very full trial before this court which included, amongst other things, an attempt to bring about a reconciliation, which was abortive. Looking back at my notes I see that we had before us a transcript of the evidence before the stipendiary magistrate and a certain amount of correspondence. Of one thing only we had no transcript, or copy, and that was the evidence of the husband, because he was not called to give evidence, in spite of figuring as the passive encourager, so it was suggested, of the treatment meted out to the wife by his mother.

H

I

The learned magistrate had taken a view of the case based on his interpretation

of the evidence, which was set out at considerable length, in a very careful judgment; we took a different view, and, indeed, in certain respects on particular points we differed explicitly from his view as to the effect of the evidence. From first to last, however, the question was purely one of the true inferences to be drawn on the facts as we saw them, which, of course, was only at second-hand from a very full note and after hearing very full argument. We decided that the case called for a re-hearing, and it was made abundantly clear, in unmistakable language, by my brother* who delivered the first judgment, with which, as I said, I wholeheartedly agreed, that the observations that we had made in support of our view that different inferences of fact should be drawn from those which had been drawn by the stipendiary magistrate were not intended in any way to prejudice the re-hearing by a fresh panel, who would come to their own conclusion.

When the case came on it was attempted in the opening on behalf of the wife to read our judgment, and the magistrates expressed the view that they wished, or thought they ought, to have an unprejudiced view of the evidence, without the matter being in any way hampered, or assisted, as the case may be, by anything which we had said on the interpretation of a transcript.

We are asked to say that this creates a dangerous precedent, and that it is of vital importance that a public judgment, as a judgment of this court is, should not be concealed artificially from the magistrates when the matter comes on for re-hearing. I think, for my part, that this is not a matter about which a general pronouncement can be made: everything depends on the nature of the particular case. In the first place, I draw the widest possible distinction between a judgment of this court which points out that the magistrates have gone wrong in this or that particular as a matter of law and a judgment in a case which depends solely on inferences on fact. In cases involving matters of law (and they, of course, form the very great majority of the cases in which we do order a re-hearing) there can be no question that the magistrates have the right—indeed, they are under the duty—to see in what respect we think that the first magistrates' court misdirected themselves in matters of law, so that they may avoid falling into the same pitfall; of that there can be no doubt at all. But the position is different when a case is purely one of the inferences of fact which are to be drawn from this piece of evidence or that piece of evidence. We did say in this case, and we often say in other cases, that with regard to the inferences of fact we have no wish at all to prejudice the re-hearing but are only trying to show sufficient grounds for having ordered a re-hearing; and we should, I think, be making a pretence of that, and turning it into a mere formula, if we were to force magistrates, who wish to form their own view, to read what we said about the various questions of fact.

It is said that to take this view of the matter puts an impossible burden on the court, on counsel and on advocates generally, because it is impossible to know where the line should be drawn. Well, it is a very long time since it was first said (and the instance which I have in mind is one in which it was said by LORD BLACKBURN) that it may be very difficult to know where to draw the line but it may be very easy in any given case to say that that case is on one side or the other of any line that can reasonably be drawn. In this case it is perfectly easy to say that it stands unquestionably on the side which is one of pure fact and no law, rather than on the side where there is some law but a good deal of fact, and a very, very, long way indeed from a case where the decision to upset the judgment in the first trial depended solely on a matter or matters of law alone.

I think that the magistrates were right in taking the view that they would try the case better if they did not have our judgment read. We have read it very carefully and had it read to us, and I think that they were right in that

* STEVENSON, J.—the court hearing the original appeal was constituted similarly to this court.

view, but I want to say this by way of caution: if in the course of the hearing any reference is made to any supposed point on which we are alleged to have expressed an opinion, or if any attempt is made to drag in any part of the very full and careful reasoning of the magistrate about a question of fact, then in my view the whole thing would be open, and the magistrates would not only be entitled but would be bound to let in what we said about the case. Provided, however, that the case is tried as it should be, de novo, and without reference to inferences which may have been drawn in the past, either by the stipendiary magistrate or by this court on the questions of fact, I think that this judgment should remain where it is. The secret is, I imagine, only known to the clerk of the court, who will be able to ensure that there is fair play all round.

STEVENSON, J.: I entirely agree, and I only want to add a few words by way of emphasis, lest anyone may in future seek to suggest as a general proposition that judgments of this court should not be revealed to magistrates who are charged with the task of re-hearing a case remitted by this court.

The question at issue in this case is whether or not this husband constructively deserted his wife. In the course of the hearing before the stipendiary magistrate at Hull the husband was not called. The evidence of the husband was in our view essential to the determination of the question which that court had to decide, and it is important to observe that counsel for the husband appearing in this court conceded that there must be a re-hearing. In those circumstances, the judgments delivered in this court consisted almost entirely of discussion of and comment on the evidence before the learned magistrate, which are designed to explain or to justify the order for the re-hearing, which was already a matter of concession. I have said this in order to emphasise that these judgments consist of comments on facts, and nothing else.

It is the task of the justices who form the panel engaged in re-hearing this case to try those very facts, one hopes on evidence which will be complete, and on which they will have a full opportunity of making up their own minds. In those circumstances, I think they were manifestly right not to consider and permit to be read before them the judgments of this court, which are, indeed, qualified by the observation that they are not intended to prejudice the re-trial of the issues in this case by the fresh panel of justices.

As my Lord has pointed out, utterly different considerations must arise where a judgment is based on any proposition of law, or any direction on a matter of law in relation to which the court of trial has gone wrong, because, of course, the magistrates who have to re-hear such a case must always direct themselves with reference to the judgments which have been delivered in this court.

For these reasons I am quite satisfied that this application must be dismissed.

Application refused.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Gosschalk, Austin & Wheldon*, Hull (for the wife); *Thompson, Cook & Babington*, Hull (for the husband).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

NOTE.

JOHN *v.* JOHN.

[Probate, Divorce and Admiralty Division (Lord Merriman, P., and Hewson, J.), October 31, November 3, 1958.]

Magistrates—Husband and wife—Maintenance order—Discharge—Application to vary or discharge made to different magistrates' court—Transmission of information by original court to new court—Magistrates' Courts Rules, 1952 (*S.I.* 1952 *No.* 2190), *r.* 34 (2), (7).

[As to the variation or discharge of a maintenance order, see 12 Halsbury's Laws (3rd Edn.) 491, para. 1091; and as to the procedure on an application, see ibid., p. 494, para. 1092.

For the Magistrates' Courts Rules, 1952, r. 34, see 13 Halsbury's Statutory Instruments 54.]

Appeal.

This was an appeal by the husband from an order of the justices for the Long Aston Petty Sessional Division of Somerset, sitting at Flax Bourton on Aug. 27, 1958, whereby they dismissed his complaint to discharge or vary an order made by the justices for the Petty Sessional Division of Aberavon, sitting at Port Talbot, Glamorganshire, on Nov. 20, 1957.

By the order of Nov. 20, 1957, which was made against the husband on the ground of desertion, the wife was given custody of a child and was granted maintenance at the rate of £2 10s. a week for herself and £1 10s. a week for the child. By his complaint the husband sought to have the order discharged or varied on the ground that he had fresh evidence, within the meaning of s. 7 of the Summary Jurisdiction (Married Women) Act, 1895, to show that he was not the father of the child. The "fresh evidence" on which the husband relied was a letter alleged to have been written by the wife to her relatives. The justices ruled that there was no case to answer.

At the hearing of the complaint, except for the evidence of the husband that he had denied the paternity of the child in the proceedings before the Aberavon justices, there was no information whatever before the Long Aston justices in regard to the hearing before the Aberavon justices. The case is reported solely for the observations of Lord Merriman, P., on this point.

P. A. Webster for the husband.
J. D. F. Moylan for the wife.

LORD MERRIMAN, P.: I want to say a word about a feature of this case which is not without importance. As is well known, until recently, applications to vary or discharge an order had to be made to the petty sessional division which had made the original order, but now, since the Magistrates' Courts Act, 1952, was passed, and, in particular, since the making of r. 34 of the Magistrates' Courts Rules, 1952, it is possible, as in this case, to make the application to another petty sessional division. By r. 34 (2), which is the operative paragraph of the rule, a complaint for the revocation, discharge, revival, alteration or variation of an order enforceable as an affiliation order may be made to a justice acting for the same petty sessional area as the court which made the order (which court is referred to as "the original court"), or to a justice acting for the petty sessional area where the complainant is for the time being. Rule 34 (7) reads:

> "Where a complaint to which this rule applies is made to a justice of the peace acting for a petty sessions area other than that for which the original court acted, the justice shall cause the clerk of the magistrates' court acting for that other petty sessions area to send the complaint and the said particulars by post to the clerk of the original court; and the clerk of the original

court shall bring the complaint before the court; and thereupon paras. (4) to (6) of this rule shall have effect as if the complaint had been made and the particulars furnished to a justice of the peace acting for the same petty sessions area as the original court." A

I wish particularly to call attention to a note to r. 34 (4)* in STONE'S JUSTICES' MANUAL (90th Edn.) (1958) at p. 2664, setting out a Home Office circular relating to this particular jurisdiction. The note reads: B

" It is pointed out in Home Office Circular (278/1947) that it is desirable in order that the other court [that is, the new court] may be in a position to deal with the matter that any necessary further information should be transmitted at the same time as the complaint is sent . . . where the application is for variation of some other provision of the order [that is, other than the mere amount] the court would also be helped by knowing the circumstances in which this provision was included in the order. It will be for the clerk of the transmitting court to decide what information should be sent with the complaint in any individual case, but the Secretary of State would suggest that the guiding principle should be that such information should be sent as it would in his opinion be desirable that the original court should have, if it were dealing with the complaint." C D

There is not a single piece of information of any kind available in this case about what happened at the hearing before the Aberavon justices with this exception, that the husband stated in evidence before the Long Aston justices that he had denied the paternity at the hearing before the Aberavon justices. Manifestly that is an important circumstance, because, if he had admitted E the paternity on that occasion or had done something which estopped him from raising the point afterwards, that would be a matter, no doubt, of considerable importance in applying the rule about fresh evidence. As the matter stands before us, we have the record of the husband's evidence that he had denied the paternity at the hearing before the Aberavon justices. I have called attention to this matter so that, when there is, as I think that there inevitably must be, a F re-hearing by the Long Aston court, an attempt will be made to rectify this omission, so that whatever record is available of what happened at the hearing before the Aberavon justices on the first occasion may be made available to the Long Aston justices.

[The DIVISIONAL COURT allowed the appeal, set aside the order dismissing the husband's complaint and remitted the complaint for re-hearing by a fresh panel G of justices for the Long Aston Petty Sessional Division.]

Solicitors: *Le Brasseur & Oakley*, agents for *Wehrle & Sheehan*, Port Talbot (for the husband); *Haslewoods*, agents for *E. J. Watson, Cox & Counsell*, Bristol (for the wife).

[*Reported* by A. T. HOOLAHAN, ESQ., *Barrister-at-Law*.]

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* By r. 34 (4), where a complaint under the rule is made to a justice acting for the same petty sessions area as the court which made the order, if the justice determines that the case could be more conveniently dealt with by a court acting for the area where the complainant or defendant resides, he is to have the complaint and particulars sent to the clerk of that other court.

SHELL-MEX AND B.P., LTD. *v.* HOLYOAK (VALUATION OFFICER).

[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Keith of Avonholm and Lord Denning), December 11, 15, 1958, January 28, 1959.]

Rates—Valuation—Plant and machinery—"Tank"—Underground petrol tank in brick and concrete compartment—Whether whole or container only constituted a tank within Plant and Machinery (Valuation for Rating) Order, 1927 (S.R. & O. 1927 No. 480), schedule, class 4—Rating and Valuation Act, 1925 (15 & 16 Geo. 5 c. 90), s. 24 (1).

At a petrol filling station for motor vehicles there were installed underground four tanks, each of three thousand gallons capacity, to be used for the storage of petrol. Each tank was constructed of metal and was cylindrical in shape, and was delivered to the site as a complete unit, thirteen feet six inches in length and seven feet in diameter, and weighing when empty about two tons. Each was installed in a pit measuring internally eight feet six inches by fifteen feet by nine feet, the floor of which was covered by a concrete slab, nine inches thick. The walls of the pit were of brick, nine inches thick, and the pit was covered with a concrete slab six and a half inches thick which formed an extension of the forecourt to the filling station. There was access to the pit by a manhole supported on rolled steel joists. Each tank rested by its own weight on three concrete cradles, twelve inches in height, on the floor of the pit, and the space around the outside of the cylinder and between it and the walls of the pit was filled with sand. A tank could only be removed from its pit by demolishing the concrete covering. Under s. 24 (1) of the Rating and Valuation Act, 1925*, and class 4 of the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927*, no account was to be taken, when valuing a hereditament for rating, of tanks in or on the hereditament, save when a tank was, or was in the nature of, a building or structure. It was admitted that each tank in the present case, when considered by itself, was not a building or structure or in the nature of a building or structure. It was agreed that each of the pits or chambers in which the tanks were was itself a building or structure.

Held (LORD KEITH OF AVONHOLM and LORD DENNING dissenting): the tank to which class 4 of the Order of 1927 referred was the metal cylinder, not the unit consisting of the cylinder and the chamber in which it was housed, and, as each tank was not in the nature of a building or structure, it should not be regarded as part of the hereditament for rating purposes.

Dictum of JENKINS, J., in *Cardiff Rating Authority & Cardiff Assessment Committee* v. *Guest Keen Baldwins Iron & Steel Co., Ltd.* ([1949] 1 All E.R. at p. 37) considered.

Decision of the COURT OF APPEAL ([1958] 1 All E.R. 702) reversed.

[As to plant and machinery deemed to be part of the hereditament for rating purposes, see 27 HALSBURY'S LAWS (2nd Edn.) 393, 394, para. 827; and for cases on the subject, see DIGEST Supps.

For the Rating and Valuation Act, 1925, s. 24, see 20 HALSBURY'S STATUTES (2nd Edn.) 130.]

Cases referred to:

(1) *Cardiff Rating Authority & Cardiff Assessment Committee* v. *Guest Keen Baldwins Iron & Steel Co., Ltd.*, [1949] 1 All E.R. 27; [1949] 1 K.B. 385; [1949] L.J.R. 713; 113 J.P. 78; 2nd Digest Supp.

* The relevant parts of s. 24 (1) and class 4 are set out at p. 396, letters A to D, post.

(2) *Escoigne Properties, Ltd.* v. *Inland Revenue Comrs.*, [1958] 1 All E.R. 406; [1958] A.C. 549.

(3) *B.P. Refinery (Kent), Ltd.* v. *Walker*, [1957] 1 All E.R. 700; [1957] 2 Q.B. 305; 121 J.P. 231; 3rd Digest Supp.

Appeal.

Appeal by the ratepayers, Shell-Mex and B.P., Ltd., from an order of the Court of Appeal (LORD EVERSHED, M.R., PARKER and SELLERS, L.JJ.), dated Feb. 21, 1958, and reported [1958] 1 All E.R. 702, on a Case Stated, reversing a decision of the Lands Tribunal (1 R.R.C. 148), dated Nov. 5, 1956. The appellants had appealed to the Lands Tribunal from a decision of a local valuation court of Warwickshire Local Valuation Panel given on Feb. 21, 1956, directing that the assessment of a hereditament known as Oaklands Filling Station, Birmingham Road, Budbrooke, in the valuation list for Warwick rural district should be increased from £25 gross value, £18 rateable value, to £80 gross value, £64 rateable value. The facts are set out in the opinion of VISCOUNT SIMONDS.

J. P. Widgery, Q.C., and *W. L. Roots* for the appellants.

Maurice Lyell, Q.C., and *P. R. E. Browne* for the respondent.

Their Lordships took time for consideration.

Jan. 28. The following opinions were read.

VISCOUNT SIMONDS: My Lords, it is not surprising that in this case there should have been a difference of opinion between the Lands Tribunal before whom it originally came and the Court of Appeal from whose decision an appeal has been brought to this House, nor that your Lordships should be unable to agree on the matter. For, in truth, the arguments on either side are nicely balanced, and I have not easily reached the conclusion that the appeal should be allowed and the decision of the tribunal restored.

The primary facts have been found by the tribunal and are not in dispute. The appellants are the owners and occupiers of a hereditament known as the Oaklands Filling Station, Birmingham Road, Budbrooke, in the rural district of Warwick. It is a familiar type of wayside petrol filling station for motor vehicles, consisting of a single building for office, stores and showroom and a concrete forecourt with three petrol pump islands each accommodating two pumps. These pumps are connected by underground pipes to four tanks each of three thousand gallons capacity at the side of the building. These tanks which are constructed of metal and were delivered at the site as complete units are cylindrical in shape, thirteen feet six inches in length and seven feet in diameter, and weigh when empty about two tons. Each of them was installed underground on the premises in accordance with plans approved by the local authority and a licence granted by them under the Petroleum (Consolidation) Act, 1928. The method of installation was as follows: a pit was excavated, its floor was covered with a concrete slab, brick walls nine inches thick were then built round the sides of the pit and lined internally with cement. The internal dimensions were eight feet six inches by fifteen feet by approximately nine feet. Concreted cradles twelve inches in height were laid on the floor of the pit and the tanks laid on the cradles. The pit was then filled with sweet sand, to absorb any possible leakage and to reduce the risk of explosion, and the whole covered with concrete 6½ inches thick, a manhole with cover supported on rolled steel joists giving access through the concrete to the top of the tank. This concrete covering forms an extension of the forecourt at the side of the building. Each tank is in a separate similar compartment, and is connected by underground pipes to one or two of the pumps but not to the other tanks. It was agreed between the parties at the hearing before the tribunal that each of the tanks formed part of the plant installed at the filling station, and it was admitted by counsel for the respondent that, looked at by itself, it was neither a building nor structure nor in the nature of a building or structure. It was further agreed

A that each of the compartments was itself a building or structure or in the nature of a building or structure. I have mentioned the licence granted by the local authority, and this document, with the plans annexed to it or exhibited with it, assumed some importance. But I doubt whether it should have much weight in construing the Act and order to which I now refer.

The Rating and Valuation Act, 1925 (which made a substantial alteration B in the law in regard to the rating of plant and machinery), provided, by s. 24 (1), as follows:

> " For the purposes of the making or revision of valuation lists . . . the following provisions shall have effect with respect to the valuation of any hereditament . . . (a) All such plant or machinery in or on the hereditament as belongs to any of the classes specified in Sch. 3 to this Act shall be deemed C to be a part of the hereditament: (b) Subject as aforesaid, no account shall be taken of the value of any plant or machinery in or on the hereditament."

Under and by virtue of an order made under later sub-sections of the same section (the Plant and Machinery (Valuation for Rating) Order, 1927 (S.R. & O. 1927 No. 480)), the classes of machinery and plant deemed to be part of the here- D ditament under the said Sch. 3 to the Act included class 4 described as

> " The following parts of a plant or a combination of plant and machinery whenever and only to such extent as any such part is, or is in the nature of, a building or structure . . ."

Then followed numerous items of which I give as specimens " blast furnaces ", " bins and hoppers ", " conveyor gantries ", " flues ", " foundations, settings, E gantries, supports, platforms and stagings for plant and machinery " and " tanks ".

The question at issue can now be stated. It is whether the metal containers, which I have without prejudice referred to as tanks, fall to be rated as part of the hereditament known as the Oaklands Filling Station. This question can F be answered in the affirmative only if (i) they are " tanks " within the meaning of the order, and (ii) they are buildings or structures or in the nature of buildings or structures. The Local Valuation Court having held that these conditions were fulfilled and rated the hereditament accordingly, the present appellants appealed to the Lands Tribunal (Mr. ERSKINE SIMES, Q.C.). That tribunal allowed the appeal, concluding that the only part of the installation which G could properly be called a tank for the purpose of the order was the metal cylinder, and that the compartment in which it was housed did not form a functional entity with it any more than any other building in which a piece of plant or machinery is housed. The tribunal said:

> " That compartment appeared to me to form an integral part of the hereditament like any other building thereon but the metal tank which is H admittedly not a building or structure or in the nature of a building or structure looked at by itself should not under s. 24 and the order be deemed to be a part of the hereditament."

The expression " functional entity " was taken from the judgment of JENKINS, J., in *Cardiff Rating Authority & Cardiff Assessment Committee* v. *Guest Keen Baldwins Iron & Steel Co., Ltd.* (1) ([1949] 1 All E.R. 27 at p. 37). I must with I great respect doubt whether so vague and elastic an expression is of any real assistance in determining whether a piece of plant or machinery is, or is in the nature of, a building or structure.

The present respondent (the valuation officer) appealed to the Court of Appeal on a Case Stated by the tribunal on the grounds that the tribunal misdirected itself and was wrong in law in holding that the only parts of the underground installation referred to in the Case Stated which could properly be described as " tanks " for the purposes of the order were the metal cylinders therein referred to, and that, although the said metal cylinders were not, looked at by themselves,

buildings or structures or in the nature of buildings or structures, each of them as installed on the hereditament in question was, or was in the nature of, a building or structure within the meaning of the said order. A

The appeal was allowed by the Court of Appeal. LORD EVERSHED, M.R., observed ([1958] 1 All E.R. at p. 705) that he had, in the course of his judgment in a previous case*, made the point that, when the question arises as to some identifiable piece of apparatus, whether and to what extent it is in the nature of a structure, that question is prima facie a matter of degree and of fact. And he added (ibid.): B

> " So also . . . it will be prima facie a matter of fact to say what constitutes the thing to be identified with the item in the catalogue in any case. Therefore, if, after examining the material and perhaps the site, the tribunal had merely said, ' I conclude that the tank here is no more than the cylinder ', that might well have been the end of the matter, but the tribunal has not so confined itself." C

The Master of the Rolls then explained that, in his view, the tribunal had materially misdirected himself and summed it up thus (ibid., at p. 706):

> " With all respect, it seems to me that the fallacy lies in this sentence: ' But it seems to me that the compartment in which the tank is housed does not form a functional entity with the tank any more than any other building in which a piece of plant or machinery is housed '. I have been unable to escape from the conclusion that in the end the tribunal came to the view that what it called ' the compartment ', the installation other than the cylinder, was no more relevant to the question of the rating of the cylinder in this case than would be an ordinary above ground edifice in which a cylinder, a tank, happened to be found, resting on a cradle. In my judgment, quite manifestly that is not so." D E

The learned judge thought that the reasoning to which he had referred disabled the conclusion of the tribunal and allowed the appeal, saying that the tank on the hereditament in question was the installation in its entirety, in which case there was no question but that the whole of it was of the nature of a structure. F

PARKER, L.J., in my view, rightly pointed out (ibid., at p. 706) that the question was what, not in relation to the licence but in relation to the hereditament, was properly described as the tank, and concluded that, looking at the primary facts found by the tribunal, the only reasonable conclusion was that the whole structure, walls and metal lining, themselves formed " the tank ". He referred to the purpose of the installation, viz., the storage of petrol, and, though he did not use the expression " functional entity ", he relied, I think, on the fact that, in his view, the brick and concrete structure without the lining performed no function at all, and, equally, the lining without the walls and concrete performed no sensible function. It was, he thought, a case where the so-called chamber was a housing which formed part of the plant itself. SELLERS, L.J., agreed (ibid.), thinking that the significant matter was that these tanks were for the storage of petrol and that the matter must be so viewed. It would not, he said, be sufficient to have the petrol simply in the cylinder; it had to be dealt with in some manner similar to that in which it was dealt with here for the purposes of safety and proper user; the manner of protecting or lagging or securing it had turned what was simply a cylinder into a structure or building; he could not think that in law or in fact it would be sensible or realistic to split the two things up; what had been called the structure or building and the cylinder formed one tank for the purpose of storage of petrol and it should be so regarded. G H I

My Lords, I have referred to these judgments at some length because they express in their most cogent form the arguments which the appellants must

* *W. Collier, Ltd.* v. *Fielding* (*Valuation Officer*), [1958] 1 All E.R. 694.

meet. They meet them very simply. They ask whether the so-called metal cylinder is not properly called a tank. It clearly is; no one has suggested the contrary. I do not, as I have said, attach great importance to the language of the licence or to the legends on the plans, but it has some significance that, in the ordinary user of words by persons accustomed to deal with these things, the " tank " is the metal container. It is a thing which is to be " tilted to simplify extraction of sludge ", and a thing of which it can be said that the sand in-filling is not to be laid until the air test of it has been completed. There are, indeed, other passages in which the whole installation appears to be referred to as a tank. But it is at least abundantly clear that the metal cylinder alone can be, and is properly identified as, a " tank ". So far the appellants make good their case. Nor have they, I think, any difficulty in their next step. For it is clear, as was admitted, that the metal cylinder, looked at by itself, is not, and is not of the nature of, a structure or building. Now they face the final difficulty. It is said that, though the metal cylinder is by itself a tank and by itself is not of the nature of a structure or building, and though the compartment is not by itself a tank, yet when the metal container is put into the compartment, the whole installation becomes a tank for the purposes of the order: " what was ", in the words of SELLERS, L.J. (ibid., at p. 707), " simply a cylinder " has been " turned into a structure or building ". To this the simple answer is made, that it is not a case of that which was a tank being turned into a structure, but of that which was a tank remaining a tank, and being housed in a structure made for that purpose. It appears to me, my Lords, that this is a question of great nicety, and I am by no means satisfied that it is not a question of fact on which the finding of the tribunal should not be disturbed. So, as it appears to me, the Master of the Rolls would have held but for the passage in the judgment of the tribunal which I have already cited. If it is not a question of fact, I am not very clear what is the question of law that is involved. I would agree that the tribunal was in error in so far as it made functional entity the test, though, as I have pointed out, two at least of the judgments in the Court of Appeal were not altogether free from the same error. It is, in my view, an error because it entirely depends on what is the function which is in mind. It is equally true to say that it is the function of the whole installation to store petrol, or to say that it is the function of the metal container to contain petrol and that of the compartment to protect the container and minimise any danger to it or to the public if it did not function properly. This leaves the question unanswered to which an answer must be given. Then the test was suggested of *physical* entity, but I fear that this is a case of obscurum per obscurius. For, if the whole installation can be described as a physical entity, as probably it can, so also was the metal container a physical entity when it was placed in the compartment, so it is while it remains there and so it will be if and when it is removed as it easily can be. The question remains whether there is a " tank " formed by the whole installation or a " tank " which is housed within a structure. I have come to the conclusion that the latter view is correct. It is with diffidence that I do so in face of the unanimous opinion of the Court of Appeal. But I think that paramount weight should be given to the consideration that, beyond doubt, the metal container is a tank, and is identifiable as a tank wherever it may be placed, whether above ground or under ground and by whatever structure it may be protected. If it is a tank, it is not for rating purposes to be regarded as part of the hereditament unless it is, or is in the nature of, a building or structure. I do not think that any finding of fact would justify that conclusion.

I would allow the appeal and restore the decision of the tribunal with costs here and below.

LORD MORTON OF HENRYTON: My Lords, the question for decision on this appeal arises under s. 24 of the Rating and Valuation Act, 1925, and the

Plant and Machinery (Valuation for Rating) Order, 1927, made thereunder. It is convenient to set out at once the relevant provisions of the section, and of Sch. 3 to the Act, as settled by the Order of 1927. They are as follows:

" 24—(1). For the purpose of the making or revision of valuation lists . . . the following provisions shall have effect with respect to the valuation of any hereditament . . . (a) All such plant or machinery in or on the hereditament as belongs to any of the classes specified in Sch. 3 to this Act shall be deemed to be a part of the hereditament: (b) Subject as aforesaid, no account shall be taken of the value of any plant or machinery in or on the hereditament.

. . . . .

" Schedule 3.

" Classes of machinery and plant to be deemed to be part of the hereditament . . . Class 4. The following parts of a plant or a combination of plant and machinery whenever and only to such extent as any such part is, or is in the nature of, a building or structure."

The schedule then sets out a long list of items, including such items as racks, refuse destructors and incinerators, retorts, silos, stills, superheaters, tanks, vats, weighbridges and windmills. The relevant item for the present purpose is " tanks ".

This appeal relates to an installation used for the storage of petrol which is to be supplied to the public from petrol pumps on a roadside petrol filling station of the usual type, owned and occupied by the appellants. The installation, and the method by which it was constructed, are described in the decision of the Lands Tribunal and illustrated by a plan and drawing exhibited to the Case Stated. A pit was dug and its floor was covered with a concrete slab; brick walls nine inches thick were built round the sides of the pit and lined with cement, and the pit was divided into four compartments by similar walls built across it. Each of these compartments is fifteen feet long, eight feet six inches wide and nine feet deep. On the floor of each compartment are installed three concrete cradles twelve inches in height, on which rests by its own weight a metal cylinder thirteen feet six inches long and seven feet in diameter. Each of the four metal cylinders (one in each compartment) weighs about two tons and has a capacity of three thousand gallons. The space round the outside of the cylinder, and between it and the walls of the compartment, is filled with sweet, dry sand to absorb any possible leakage and to reduce the risk of explosion. The whole pit is covered with a concrete slab 6½ inches thick which forms an extension of the forecourt of the filling station. There is access to each cylinder by a manhole supported on rolled steel joists, but otherwise each compartment is completely enclosed, and the cylinders could only be removed by demolishing the concrete covering.

At the hearing of the appeal in this House, counsel for both parties were agreed (a) that each of the metal cylinders, when considered by itself, can properly be described as a " tank ", and is neither a building or structure nor in the nature of a building or structure, within the meaning of class 4 already quoted; (b) that each of the four compartments, by itself and apart from the metal cylinder, is not a tank, and is a building or structure, or in the nature of a building or structure, rateable as part of the hereditament; (c) that there are four " tanks " on the premises, within the meaning of that word as used in class 4. The only question arising on this appeal is whether the four " tanks " are the four metal cylinders or the four complete installations, including the metal cylinders, which I have already described. The appellants contend that the former view is correct, and, if they are right, the metal cylinders will not be rateable, although the four compartments containing them will be rateable. The respondent contends that the latter is the correct view, and that, consequently, the four complete installations are rateable.

My Lords, the Lands Tribunal accepted the contention of the present appellants, and I agree with him. I turn first to the Act of 1925 and Sch. 3. Section 24 (1) of the Act, read in conjunction with class 4 in the schedule, deems to be part of a hereditament and rateable accordingly,

> "the following *parts* of a plant or combination of plant and machinery, whenever and only to such extent as any such *part* is, or is in the nature of, a building or structure."

I have emphasised the words *part* and *parts* because it seems to me vital to bear in mind that class 4 is dealing with parts, and nothing but parts, so that, when "tanks" are mentioned in the list, they are mentioned as part of a plant. It is rightly conceded by counsel for the respondent that each metal cylinder, if it were not enclosed at all, or if it were placed in a large room, would be a tank within class 4 and would not be included in the valuation of the premises for rating purposes, because it would not be, or be in the nature of, a building or structure. They contend, however, that each cylinder loses its identity as a tank when it is in the underground structure already described, and thereupon the whole of each underground installation becomes a tank within class 4 and is rateable as a whole because it is, or is in the nature of, a building or structure. My Lords, I cannot accept this contention. The position might well be different if the metal cylinder were so linked with the surrounding compartment as to become one physical entity with it—for instance, if the space now filled with sand were filled with concrete adhering to the cylinder. As it is, the cylinder is simply a tank which has been placed in an underground structure, and surrounded with sand, for safety reasons. It is not a physical entity with the compartment, but can be lifted out and replaced again at the will of the owner, still in exactly the same condition, although it would be necessary, as I have said, to demolish the concrete covering before removing the cylinder. If the respondent's contention were correct, the cylinder would again become a "tank" when it emerged from the pit, and would lose its identity as such if and when it was replaced in the pit. This seems to me a highly artificial conception.

It was suggested on behalf of the respondent that the whole of the underground installation formed a "functional entity" and that it was this functional entity which formed the "tank" within class 4. The phrase "functional entity" appears in the judgment of JENKINS, J., in *Cardiff Rating Authority & Cardiff Assessment Committee* v. *Guest Keen Baldwins Iron & Steel Co., Ltd.* (1) ([1949] 1 All E.R. 27 at p. 37), and that case was read to the House, but the facts differ so widely from the facts of the present case that I do not find the *Cardiff* case (1) of assistance to either party. My Lords, in my opinion, this contention on behalf of the respondent also fails. I would accept the view advanced by counsel for the appellants that the placing of a tank within a building or structure, whether for convenience of operation or to protect the tank or to protect persons from nuisance or risk emanating from the tank, does not cause the building or structure to become a functional entity with the tank which it contains or vice versa. The tank and its functions remain unaltered by the building which contains it, and, similarly, the nature and function of the building remains unaltered by the tank which it contains.

I find some confirmation of the views which I have formed, that the "tank" is the metal cylinder and not the structure which surrounds it, in the wording of the licence to keep petrol on the premises which the appellants had to obtain from the local authority, and in the wording which appears on the plan which is exhibit B to the Case Stated. It seems to me reasonably clear that the word "tank", when used in the "Schedule of conditions" indorsed on the licence, refers to the metal cylinder, and clear beyond doubt that the same word, when it appears in exhibit B, has the same meaning. It would not, of course, be legitimate to construe the Act of 1925 and the schedule by reference to such

documents, but class 4 is a list of parts of business installations, and the licence and the plan deal with business matters. It is, therefore, interesting to observe that the word " tank " is used in such documents as applying to the metal cylinder and not to the complete installation.

It was suggested in the course of argument that the following sentence, in the decision of the Lands Tribunal, is a finding of fact from which there is no appeal:

> " I have come to the conclusion that the only part of the installation which can properly be described as a ' tank ' for the purposes of the order is the metal cylinder."

The tribunal went on to give its reasons for this view and the Court of Appeal thought that it had misdirected itself. As I find no misdirection, and agree with the passage just quoted, I do not find it necessary to express an opinion whether the passage ought, or ought not, to be treated as a finding of fact.

I would allow the appeal.

LORD REID: My Lords, I need not restate the facts. The case turns on the proper construction of the item " tanks " in class 4 of the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927 (S.R. & O. 1927 No. 480), and that requires consideration of the structure and apparent purpose of this order and of s. 24 of the Rating and Valuation Act, 1925, under which the order was made. This section de-rated all plant and machinery with certain exceptions. The original exception was that

> " . . . with respect to the valuation of any hereditament . . . (a) All such plant or machinery in or on the hereditament as belongs to any of the classes specified in Sch. 3 to this Act shall be deemed to be a part of the hereditament."

And the relevant part of Sch. 3 was:

> " 4. Such part of any plant or any combination of plant and machinery, including gas holders, blast furnaces, coke ovens, tar distilling plant, cupolas, water towers with tanks, as is, or is in the nature of, a building or structure."

Section 24 of the Act of 1925 gave power to make an order to be substituted for Sch. 3, and this order was duly made for that purpose. The schedule to the order sets out the " Classes of machinery and plant to be deemed to be part of the hereditament ". Under class 4 are included:

> " The following parts of a plant or a combination of plant and machinery whenever and only to such extent as any such part is, or is in the nature of, a building or structure."

Then there follows a long list of items including " tanks ". Class 4 deals with " parts of a plant " and, looking to the descriptions of a number of the items in it such as burners, crane gantries and stagings, it seems to me to be clear that they need not be, and in some cases cannot be, capable of working as separate self-sufficient units. So the order requires one to pick out of the whole installation of plant and machinery those bits which correspond to any of the items mentioned in the list, irrespective of whether or not they require to be associated with other things in order to produce any useful result. Then the next step is to consider whether each bit of plant so picked out is, or is not, taken by itself, a building or structure or in the nature of a building or structure. If it is, then it is to be taken into account in valuing the hereditament; but if it is not, then it is not to be taken into account.

In the present case, metal cylinders which hold petrol are enclosed in underground chambers and the spaces between the walls of the chambers and the cylinders are packed with sand; a cylinder could not be taken out without breaking the roof of its chamber. I assume, although this is not very clearly

stated, that, for practical purposes, the cylinder and its chamber are a unit; this arrangement is necessary for reasons of safety, and without such an arrangement the cylinder would not be allowed to be used. But it seems clear that the purpose of the chamber and the sand is not to contain the petrol, it is to minimise danger if there should be a leakage of petrol from the cylinder. What, then, is the " tank " within the meaning of the order? Is it the whole unit, chamber sand and cylinder, or is it simply the cylinder? It has not been argued that any technical meaning attaches to the word " tank " in the order, and it must, therefore, be taken as an ordinary word of the English language to be construed in light of the context in which it is found. The question is crucial because a " tank " is not rateable unless it is in the nature of a building or structure. If the whole unit, chamber sand and cylinder, is the tank, then, admittedly, it is of that nature and is rateable. But if the cylinder alone is the tank, then admittedly it is not, taken by itself, in the nature of a building or structure and it is not rateable; on that view only the chamber is rateable.

The Court of Appeal, as I read their judgments, have decided in favour of the respondent because the whole unit is a " functional entity ". The reasoning is stated succinctly by SELLERS, L.J. ([1958] 1 All E.R. at p. 706):

> " The significant matter is that these tanks are for the storage of petrol, as my Lord has just indicated. The matter has so to be viewed. The mere cylinder would be quite insufficient for that purpose having regard to the liabilities of the occupiers, who are the [appellants]. It would not be sufficient to have the petrol simply in the cylinder. It has to be dealt with in some manner similar to that in which it is dealt with here for the purposes of safety and proper user. The manner of protecting it or lagging it or securing it has turned what was simply a cylinder into a structure or building. I cannot think that in law or in fact it would be sensible or realistic to split the two things up."

I agree that, in fact, from a practical point of view, it would not be sensible or realistic to split the two things up. But, as I have said, it appears to me to be the purpose of this legislation to split up for rating purposes installations which are for practical purposes indivisible. I must, therefore, leave out of consideration the functional connexion between the chambers and the cylinders. Then it appears to me to be clear that the tank is the cylinder and nothing else. There may well be cases where a tank consists of a structure with a metal lining; in such a case probably the lining would not be capable of use as a tank without the support of the structure. But these cylinders are not mere linings; they would properly have been described as tanks before they were enclosed in the chambers, and enclosure did not alter their character. Taking the ordinary meaning of the word " tank ", I think that these cylinders were tanks originally and are still tanks. They have not acquired additional walls; the sand cannot be part of the tank wall, and I do not think that it would be in accordance with ordinary usage to say that the walls of the chambers became part of the tanks by reason of the tanks being enclosed in the chambers. In my opinion, this appeal should be allowed.

LORD KEITH OF AVONHOLM: My Lords, were it not that there was a difference of opinion in this case, I would have been content to express my entire concurrence with the judgments of the Court of Appeal. As it is I can express my views very briefly.

We are concerned here with four tanks for keeping petroleum spirit below ground in connexion with what is described in the findings of the Lands Tribunal as

> " a wayside petrol filling station of a usual type with a single building for offices, stores and showroom and having a concrete forecourt with three petrol pump islands each accommodating two pumps. These pumps are

connected by underground pumps to four three thousand gallon tanks at the side of the building. Each of these tanks which are constructed of metal and were delivered at the site as complete units are cylindrical in shape, thirteen feet six inches in length, seven feet in diameter and weigh when empty about two tons."

It is stated by the Lands Tribunal that it was agreed between the parties that "each of these tanks forms part of the plant installed at the filling station." I mention this fact because it satisfies the first requirement of class 4 of the schedule to the Plant and Machinery (Valuation for Rating) Order, 1927, that the tanks must be part of a plant. In order, however, that the tanks may be rateable as part of the hereditament, it is necessary that the second requirement of class 4 of the schedule be satisfied, that the tanks "are, or are in the nature of, a building or structure."

The method of installation has already been described. It is clear that the pits with their brick and concrete walls, floors and covers were useless except for the purpose of holding the metal containers, as I shall call them for the moment, and the metal containers were useless for their purpose unless placed in the pits or equivalent structures. Now what is said, as I understand it, is that it appears from the licence that was granted under the Petroleum (Consolidation) Act, 1928, by the local authority to store petrol on the premises and from the plans that were submitted to the local authority, that what was meant by "tanks" was the metal containers only and not the containers with their housing. So far as the licence is concerned, no such inference can, in my opinion, be made. The licence says the spirit "shall be kept only below ground in a tank". The first condition of the schedule of conditions to the licence says:

> "The petroleum spirit tank(s) together with the connexion pipes and fittings shall be so constructed and maintained as to prevent any leakage of petroleum spirit."

The sixth condition says: "No alterations shall be made to the tank(s) pump(s) and vent(s) except with the approval of the local authority". This language, in my opinion, leaves it entirely open as to what the local authority understood by a tank. But, from the mere language of condition 6, I should have thought that the local authority would be entitled to object to any alteration of the pit, its structure, or its lay-out as shown in the plans submitted without their approval. In the plans it is true that the appellants described the metal containers as "tank" or "tanks". But all that, in my opinion, is irrelevant. Call them tanks if you will. That is what the Plant and Machinery Order calls them. The question is what becomes of the tank when it is put into the ground. Unless "tank" as used in the order, means only a tank that is constructed in the ground like a small reservoir, clearly there must be some point at which, in some cases at least, a ready made tank brought to the site of premises becomes a tank for rateable purposes within the meaning of the schedule.

In my opinion, when the container here was brought to the site and fitted into a specially prepared pit, with a surround of compacted sand, which, after all, is only a special kind of soil, it became part of a larger unit which can all be described as the tank forming part of the admitted plant of the filling station. The whole is then in the nature of a building or structure. The container is, as LORD EVERSHED, M.R., and PARKER, L.J., described it, just the lining of a tank. It would be an excessive refinement to say that, if a hole was dug in the ground, retained with brick or tiles and lined with metal or some other material and covered over with a cushion of sand between the retaining wall and metal lining, that was a tank for the purposes of the schedule, as I think it must be, but, if the metal lining is brought to the prepared pits as a whole, it is not such a tank. The container here was, in my opinion, just part and parcel of a structure for holding petrol which it was not permissible in the present case to store in any other way.

A I agree with the views of the Court of Appeal. The Lands Tribunal, in my opinion, went wrong in thinking that the licence necessarily referred to the container as the tank. In any case, that was, I think, an irrelevant consideration. It also went wrong in thinking that the pit and its structure was just a building housing a piece of plant or machinery like any other building, by which I take the tribunal to include a factory or similar building, in which plant or machinery B can be found. Cylinder and housing were, in my opinion, one integral whole.

I would dismiss the appeal.

LORD DENNING: My Lords, in the course of the argument, it was said that this was a matter of degree for the Lands Tribunal to decide. I am glad that your Lordships will not dispose of the case on this facile ground. C The primary facts are all agreed. The only question is whether, on those facts, the four petrol tanks fall to be rated as part of the hereditament. That involves in this case a question of law, for the solution of it depends on the true interpretation of the Act of Parliament and the order made thereunder—an order which has not, I believe, come up to this House before. It is, moreover, a test case which will decide, once and for all, the rateability of all the wayside filling D stations. If your Lordships were to say: "This is a question of degree for the Lands Tribunal with which we cannot interfere, whatever our own views", you would leave the matter open to be canvassed again before another tribunal. You would leave the position uncertain when it ought to be made certain. By deciding it here and now, your Lordships will give guidance where it is needed and asked.

E My Lords, this metal cylinder was, beyond doubt, a "tank". If it had been put on to the chassis of a lorry, it would have been called by everyone a petrol tank; and the vehicle would be called a tanker. Or if it had been installed above ground, inside a shed for protection from the weather, it would still have been a tank. When it is put underground, it is still, I think, a tank. But is it "in the nature of a structure"? Looked at by itself, it is, admittedly, F not in the nature of a structure. Looked at, as installed on a lorry, or as housed in a shed above ground, it is still not in the nature of a structure. But when it is placed underground in a brick and concrete emplacement, and built into it tight and fast, is it not then "in the nature of a structure"? This depends, of course, on what you mean by "in the nature of a structure": or rather, on what Parliament meant when it used those words in Sch. 3 to the Rating G and Valuation Act, 1925, and what the Plant and Machinery (Valuation for Rating) Order, 1927, meant when it repeated those words.

The Act itself gives some guidance in this respect; for it gives a few instances of what Parliament had in mind. To take illustrations, is, I find, often the most helpful way of understanding what an Act of Parliament means: see *Escoigne Properties, Ltd.* v. *Inland Revenue Comrs.* (2) ([1958] 1 All E.R. 406). H Schedule 3 includes this specific illustration: "Water towers with tanks". Everyone knows what a "water tower with tank" is. It is a concrete or steel structure built up from the ground with a water tank fitted into the top so that it forms part of one integral whole. If such a tank stood on the ground, it would probably not be rateable as part of the hereditament, because it would not be a structure or in the nature of a structure. But when it is built into I a water tower so as to form an integral part of the whole, it becomes rateable as part of the hereditament, because it then becomes in the nature of a structure. The water tower itself is clearly a structure; and the tank, being part of it, partakes of the nature of a structure.

Another illustration can be found in a decided case, *B.P. Refinery (Kent), Ltd.* v. *Walker* (3) ([1957] 1 All E.R. 700). There was a boiler unit on the premises. It was a very large structure but, in its essentials, it was merely an enlarged version of the common domestic boiler, with its constituent parts, furnace, flues, and so forth, built in together so as to form one integral whole.

The boiler unit itself was held not to be rateable because class 4 does not include boilers. But some of the constituent parts, such as the " furnace ", the " economiser " and the " flues " were held to be rateable, because they were mentioned in class 4. Now if you were to take one of those parts and set it on the ground, and look at it separately by itself, it would not be rateable because it would not be in the nature of a structure; but when it was built into the boiler unit so as to become part of the integral whole, it did become rateable because it was in the nature of a structure. It took its colour, so to speak, from the boiler unit of which it formed part. The boiler unit was a structure. So the various parts built into it were in the nature of a structure.

There are, of course, other ways in which parts of a plant may partake of the nature of a structure, as appears from *Cardiff Rating Authority & Cardiff Assessment Committee* v. *Guest Keen Baldwins Iron & Steel Co., Ltd.* (1) ([1949] 1 All E.R. 27), but the two illustrations which I have given point the way to the decision in this case. If this petrol tank had stood on the ground, housed in a shed, it would not be rateable as part of the hereditament, because it would not be in the nature of a structure. But the position is altogether different when you find it built into an underground emplacement, embedded in sand, boxed in by girders, encased in a concrete cover—so that no one can get it out except by breaking up the emplacement. The tank is clearly an integral part of the whole, and, as such, partakes of the nature of the whole, just as a tank on a water tower, or a furnace in a boiler. This is a tank which is in the nature of a structure and is, therefore, rateable as part of the hereditament.

The chairman of the Lands Tribunal held otherwise. He asked himself: " Is the whole of the installation a ' functional entity '? " And, finding it was not, he held the tank was not rateable. He took the phrase " functional entity " from the judgment of JENKINS, J., in the *Cardiff* case (1) (ibid., at p. 37), but I am sure that the learned judge did not mean it to be a test of rateability. A part of plant can be in the nature of a structure without being a functional entity. Each of the various parts in the *B.P. Refinery* case (3), of which I have spoken, such as the furnace, the economiser and the flues, was rateable although none of them was a " functional entity " in itself. I get no help from the phrase and think it should be discarded. By making it the test of rateability, the Lands Tribunal fell into error.

The Court of Appeal reversed the decision of the Lands Tribunal, and held the tank was rateable. They emphasised, just as I would wish to do, the fact that the metal cylinder was built into the brick and concrete structure so as to form one integral whole; and on that account they held it to be rateable as part of the hereditament. I entirely agree with them in the result, but I would use a somewhat different line of reasoning or, perhaps I should say, a somewhat different terminology. LORD EVERSHED, M.R., and PARKER, L.J., seem to have regarded the whole installation as a " tank " which was in the nature of a structure; whereas I think the metal cylinder still remains a " tank ", but, by being built into one whole structure, it partakes of the nature of a structure. SELLERS, L.J., used words more in line with my view when he said ([1958] 1 All E.R. at p. 707):

> " The manner of protecting it or lagging it or securing it has turned what was simply a cylinder into a structure or building. I cannot think that in law or in fact it would be sensible or realistic to split the two things up."

I entirely agree with that line of approach.

In the oral argument before your Lordships, counsel for the respondent put his case in the same way as the majority of the Court of Appeal. He said the whole thing was a " tank " just as they did; but in the printed Case he put it also in the way I prefer, saying that, though each cylinder was a " tank ", it was, as installed, in the nature of a structure: see reason 3. Is this House

bound to determine the case according to the particular way in which counsel puts his argument orally before your Lordships? I think not. Your Lordships are to " determine what of right " ought to be done. To my mind, it is a mistake to fret about this way or that way of putting the case. The decision should not rest on such niceties. Suffice it to take hold of the cardinal fact that this metal cylinder was built into the structure so as to form one integral whole. It is that fact which makes it rateable as part of the hereditament. It is that fact which counsel stressed. The rest is all words and not substance; and words are delusive things anyway. It is a matter of indifference whether you call the whole thing a " tank " or only the metal cylinder a " tank ", so long as you are agreed that, in either case, it is in the nature of a structure.

The question after all is whether these four petrol tanks fall to be rated as part of the hereditament; and I feel a good deal of confidence in saying that they do, when I find that all three judges in the Court of Appeal think so, and so does my noble and learned friend, LORD KEITH OF AVONHOLM, and, lastly, I myself do too. I would, therefore, dismiss this appeal.

Appeal allowed.

Solicitors: *Sydney Morse & Co.* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

WINTER *v.* HINCKLEY & DISTRICT INDUSTRIAL CO-OPERATIVE SOCIETY, LTD.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Ashworth, JJ.), January 20, 28, 1959.]

Weights and Measures—Coal—Weight—Exposure of coal in sacks for sale—Representation by seller as to weight—Deficiency in weight owing to theft by servant—Mens rea—Weights and Measures Act, 1889 (52 & 53 *Vict. c.* 21), *s.* 29 (2)—*Sale of Food* (*Weights and Measures*) *Act*, 1926 (16 & 17 *Geo.* 5 *c.* 63), *s.* 12 (5).

An inspector of weights and measures weighed sacks of coal from a company's coal lorry on which thirty-nine sacks of coal were exposed for sale, each marked " 112 lb. coal ". Thirty-three of the sacks contained short weight. The sacks had contained 112 lb. of coal each when they left the company's premises, but C., the company's servant who was in charge of the vehicle, had stolen coal from the sacks and this had produced the deficiencies. Informations were preferred against the company under s. 29 (2)* of the Weights and Measures Act, 1889. The company gave notice under s. 12 (5)† of the Sale of Food (Weights and Measures) Act, 1926 and preferred informations against C. The magistrates dismissed all the informations on the grounds that the company did not know that the

* Section 29 (2) of the Weights and Measures Act, 1889, provides: " If it appears to a court of summary jurisdiction that any load, sack, or less quantity so weighed is of less weight than that represented by the seller, the person selling or keeping or exposing the coal for sale, or the person in charge of the vehicle, as the case may be, shall be liable to a fine . . ."

† Section 12 (5) of the Sale of Food (Weights and Measures) Act, 1926, so far as relevant, provides: " Where an employer . . . is charged with an offence . . . he shall be entitled on information duly laid by him . . . to have any other person whom he charges as the actual offender brought before the court . . . and, if . . . the employer . . . proves . . . that the said other person had committed the offence . . . without his consent, connivance or wilful default, the said other person shall be summarily convicted of the offence and the employer . . . shall be exempt from any penalty . . ."

representations as to weight were false and that, the theft by C. being outside the scope of his employment, the exposing for sale was his act, not the company's. On appeal,

Held: the company had exposed the coal for sale, as it was their coal that was in the sacks, and, no mens rea being necessary to constitute an offence against s. 29 (2) of the Weights and Measures Act, 1889, the case would be remitted to the magistrates with a direction to convict.

Brentnall & Cleland, Ltd. v. *London County Council* ([1944] 2 All E.R. 552) followed.

Roberts v. *Woodward* ((1890), 25 Q.B.D. 412) distinguished.

Twentyman v. *John Hulbert, Ltd.* ((1944), 170 L.T. 340) overruled.

Appeal allowed.

[As to the powers of inspectors to stop vehicles carrying coal for sale and to test weights, see 33 HALSBURY'S LAWS (2nd Edn.) 689, 690, para. 1243.

As to the liability of the master for the criminal acts of his servant, see 25 HALSBURY'S LAWS (3rd Edn.) 549, 550, para. 1046; and for cases on the subject, see 14 DIGEST (Repl.) 42-45, *108-134*.

For the Weights and Measures Act, 1889, s. 29 (2), see 26 HALSBURY'S STATUTES (2nd Edn.) 1271; and for the Sale of Food (Weights and Measures) Act, 1926, s. 12 (5), see ibid., 1303.]

Cases referred to:

(1) *Twentyman* v. *John Hulbert, Ltd.*, (1944), 170 L.T. 340; 108 J.P. 168; 2nd Digest Supp.

(2) *Brentnall & Cleland, Ltd.* v. *London County Council*, [1944] 2 All E.R. 552; [1945] K.B. 115; 114 L.J.K.B. 17; 172 L.T. 215; 109 J.P. 34; 2nd Digest Supp.

(3) *Roberts* v. *Woodward*, (1890), 25 Q.B.D. 412; 59 L.J.M.C. 129; 63 L.T. 200; 55 J.P. 116; 14 Digest (Repl.) 44, *122*.

Appeal.

This was an appeal by way of Case Stated from a decision dated June 19, 1958, by the Leicester County Justices sitting at Market Bosworth, whereby they dismissed nine informations laid by Mr. Wilfred John Winter, an inspector of weights and measures, against the Hinckley & District Industrial Co-operative Society, Ltd. for alleged offences under s. 29 (2) of the Weights and Measures Act, 1889. The facts are stated in the judgment.

J. G. Jones for the appellant.

H. A. Skinner for the respondents.

Cur. adv. vult.

Jan. 28. **DONOVAN, J.**, read the judgment of the court: The facts in summary are these. The respondents sell coal, among other things. On May 1, 1958, they sent out a lorry with sacks of coal on it for sale in the street to whomsoever might want to buy it. The appellant, a weights and measures inspector, stopped the lorry. There were then thirty-nine sacks of coal on it. Each sack was labelled " 112 lb. coal ". When weighed by the inspector thirty-three of the sacks were found to contain less than 112 lb. of coal. The deficiency varied between eleven and twenty-two lb. per sack.

When the sacks left the respondents' premises they each contained 112 lb. of coal, but an employee named Cooper, who was in charge of the vehicle, thereafter stole coal from the sacks and thus produced the deficiencies in weight found by the inspector. The respondents, after being served with informations, availed themselves of s. 12 (5) of the Sale of Food (Weights and Measures) Act, 1926, and preferred informations against Cooper alleging that the respondents had used diligence to enforce the execution of the said Act and that Cooper had committed the offence without the respondents' consent, connivance or wilful default; and that he was the actual offender. All the informations were heard

A together by the magistrates, and after hearing legal arguments they dismissed them all. In doing so they said that in their view the contentions put forward by counsel for the respondents were correct. Those contentions were these: (a) that there was no evidence to prove that the respondents knew that the representation as to weight was false, or could reasonably have found out that the coal was short weight; (b) since the respondent in *Twentyman* v. *John Hulbert,*
B *Ltd.* (1) ((1944), 170 L.T. 340) was held not criminally liable for " tampering " by his servant, a fortiori the respondents were not liable for the larceny of their servant in this case; (c) since the act of stealing by Cooper was outside the scope of his employment and done in fraud of the respondents, the act of exposing for sale was an independent act by Cooper outside the course and scope of his employment for which the respondents were not criminally liable. In answer to
C these contentions the present appellant argued before the magistrates that the offences charged under s. 29 (2) were absolute: that proof of mens rea was not necessary and that the act of Cooper in exposing for sale sacks which were deficient in weight was sufficient to render the respondents guilty of the alleged offences.

In support of his contentions the solicitor for the present appellant quoted
D *Brentnall & Cleland, Ltd.* v. *London County Council* (2) ([1944] 2 All E.R. 552). On this the magistrates say that, the solicitor not having a report of that decision with him, they were not referred to any specific passages in the judgments. One can perhaps sympathise with the magistrates in this respect because the decision in *Brentnall & Cleland, Ltd.* v. *London County Council* (2) clearly lays down that mens rea is not a necessary ingredient of this offence, and HUMPHREYS,
E J. (whose remarks in the *Twentyman* case (1) were relied on by counsel for the respondents) specifically disowned their accuracy and rather doubted whether he had been correctly reported.

Now that the Case Stated is before us, counsel for the respondents admits that the offence created by s. 29 (2) is absolute, and that mens rea is not a necessary
F ingredient of the offence. He also admits that the representation constituted by the respondents' label on each of their sacks, namely, " 112 lb. of coal " was a representation by the respondents. But he says that in the circumstances the respondents did not " expose the coal for sale ". This, he still alleges, is an independent act done by Cooper outside the scope of his employment, and therefore that the respondents are not in breach of s. 29 (2).

G We have some difficulty in understanding this argument. Before Cooper committed the theft of a few pounds of coal from some of the sacks, the 112 lb. of coal in each of those sacks was admittedly being exposed for sale by the respondents; and what is true of the whole contents of the sacks seems to us to be true of each part. When, therefore, the contents of the sacks are reduced to ninety odd lb., each of those sacks is still being exposed for sale by the respon-
H dents. The reduced contents were, in our view, unaffected in this respect by Cooper's pilfering. Different considerations would arise if Cooper had substituted different coal not belonging to the respondents, but such is not the case. It was the respondents' coal which was still being sold in their sacks by the man authorised to sell it, and in these circumstances we think the respondents were clearly exposing it for sale.

I That is enough to dispose of this case; but a word should perhaps be said about the authorities quoted to us. In *Roberts* v. *Woodward* (3) ((1890), 25 Q.B.D. 412) it was held that there must be a representation by the seller of the weight of coal sold. The facts of the case were that a greengrocer who also sold coal received orders for five cwt. of coal, and the five sacks containing this coal when weighed by the inspector en route to the customer were found to be deficient in weight. But the seller had made no representation to anyone as to the weight of the coal. All that had happened was that when his servant was stopped en route by the inspector, and was asked what weight the sacks contained,

the servant told him one cwt. each which was found to be wrong. On these rather special facts the court held that the seller had made no representations as to weight and was not criminally responsible for the representation made by his servant. It is to be noted that the case was decided in 1890, i.e., one year after the Act was passed; but in any event the decision does not touch the present case where admittedly there was a representation by the respondents. It may also be useful to recall that POLLOCK, B., said (ibid., at p. 415) among other things:

> "In the present case there was no verbal representation by the seller as to the weight of the coals, as there usually would be in cases where the coals were sold in the shop or were hawked round the streets for sale . . ."

In *Twentyman* v. *John Hulbert, Ltd.* (1) the report in the LAW TIMES gives the ratio decidendi of the judgment to be that evidence must be forthcoming that the seller knew that the representation as to weight was false; in other words that there must be mens rea. No other ground for the decision is suggested in that report. As it stands, therefore, the decision cannot be treated as of continuing authority.

Brentnall & Cleland, Ltd. v. *London County Council* (2) lays down specifically that mens rea is not a necessary ingredient for an offence under s. 29 (2); and the following passage in the judgment of VISCOUNT CALDECOTE, C.J. ([1944] 2 All E.R. at p. 554) is in point:

> ". . . I think that the court of quarter sessions came to a perfectly correct decision when they said that in their opinion mens rea was not a necessary element in the offence . . . If an offence is shown to have been committed under s. 29, I think it is sufficient to show that there was a representation —which of course is clearly proved in this case—and that, as the coal which was being carried was deficient in weight, whether or not Messrs. Brentnall & Cleland, Ltd., the appellants, themselves were aware of the fact seems to me to have been an unnecessary matter for consideration."

What happened in the present case was that there was an exposing for sale by the respondents of coal which was represented as being 112 lb. in weight but which was in fact less; that the respondents were saddled with such representation and deficiency by the dishonest act of their employee Cooper. This gives the respondents no defence under s. 29 (2); but since Cooper, the real offender, was not made a party to the present appeal, no penalty can now be visited on him. In the circumstances the magistrates might think it right on this occasion to grant the respondents an absolute discharge, though this is a matter for them to decide. The appeal must be allowed and the case go back to the justices with a direction to convict these respondents.

Appeal allowed.

Solicitors: *Kingsford, Dorman & Co.*, agents for *John A. Chatterton*, Leicester (for the appellant); *Thomas Flavell & Sons*, Hinckley (for the respondents).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

Re SELINGER'S WILL TRUSTS. MIDLAND BANK EXECUTOR AND TRUSTEE CO., LTD. AND OTHERS *v.* LEVY AND OTHERS.

[CHANCERY DIVISION (Harman, J.), January 29, 1959.]

Will—Condition—Performance—Time for performance—Charitable bequest—Charity to be chosen within twelve months after probate—Revocation of gift at expiration of time limit if charity not chosen—Whether time of essence.

A testatrix gave a legacy to a named charity with a direction that, if the charity could not fulfil the wishes that she expressed in relation to the gift, the legacy should go to some other similar charity regarded as suitable by the trustees of her will. If, however, they were not successful in finding, within a year after probate, another suitable charity, willing to give effect to the testatrix' endowment to the satisfaction of the trustees, then she revoked the legacy, with the consequence that the amount would fall into residue. The named charity was unable to accept the legacy and the trustees did not find another suitable charity until two years and four months after probate. It had not been possible to distribute the estate before then owing to other questions.

Held: the condition as to time was intended by the testatrix to prevent the distribution of her estate being delayed by the trustees considering what charitable institution should be the object of her bounty; distribution had not been delayed thereby, and accordingly the legacy should now be paid to the charity that had been found.

Dictum of ROMER, J., in *Re Goodwin* ([1924] 2 Ch. at p. 30) applied; *Re Hanbey's Will Trusts* ([1955] 3 All E.R. 874) considered.

[As to the time for performance of conditions, see 34 HALSBURY'S LAWS (2nd Edn.) 119, para. 153; and for cases on the subject, see 44 DIGEST 472-475, *2914-2934*.

As to conditions with a gift over being strictly enforced, see 4 HALSBURY'S LAWS (3rd Edn.) 298, para. 616; and for cases on the subject, see 8 DIGEST (Repl.) 435-437, *1257-1272*.

As to the default of trustees not defeating a charitable purpose, see 4 HALSBURY'S LAWS (3rd Edn.) 295, para. 610.]

Cases referred to:

(1) *Re Goodwin, Ainslie* v. *Goodwin*, [1924] 2 Ch. 26; 93 L.J.Ch. 331; 130 L.T. 822; 44 Digest 474, *2933*.

(2) *Re Hanbey's Will Trusts, Cutlers' Co. (Sheffield)* v. *London Corpn.*, [1955] 3 All E.R. 874; [1956] Ch. 264; 3rd Digest Supp.

Adjourned Summons.

By her will made on Apr. 2, 1948, Mrs. Annie Selinger, after appointing the plaintiffs to be executors and trustees thereof, made a general devise and bequest on the usual trusts for sale and conversion and for investment of the residue after payment of debts, expenses, legacies and death duties, to be held on trusts, as events happened, to pay certain legacies which included a legacy in the following terms:

"To the Jewish Home of Rest to endow four beds in memory of (1) Hannah de Villiers (2) Gali Selinger (3) Sara de Villiers and Sophia Green and (4) Annie Selinger (being myself) and Oscar Selinger (being my husband) respectively £1,500 . . . for the four beds and I Declare that it is my wish that the said four beds shall be placed alongside the bed already endowed in the said Home to the memory of the said Sir John de Villiers (the location of the last mentioned bed being changed for such purpose if necessary) and I Direct that if the said Home is unable or unwilling to give effect to my wish as expressed above to the satisfaction of my trustees such legacy

shall go to some other similar charitable institution Jewish or non-Jewish determined by my trustees, regarded as suitable by my trustees for the endowment of four beds alongside each other in memory respectively of (1) Hannah de Villiers and Sir John de Villiers (2) Gali Selinger (3) Sara de Villiers and Sophia Green and (4) Annie Selinger and Oscar Selinger Provided that if my trustees shall not within a year after obtaining probate of this my will succeed in finding such other Jewish hospital or similar charitable institution regarded as suitable by my trustees as aforesaid and able and willing to give effect to the last-mentioned endowment to the satisfaction of my trustees then and in such case such legacy shall stand revoked."

By cl. 8 of the testatrix' will her executors and trustees were directed to divide anything that might be left over of her residuary estate, after giving effect to foregoing provisions of her will and to certain further legacies, between such of ten named residuary legatees as should survive her and her husband. The testatrix died on Aug. 25, 1954. All the residuary legatees named in her will survived her and were defendants in these proceedings.

The Jewish Home of Rest had been almost wholly destroyed in the war of 1939-45 by bombing, and subsequently had been partly rebuilt and had been taken over by the Minister of Health under the National Health Service Act, 1946. The plaintiffs, the trustees of the testatrix' will, in the light of information supplied to them by the secretary of the Jewish Home of Rest and the finance officer of the Wandsworth Hospital Group of which the Home had become part, decided that the Home was unable to give effect to the wishes of the testatrix to their satisfaction, and they communicated their decision to the finance officer in December, 1954. A verbal approach was then made to an orphanage for Jewish children, but in view of the reply received, the plaintiffs formed the opinion that the orphanage was not suitable for the endowment of four beds in accordance with the testatrix' wishes and moreover doubted whether it was an institution similar to the Jewish Home of Rest. On Oct. 27, 1954, the plaintiffs obtained probate of the testatrix' will. In November, 1954, the plaintiffs requested their solicitors to communicate with the Home for Aged Jews. Through an oversight this was not done and it was not until February, 1957, that the plaintiffs ascertained that the Home for Aged Jews was able and willing to accept the legacy in accordance with the provisions of the testatrix' will. The plaintiffs considered the Home to be a suitable recipient for the legacy of £1,500.

By originating summons, dated Mar. 10, 1958, the plaintiffs asked for the determination of the question whether on the true construction of the testatrix' will and in the events which had happened the plaintiffs, as trustees of the will, stood possessed of the legacy of £1,500 (a) on trust for the Home for Aged Jews or (b) on the trust declared by cl. 8 of the will of and concerning the residuary estate of the testatrix or (c) on some other and if so what trusts. There were thirteen defendants of whom the first two were the joint treasurers of the Home for Aged Jews, the third to the twelfth were the residuary legatees, or their representatives or assignees, and the last was Her Majesty's Attorney-General.

A. J. Balcombe for the plaintiffs, the executors and trustees of the will of the testatrix.

J. A. Wolfe for the first two defendants, the joint treasurers of the Home for Aged Jews.

G. A. Godfrey for the third to twelfth defendants, the residuary legatees.

Denys B. Buckley for the thirteenth defendant, the Attorney-General.

HARMAN, J., after stating the relevant terms of the testatrix' will and the facts concerning probate and the Jewish Home of Rest and concerning the inquiries for a suitable charity, continued: The question has been raised whether, the time limit of a year from probate set by the testatrix having long passed, the revocation expressed in the will has taken effect, with the consequence that the subject-matter of the gift has fallen into residue. There is no doubt that if

A the terms of the will are read literally, that is what has happened. The words are " shall not within a year succeed in finding " another institution. The trustees did not succeed in doing that. The will provides that " then and in such case such legacy shall stand revoked ". The question is whether that revocation must be treated with the strictness with which the testatrix set it down.

In the forefront of the argument for the charity and for the Attorney-General
B it is said that the charitable bequest should not be defeated by reason of the default of the trustees. It is argued that the words " succeed in finding " postulate that the trustees have made all due efforts to find and it is said they did not do anything of the kind; that having made a few ineffectual efforts about the time probate was granted, they forgot the whole matter and neglected their duties, and owing to their negligence or forgetfulness failed to find; and that that
C ought not to redound to the detriment of the proposed legatee—after all, there was nothing that it could do and indeed no persona designata existed who could make any protest over the matter. It is a well-known principle and one that does not need any authority, that a charitable bequest ought not to fail by reason of the default of the trustees. This limit must be put on it, however, that the result must not follow unless it was the intention of the testatrix that it should
D fail if the trustees did not carry out the trust; otherwise the testatrix' intention would be defeated.

Secondly, it is said that time conditions of this sort are not to be treated with strictness; if they are substantially fulfilled that is enough; that if the object of the testatrix was to procure the bringing about of a certain result and the court can see its way to bring about that result it will not be slow to treat the condition
E as to time as not being of the essence of the matter, but will treat a compliance with it as soon as possible as a compliance in substance with the request.

I have found the authorities sadly confused on this matter. One may start with *Re Goodwin, Ainslie* v. *Goodwin* (1) ([1924] 2 Ch. 26). There the testator had bequeathed an annuity of £500 to his wife. She was entitled under a deed inter vivos to an annuity of £70 and he made it a condition that she should
F release her right to the annuity of £70 within six months of his death or else the bequest of the annuity of £500 should become and be absolutely void and of no effect. In fact his estate took a very long time to wind up. The widow continued to take her £70 under the deed, she never received anything under the will and was never asked to release her £70, and indeed in the end she died without ever having done so. However, after that event happened, the executors suddenly
G found themselves in a position to distribute to the beneficiaries. The question then arose whether, the widow not having ever released, still less not within six months of the death of the testator, she could become entitled to anything under the will. Romer, J., held that she could. He says this, which seems to me a general statement (ibid., at p. 30):

H " It is well settled by authority that where a gift in a will is made subject to a condition, even a condition precedent, to be performed within a specified time, but the condition is not in fact performed within that time, then, at any rate in the absence of an express gift over, it is always a question for the court to determine whether the time so specified was of the essence of the matter. In determining that question the court must have regard to what was pre-
I sumably the intention of the testator in inserting the condition, what it was that he desired to bring about or to guard against; and if the court finds that a performance of the condition at a time subsequent to the expiration of the period fixed by the testator in substance provides for the very thing that the testator intended to provide for, so that all parties can be put in substantially the same position as they would have been in had the condition been performed within the proper time, time is not regarded as of the essence, and such performance is treated as a sufficient compliance with the condition."

That would seem exactly to fit this case but for the exception which the learned judge makes in the absence of an express gift over. A

When I look at the authoritative work, ROPER'S LAW OF LEGACIES (4th Edn.) (1847), I find in his article on Legacies upon Condition this (Vol. 1 at p. 769):

> " When the condition is precedent, there is nothing to forfeit, since no interest can vest previously to the literal or substantial performance of the condition. The question in all those cases appears to be, have the conditions been duly performed? In resolving such questions, it is presumed that the following distinction is material to be regarded. When there is no disposition upon non-compliance with the terms of the condition, either in time or collateral circumstances, a liberal construction is to be put upon the performance, under authority of the testator's intention, inferred from the absence of any disposition over, that he meant the legatee to receive the legacy, upon the condition being performed cy-près, or in substance, as in the preceding cases. But when there is a limitation over of the legacy on non-compliance with its specific terms, the construction is less liberal, a strict and literal performance being required; as it is presumed, from the disposition over of the legacy to another person, that the testator meant, if the terms which he imposed were not literally fulfilled, the second object of his bounty should succeed to the bequest by way of conditional limitation."

B C D

Here there is no express gift over, but there is an express revocation of the gift. The question which has been much debated before me is whether such an express revocation is not tantamount to a gift over, because an express revocation of a legacy is in effect a gift of it to residuary legatees. In JARMAN ON WILLS (8th Edn.) that view is expressed (Vol. 2 at p. 1468) in these words: E

> " Where conditions require an act to be done within a particular time, a distinction is to be drawn, on the one hand where there is an express gift over or (what amounts to the same thing) an express direction that on breach of the condition the legacy shall lapse and fall into residue, and on the other hand where there is no such express gift over." F

This is neither quite one thing nor the other and it is difficult to say on which side of the line to come down. Indeed DANCKWERTS, J., in *Re Hanbey's Will Trusts, Cutlers' Co. (Sheffield)* v. *London Corpn.* (2) ([1955] 3 All E.R. 874), said that he did not think that any indication was to be found from the cases of the line that should be pursued in a matter of this sort. In that case there was a bequest to one charitable legatee with a gift over to a second charitable legatee in the event of default by the trustees; and the question was whether the default of the trustees should be allowed to defeat the gift. It seems to me that, if one reaches the conclusion that that is exactly what the testator intended, then his intention should not be defeated; on the other hand, if the conclusion is that his intention was merely not to hold up the administration of his estate, or something of that sort, then time is not of the essence. DANCKWERTS, J., said this (ibid., at p. 879): G H

> " I find it a little difficult to see what is the distinction between the cases where the default of the trustees to apply property in accordance with the testator's direction is not allowed to defeat the gift and the cases in which the default of the trustees does defeat the gift and results in the gift over taking effect. It seems to me practically impossible to discover what is the dividing line." I

It is not very encouraging for a judge to find that being said by one of his brethren, especially one so well acquainted with the law of charities as DANCKWERTS, J.

It seems to me that I should look at what I think to have been the wish of this testatrix, as expressed in her will. Her desire was, in my judgment, not to allow the administration of her estate to be held up while the executors considered

what charitable institution they should make the object of her bounty. They were to choose and she said, in effect, "You must choose within a year or the legacy is revoked". She did not expressly provide that the amount of the legacy was to fall into residue, though that, of course, would be the result of the revocation of the legacy. She is, however, saying, in effect, "You are not to hold up the distribution of the estate by hesitations on this subject". In fact the distribution has not been held up at all; it has been impossible, as I am informed, to distribute this estate until quite recently because of difficulties over estate duty. If the legacy were paid now to the Home for Aged Jews, who satisfy the conditions exactly, the effect would be produced which the testatrix intended. Therefore, so it seems to me, this is a case where time ought not to be treated as being of the essence of the matter and the delay by the trustees in performing their duties ought not to be allowed to defeat the gift.

Declaration accordingly.

Solicitors: *Arthur S. Joseph & Cates* (for the plaintiffs and for the third to twelfth defendants); *Bartlett & Gluckstein* (for the first two defendants); *Treasury Solicitor* (for the thirteenth defendant).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

R. *v.* JONES.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Donovan and Ashworth, JJ.), January 26, 1959.]

Criminal Law—Capital murder—Murder done "in the course . . . of theft"—Theft already committed—Murder committed in order to avoid detection and to escape—Homicide Act, 1957 (5 & 6 *Eliz.* 2 *c.* 11), *s.* 5 (1) (*a*).

The appellant broke into some stores and committed a theft. As he was about to leave the premises, he saw the manager of the stores and, in order to avoid detection and to escape, struck him and killed him. The appellant was convicted of capital murder under s. 5 (1) (a) of the Homicide Act, 1957. He appealed against the conviction on the ground that the murder was not done in the course of theft, within s. 5 (1) (a)*, so as to constitute capital murder, because the theft was completed and he had already decided to leave the premises before he saw and killed the manager.

Held: the murder having been committed in order to avoid detection, it was murder done in the course of theft, within the meaning of s. 5 (1) (a) of the Homicide Act, 1957, although the actual theft had already been committed, and, therefore, the appellant was rightly convicted of capital murder under s. 5 (1) (a).

Summing-up of LORD SORN in *H.M. Advocate* v. *Graham* ([1958] S.L.T. at p. 169) approved.

Appeal dismissed.

[For the Homicide Act, 1957, s. 5 (1), see 37 HALSBURY'S STATUTES (2nd Edn.) 177.]

Case referred to:

(1) *H.M. Advocate* v. *Graham*, [1958] S.L.T. 167.

Appeal.

This was an appeal by Ernest Raymond Jones against his conviction of capital murder under s. 5 (1) (a) of the Homicide Act, 1957, at a trial at Leeds Assizes

* Section 5 (1) reads:

"Subject to sub-s. (2) of this section, the following murders shall be capital murders, that is to say,—(a) any murder done in the course or furtherance of theft . . ."

before HINCHCLIFFE, J., and a jury on Dec. 10, 1958. The main ground of appeal was that, even if the appellant's acts constituted murder, it was not "murder done in the course or furtherance of theft", within s. 5 (1) (a), because the theft was complete, and the appellant had decided to leave the premises where he had committed the theft, before the murder was committed.

Bernard B. Gillis, Q.C., and *L. H. Scott* for the appellant.
G. De P. Veale, Q.C., and *R. Withers Payne* for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: The appellant was convicted at Leeds Assizes of capital murder and he now appeals against his conviction. The facts are in a very short compass. On Sept. 30, 1958, at about 9 p.m. he broke into a co-operative society's stores near Huddersfield. He collected downstairs some cigarettes which he put into a carton ready to take away from the premises. He then went upstairs where, as the result of a previous successful burglary, he knew that there was a safe. To his surprise he found that the safe was open. He took silver and notes amounting to about £70 out of the safe and put all or most of it into his pocket. He was about to descend the stairs when he heard a click of the front door and the lights downstairs went on. He took refuge behind some sacks of flour. The man who had come into the premises was Mr. Turner, the manager of the stores, and he came up the stairs in order to shut up and to close the safe. When he was near the top of the stairs he received a blow from the appellant as a result of which he died, and it was found that his skull was fractured in five places. The appellant's first defence was based on an alibi, but that was not persisted in. At the trial his case was that he had merely pushed the manager, who must have struck his head and fractured his skull in falling; that he had no intention of doing grievous bodily harm to the manager, let alone committing murder; and, finally, that, even if it were held that his acts constituted murder, yet it was not "murder done in the course or furtherance of theft", within s. 5 (1) (a) of the Homicide Act, 1957, so as to constitute capital murder within the meaning of the Act.

As regards the defence that the appellant had no intention to inflict grievous bodily harm or murder, it is enough to say that no complaint is made whatsoever of the very careful directions given by the learned judge both on the law and on the facts. It is sufficient to say that there was ample evidence on which the jury could come to the conclusion that this was murder and not manslaughter. The real point taken on this appeal concerns the question whether the murder was committed "in the course or furtherance of theft" so as to constitute capital murder. It is said that, if the prisoner were to be believed, the theft was complete. His case was that, having found the safe open, he thought that someone had been there recently, that he took fright, that he took what money he could immediately lay his hands on and decided then and there to leave the premises without looking round for anything else to take and without even collecting the cigarettes which he had put aside. In other words, his case was that he took fright and that, quite apart from the clicking of the front door, he had determined to go. It is said that that defence was never adequately put to the jury. In the view of this court the defence was adequately put, even though it was not put in very great detail. The matter, however, does not end there, because, even if this was a case in which the defence had not been properly put, it does not seem to this court that the argument is sound that, if a man has committed a theft the offence is complete for all purposes, so that, if thereafter, in an attempt to avoid detection he strikes somebody and commits murder, it is not capital murder. This was a case where the appellant was caught, if one may

use the expression, red-handed, and in order to avoid detection, and while still on the scene of his theft, he committed murder. It is difficult to see why that should not be within the words " in the course . . . of theft ".

The court was referred to *H.M. Advocate* v. *Graham* (1) ([1958] S.L.T. 167), a decision in the High Court of Justiciary in Scotland, and to the summing-up in the case by LORD SORN. The facts do not matter, but in the course of summing-up LORD SORN said this (ibid., at p. 169):

> " Now you have just heard it suggested to me by counsel for the defence that murder is only done in the course of theft if the man did it in order to get on with the theft after he had done the murder. I think that was the suggestion. I have only got to tell you that I do not agree with that. It is a question of what is meant by the course of a theft, and I think that the course of a theft is begun when perpetration is begun; that is to say that it covers the period of attempt as well as the period of completion; the attempt of the crime as well as the crime; and I say that if a burglar is interrupted in that course, the course of perpetration, and if he murders even in order to get away, not with the idea of going on, but with the idea of getting away, it still is murder done in course of theft. It would be, I think, somewhat ridiculous to suppose that Parliament has said ' We will make it capital murder if the householder wakes up and goes to interfere with a burglar and gets killed by a burglar who kills him in order to go on with his stealing, but we won't make it capital murder if the burglar murders him in order to run away '. I think it does not matter what he was going to do afterwards; or what he did afterwards; if he was in the course of theft and he did the killing, it is ' in course of ' within the meaning of s. 5 of the Homicide Act; and I so direct you in law."

In the view of this court, that summing-up of LORD SORN was perfectly correct and the court agrees with what LORD SORN there said. The court would only add that for the purposes of this case it has been necessary to consider only the words " in the course . . . of theft " and not the further words " or furtherance of theft "; the consideration of the whole of those words together remains for another occasion. In these circumstances, the court is clearly of opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions.*

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

A

GINTY *v.* BELMONT BUILDING SUPPLIES, LTD. AND ANOTHER.

[QUEEN'S BENCH DIVISION (Pearson, J.), April 24, 25, 28, 29, 30, 1958.]

Building—Building regulations—Roof work—Boards to be "provided"—Duty to use boards—On whom duty rests—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948 *No.* 1145), *reg.* 4, *reg.* 31 (3) (*a*). B

Factory—Safe place of employment—Duty of occupier to provide means for ensuring workmen's safety—Meaning of "provided"—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 26 (2).

Factory—Statutory duty—Duty of workman to use safety appliances—Duty not to endanger himself without reasonable cause—Breach—Failure to use duck-boards while engaged on roof work—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6 *c.* 67), *s.* 119 (1), (2). C

The plaintiff, an experienced asbestos sheeter, was employed by the first defendant which carried on business as roofing contractors. The plaintiff had been instructed and understood that he was not to work on asbestos roofs without using boards, and he knew that there were statutory regulations on the subject. On Thursday, July 29, 1954, the plaintiff and his mate were sent to the second defendant's factory at Southampton to strip the existing asbestos roof on the second defendant's spreading shop and to replace it with new asbestos sheeting. The old asbestos sheeting was defective and the plaintiff had been told of its unsafe condition by his employer. Under the contract between the first defendant and the second defendant ladders and boards for the use of the first defendant's men were to be supplied by the second defendant, which had a builder's yard where there were duckboards, crawling boards and scaffold boards. The builder's yard was close to the spreading shop. When the plaintiff and his mate arrived at the second defendant's factory, they were taken to the builder's yard, were supplied with a ladder, and were shown the different kinds of boards and were told to help themselves to what they wanted. On Friday, July 30, employees of the second defendant noticed that the plaintiff was working on the roof without using boards, and they then took two duckboards from the builder's yard and placed them by the wall of the spreading shop, on the side where the plaintiff was working where they could be seen by him, but they did not tell the plaintiff or his mate that they had done this. On Tuesday, Aug. 3, the plaintiff went on to the roof without using boards, fell through the roof and was seriously injured. In an action by him for damages against the defendants,

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Held: (i) boards had been "provided" within reg. 31 (3) (a)* of the Building (Safety, Health and Welfare) Regulations, 1948, and, similarly, means for ensuring the plaintiff's safety had been provided within s. 26 (2)† of the Factories Act, 1937, and accordingly no breach of duty on the part of the plaintiff's employer under reg. 4 and reg. 31 (3) (a), or on the part of the second defendant, as occupier of the factory, under s. 26 (2) of the Factories Act, 1937, was established (see p. 422, letters E, F and H, and p. 423, letter B, post). H I

Farquhar v. *Chance Bros., Ltd.* ((1951), 115 J.P. 469) applied.

(ii) under reg. 4 and reg. 31 (3) (a) of the Regulations of 1948, there was an obligation on the employer not merely to provide the boards but also

* For the relevant terms of reg. 4 and reg. 31 (3) of the Building (Safety, Health and Welfare) Regulations, 1948, see p. 419, letters C and E to H, post.

† For the terms of s. 26 (2) of the Factories Act, 1937, see p. 422, letter I, post.

(vicariously) to use the boards, and there was also an obligation on the plaintiff to use the boards; though the plaintiff, and through him, his employer both were in breach of duty under these regulations, since the boards were not used, yet the plaintiff was not entitled to recover damages against his employer because the fault was the plaintiff's, and there was no fault on the part of his employer which went beyond or was independent of the plaintiff's own omission (see p. 420, letter I, p. 423, letter H, and p. 428, letters A to C, post).

Dicta of DU PARCQ, L.J., in *Smith* v. *Baveystock & Co., Ltd.* ([1945] 1 All E.R. at p. 535), of MORRIS, L.J., in *Manwaring* v. *Billington* ([1952] 2 All E.R. at p. 750) and of LORD REID in *Stapley* v. *Gypsum Mines, Ltd.* ([1953] 2 All E.R. at p. 485) applied.

(iii) in failing to use the boards which had been " provided " for his use the plaintiff did something likely to endanger himself and was in breach of s. 119 (1) and s. 119 (2) of the Factories Act, 1937* (see p. 423, letter G, post).

Per CURIAM: the important and fundamental question in a case like this is the usual question—whose fault was it ?—not the question whether there was a delegation of statutory duty (see at bottom of p. 423 and top of p. 424, post).

[Editorial Note. On the question what constitutes the providing of appliances the decision in the present case may be considered with *Norris* v. *Syndi Manufacturing Co., Ltd.* ([1952] 1 All E.R. 935, see particularly at p. 940).

As to delegation of statutory duty by an employer to an employee, see 17 HALSBURY'S LAWS (3rd Edn.) 11, para. 12, text and note (e).

As to safety provisions under building regulations, see 17 HALSBURY'S LAWS (3rd Edn.) 126, 127, para. 206.

For the Factories Act, 1937, s. 26 (2) and s. 119 (2), see 9 HALSBURY'S STATUTES (2nd Edn.) 1018, 1097.

For the Building (Safety, Health and Welfare) Regulations, 1948, reg. 4, reg. 31 (3) (a), see 8 HALSBURY'S STATUTORY INSTRUMENTS 212, 225.

For the Law Reform (Contributory Negligence) Act, 1945, s. 1, see 17 HALSBURY'S STATUTES (2nd Edn.) 12.]

Cases referred to:

(1) *Davison* v. *Apex Scaffolds, Ltd.*, [1956] 1 All E.R. 473; [1956] 1 Q.B. 551; 3rd Digest Supp.

(2) *Finch* v. *Telegraph Construction & Maintenance Co., Ltd.*, [1949] 1 All E.R. 452; 24 Digest (Repl.) 1073, *316.*

(3) *Farquhar* v. *Chance Bros., Ltd.*, (1951), 115 J.P. 469; 24 Digest (Repl.) 1065, *271.*

(4) *Goulandris Bros., Ltd.* v. *B. Goldman & Sons, Ltd.*, [1957] 3 All E.R. 100; [1958] 1 Q.B. 74; 3rd Digest Supp.

(5) *Vincent* v. *Southern Ry. Co.*, [1927] A.C. 430; 96 L.J.K.B. 597; 136 L.T. 513; Digest Supp.

(6) *Smith* v. *Baveystock & Co., Ltd.*, [1945] 1 All E.R. 531; 24 Digest (Repl.) 1093, *427.*

(7) *Gallagher* v. *Dorman, Long & Co., Ltd.*, [1947] 2 All E.R. 38; 177 L.T. 143; 24 Digest (Repl.) 1062, *252.*

(8) *Cakebread* v. *Hopping Bros. (Whetstone), Ltd.*, [1947] 1 All E.R. 389; [1947] K.B. 641; [1948] L.J.R. 361; 177 L.T. 92; 24 Digest (Repl.) 1093, *431.*

(9) *Barcock* v. *Brighton Corpn.*, [1949] 1 All E.R. 251; [1949] 1 K.B. 339; 24 Digest (Repl.) 1086, *393.*

* For the terms of s. 119 of the Factories Act, 1937, see p. 423, letters C to F, post.

(10) *Beal* v. *Gomme (E.), Ltd.*, (1949), 65 T.L.R. 543; 24 Digest (Repl.) 1094, *432*. A
(11) *Hilton* v. *Marshall (F. H.) & Co., Ltd.*, [1951] W.N. 81; 24 Digest (Repl.) 1092, *424*.
(12) *Manwaring* v. *Billington*, [1952] 2 All E.R. 747; 24 Digest (Repl.) 1077, *335*.
(13) *Stapley* v. *Gypsum Mines, Ltd.*, [1953] 2 All E.R. 478; [1953] A.C. 663; 3rd Digest Supp.
(14) *Johnson* v. *Croggon & Co., Ltd.*, [1954] 1 All E.R. 121; 24 Digest (Repl.) 1077, *336*. B

Action.

In this action the plaintiff, Thomas Ginty, claimed damages against his employer, Belmont Building Supplies, Ltd. (the first defendant, herein called "the Belmont company") and Pirelli-General Cable Works, Ltd. (the second C defendant, herein called "the Pirelli company") for personal injuries and consequential losses suffered by him as the result of an accident which occurred on Aug. 3, 1954, at the premises of the Pirelli company.

The Pirelli company had a large factory at Southampton. The company employed a maintenance staff, who not only worked on maintenance of machinery D but also worked on general maintenance of buildings, including small repair jobs. There was a builder's yard at the factory premises, containing stores, and the maintenance staff were supplied with duckboards, crawling boards, scaffold boards, and other such appliances, which were kept in the builder's yard. Behind the builder's yard was a well-equipped carpenter's shop. The builder's yard was very close to the spreading shop at which the accident happened. At E the nearest point the spreading shop and the buildings comprising the builder's yard were only about fifteen feet apart. The work in relation to which the accident occurred was that of re-sheeting with asbestos sheeting the roof of the spreading shop.

The spreading shop was brick built, with a roof of asbestos sheeting, and had a jack roof; viz., there was the elevated jack roof in the middle where the F roof ridge was and for a few feet on each side, and then, on both sides of the building, there was the main roof, in two parts, at a level that was a few inches lower than that of the jack roof. To avoid draught the space between the main roof and the jack roof had been sealed with a thin strip of plastic material fastened by small nails. The asbestos sheeting on the spreading shop roof G was old and defective; it was recognised by everyone as being particularly unsafe and unreliable for walking on. The roof had roof trusses and roof purlins. The trusses were triangular in shape with the horizontal side at the bottom, and from each end of that side there ran, sloping inwards, the two side pieces which met just under the ridge of the roof. Within the triangle there were internal supports. The trusses ran across the building from side to side; the roof H purlins ran all along the length of the buildings, and on the purlins rested the asbestos sheets which were fastened by means of drive screws. These drive screws were long threaded nails with mushroom heads and were pushed through a metal washer and a bitumen washer, and through a hole in the sheeting, to be driven into the wooden purlin beneath. Thus there were no large pieces projecting upwards from the roof, so that it was not possible to hold roof boards I by resting them against any projecting head of a drive screw. In order to remove the sheeting the drive screws would have to be taken out by means of cutters by which the heads of the drive screws could be sheared off. There was expensive machinery inside the spreading shop, so that it was important not to leave an exposed hole in the roof. Therefore, the old sheeting had to be removed and new sheeting put on concurrently. The new asbestos sheeting had corrugations about six inches wide and two inches deep, and the old sheeting had corrugations

about three inches wide and one inch deep. The consequence of this difference was that the replacement of the old by the new sheeting necessarily involved interfering with the plastic seal between the jack roof and the main roof, and the plastic seal would have to be removed altogether or re-fitted. There were several ways in which roofing work on such a roof could be rightly done, and it was found on the evidence that boards should have been used to provide safe foothold for a man doing this work on this roof. The wrong way of doing such work, on the other hand, was simply to step on to the asbestos sheeting on the roof, seeking to step only on such places as had the purlins beneath, with the consequence that, if, by mistake, a man's weight was placed on a part of the roof surface that was not so supported, he would be likely to fall through.

The quotation, dated May 21, 1954, which the Belmont company made for the job, was given after one of its directors had visited the Pirelli company's factory. The quotation expressly provided " ladders and boards to be supplied for our use free of charge ". The Pirelli company's acceptance, dated June 29, 1954, stated that ladders and boards would be supplied " by us for your use free of charge ". The method of work envisaged when the quotation was given, therefore, was that boards would be used to step on while the men were on the roof. The Belmont company worked normally as specialist sub-contractors working with main contractors, who would have their own ladders, roofing boards, etc., for their own use, and the Belmont company's men would normally use them for their purposes. In view of this the system of work followed by the Belmont company, which had eight to ten pairs of men, each pair consisting of a sheeter and his mate, was to send these pairs of men out to various jobs, sometimes quite far distant from the company's headquarters. The Belmont company had one foreman and one director going round the sites, giving necessary instructions and supervision. The men expected to find the necessary ladders and boards on the sites. Sometimes, if it happened that necessary equipment was not on a site, the men themselves, or through a foreman if he happened to be there, would telephone to the Belmont company's headquarters and ask for arrangements to be made. It was not proved that instructions had been given to the men to do that, or that it had happened so often as to amount to a practice, but it was the sensible thing to do and was done. Instructions had frequently been given to the men that they were to use boards in roofing work and that they were not to work on roofs without using boards. The evidence, which the court accepted, was that from time to time instructions were given in the clearest possible terms, and were clearly understood, that roofing work was not to be done without boards. It was clear from the plaintiff's own evidence that he had been instructed to use boards for roofing work and that he knew that there were statutory regulations (i.e., the Building (Safety, Health and Welfare) Regulations, 1948) requiring the same thing. A copy of the regulations, with certain passages marked, so as to call attention to what had to be done, had been distributed among the sheeters when the regulations were issued. On July 28, 1954, the plaintiff and his mate were told by the foreman that the job in Southampton had been assigned to them. On the following day a lorry was loaded with necessary material, but no boards or ladders, and a director of the Belmont company spoke to the men before they left. The court held that he did tell them what was involved in the job, and that the roof was an unsafe roof and that they must be careful. He also said that he had arranged with the Pirelli company that that company should provide ladders and boards. The plaintiff and his mate went down to the site on their lorry on July 29, 1954. The court accepted the evidence of the witnesses on behalf of the Pirelli company that, after the arrival of the plaintiff and his mate, they were taken to the builder's yard at the factory and were shown

the different kinds of boards (scaffold boards, duckboards, etc.), were supplied with a suitable ladder, and were told to help themselves to whatever boards they wanted. At that time the boards were not moved by the Pirelli company's men or by the plaintiff and his mate. The boards remained in the store, which was close to the spreading shop. Work was started on the west side of the building, which was the side next to the builder's yard and was visible from the carpenter's shop. A hole was left that evening in the roof, which may not have been sufficiently covered up, and subsequently the maintenance staff of the Pirelli company themselves put some kind of tarpaulin sheeting over the gap. On the next day, after taking off the tarpaulin, the plaintiff and his mate were taking down sheets from the west side of the main roof and putting in new sheets. They did not use boards of any kind on the roof. The plaintiff, who was a very experienced sheeter, was on the roof; he took out the fastenings by using cutters, and then lifted up the sheets and handed them to his mate who lowered them to the ground. When an old sheet had been taken out, a new sheet was put in its place. The court found, after reviewing evidence, that on this day some of the Pirelli company's employees observed, from the carpenter's shop, that the plaintiff was working on the roof without boards; that two of them then went to the builder's yard, picked up two duckboards, and placed them by the west wall of the spreading store where they could have been seen by the plaintiff; but that they did not tell the plaintiff or his mate that they had put the boards by the wall, there being bad feeling at the time between the plaintiff and the Pirelli company's employees in view of the hole allegedly left open in the roof of the spreading shop on the previous night. The day when the boards were placed against the wall was a Friday, and on the following Tuesday (Aug. 3, 1954), while the plaintiff and his mate were working on the east side of the roof, the plaintiff, who was on the roof and was not using boards, fell through the roof into the building, and was seriously injured.

The plaintiff claimed damages against the Belmont company for negligence and breach of statutory duty under the Building (Safety, Health and Welfare) Regulations, 1948, reg. 5, reg. 31 (2) and reg. 31 (3) (a) (b) and reg. 97. The court allowed amendments of the statement of claim at the trial to add a contention that the Belmont company failed to ensure the use of the necessary ladders and boards. The plaintiff claimed damages against the Pirelli company for breach of statutory duty under s. 26 (2) of the Factories Act, 1937, and for failing to take adequate steps for the plaintiff's safety. Both defendants denied breach of duty and negligence and pleaded that the plaintiff's injuries were due to his own negligence and to breaches on his part of his statutory duty under the Regulations of 1948. The Pirelli company also alleged that the plaintiff was in breach of s. 119 of the Factories Act, 1937, and was allowed at the trial to amend its defence so as to rely on reg. 4 of the Regulations of 1948.

John Thompson, Q.C., and *Tudor Evans* for the plaintiff.

F. H. Lawton, Q.C., and *J. C. C. Blofeld* for the first defendant, the Belmont company, the employer.

E. M. Jukes, Q.C., and *E. W. Eveleigh* for the second defendant, the Pirelli company, the occupier of the factory.

PEARSON, J., after stating the facts and reviewing evidence and observing that there was no doubt that the plaintiff and his mate knew what their instructions were, knew of the relevant provisions of the regulations, and knew that it was in breach of their instructions and of the regulations that they went on to the roof without using boards, continued: The plaintiff alleges against his employer, the first defendant, the Belmont company, breach of its statutory duty under the Building (Safety, Health and Welfare) Regulations, 1948, and breaches of its common law duty as employer. He alleged a breach of reg. 5 of the Building Regulations, but that was not argued at length. Regulation 5 reads:

A "Suitable and sufficient scaffolds shall be provided for all work that cannot safely be done on or from the ground or from part of the building, or from part of a permanent structure or from a ladder or other available means of support, and sufficient safe means of access shall so far as is reasonably practicable be provided to every place at which any person has at any time to work."

B In my view, that regulation does not apply to this case, as the work could have been safely done from a part of the building, or from a ladder or other available means of support, and indeed the right way of doing it was to use boards to give safety on the roof itself. Counsel for the plaintiff mainly relied on the first part of reg. 31 (3), providing as follows:

C "Where work is being done on or near roofs or ceilings covered with fragile materials through which a person is liable to fall a distance of more than ten feet—(a) where workmen have to pass over or work above such fragile materials, suitable and sufficient ladders, duck ladders or crawling boards, which shall be securely supported, shall be provided and used . . ."

D Regulation 31 (3) (a) has to be taken in conjunction with reg. 4, because reg. 31 (3) is expressed in the passive mood, and it does not say in itself who is to carry out these obligations and see that these requirements are fulfilled. Therefore one has to turn to reg. 4 to see on whom the obligations under the regulations are imposed.

Regulation 4 contains this provision:

E "It shall be the duty of every contractor and employer of workmen who is undertaking any of the operations to which these regulations apply . . . (ii) to comply with such of the requirements of regs. 31-33 . . . as relate to any work, act or operation performed or about to be performed by such contractor or employer of workmen . . ."

F Then there are some further provisions about the duty of contractors and employers of workmen, referring, inter alia, to "every contractor and employer of workmen who erects, instals, works or uses any crane . . ." Then, in the last paragraph of reg. 4, there is a provision that

G "It shall be the duty of every person employed to comply with the requirements of such regulations as relate to the performance of an act by him . . ."

Then there are further provisions about his duty to co-operate, and then:

H ". . . and if he discovers any defect in the scaffolding, plant or appliances to report such defect without unreasonable delay to his employer or foreman . . ."

When reg. 4 and reg. 31 (3) are read together, what is the effect? On whom are the several obligations imposed? Counsel for the Belmont company submitted that the only duty of the employer was to provide ladders, duck ladders or crawling boards; but that it was the duty, and solely the duty, of the employee

I —the sheeter or the workman—to use them. Certainly that is a possible contention, but in my view it is not right. In my view, the obligation to provide is the obligation of the employer, but the obligation to use is the obligation both of the employer and of the employee. So far as the employer is concerned, one has the provision, in reg. 4 (ii), that the employer is to comply with such of the requirements of, inter alia, reg. 31 (3) (a), "as relate to any work, act or operation performed or about to be performed by such contractor or employer of workmen". The ordinary employer of workmen is, of course, the limited

company, which must act through its servants or agents, and it seems to me quite plain that the use of duck ladders or crawling boards is an act performed by the employer through his employees, because if one does not read the regulations in that way, then under the wording of reg. 4 (ii) the regulations would apply to very few acts of the employers; but, in my view, one must read it as requiring the employer both to provide and to use the ladders, crawling boards, and so on. Then there is the last paragraph of reg. 4. Is there an obligation on the employee, under the regulation, to use; that is to say, is it his obligation as well as the obligation of the employer? In my view, it is, on the ground that one should give the natural meaning to the words:

> "It shall be the duty of every person employed to comply with the requirements of such regulations as relate to the performance of an act by him . . ."

The requirements of reg. 31 (3) (a) apply to the performance of an act by the sheeters, the workmen in this case, because it is they who are going to use the ladders, duck ladders, or crawling boards, and they are going to use them on the roof, in passing over and working on the roof; and they must use those safety devices in doing that work.

Support for that view is given by *Davison* v. *Apex Scaffolds, Ltd.* (1) ([1956] 1 All E.R. 473), a decision of the Court of Appeal. It is true that different views were taken by the members of the court as to the scope of the words which I have read from the last paragraph of reg. 4; but the argument, on the one side, was that the words should be applied as I have stated, and, on the other side, that the words should be given a more limited meaning and should be regarded as applicable only when a particular regulation imposes a specific duty on some workman who is specially referred to. As I read the judgments in *Davison* v. *Apex Scaffolds, Ltd.* (1), SINGLETON, L.J., and JENKINS, L.J., approved the view to which I have referred; it was only HODSON, L.J., who took the view that the more restricted meaning should be given to the words in question. JENKINS, L.J., said (ibid., at p. 483):

> "Counsel for the plaintiff invited us to hold that the words 'to comply with the requirements of such regulations as relate to the performance of an act by him' should be construed as limited to the provisions in the regulations under which particular employees are required to do particular acts, and he instanced reg. 34 (1) (c)."

The learned lord justice quoted that regulation, and he went on (ibid.):

> ". . . and, said counsel, reg. 4 is in this respect satisfied by provisions of that sort. I see no reason for placing that limited construction on the wide terms of this provision of reg. 4."

Then there was a statement, which was to the same effect, from SINGLETON, L.J. (ibid., at p. 481, letter H). The opinion to the contrary will be found in the judgment of HODSON, L.J. (ibid., at p. 487).

I hold, therefore, that there was a breach of duty both by the employer (the Belmont company) and by the employee, the plaintiff, inasmuch as the crawling boards and duckboards were not used. There is, however, a further question with regard to reg. 31 (3) (a), namely, whether there was a breach consisting of the non-provision of the boards. To provide the boards is plainly a duty of the employer and not a duty of the employee; the employee might conceivably have some duty to co-operate in some cases, but that is not important here. It was the duty, in the present case, of the Belmont company to provide the necessary boards; the company chose to do it by means of a contractual arrangement with the Pirelli company, but, in my view, that does not affect the obligation. It is not, in itself, a discharge of the obligation by the Belmont company

merely to make a contractual arrangement; the company is still responsible for the necessary boards being provided, and, therefore, relies on the Pirelli company to perform the obligation for it. If the Pirelli company failed to perform the obligation under the contract, then there would be a breach of the obligation under the regulation by the Belmont company as against its own employee, the plaintiff.

One does not have to consider very closely whether there would be any breach by the Pirelli company as against the plaintiff, though I am inclined to think not. Nor do I have to consider—indeed I have been expressly absolved from it in the present case at the present stage—whether the Belmont company would have any rights of contribution against the Pirelli company in that respect. If that question ever arises, it will be decided at some later stage; but, as I have said, if the boards were not provided, then that is a breach by the Belmont company in relation to the plaintiff, and there is the question of fact whether the boards were provided or not. On the facts, as I have found them, was there a fulfilment or a breach of the obligation?

There are two relevant cases. One is *Finch* v. *Telegraph Construction & Maintenance Co., Ltd.* (2) ([1949] 1 All E.R. 452), a decision of DEVLIN, J. The material passage is that in which the learned judge's view of the law is stated. He said (ibid., at p. 454):

> " In those circumstances I have to consider whether that was a ' providing of goggles ' within the meaning of s. 49 of the Act of 1937. I have listened to the careful argument of counsel for the defendants, but I have come to the conclusion that it was not a ' providing '. Of course, goggles would be ' provided ' if they were given to each man individually. I do not think that is the only way in which they could be ' provided ', but, in my view, in order to ' provide ' them within the meaning of the Act it would be necessary either that they should be put in a place where they come easily and obviously to the hand of the workman who is about to grind, or, at the very least, that he should be given clear directions where he is to get them. Accordingly, I think there has been a breach of s. 49."

The other case is *Farquhar* v. *Chance Bros., Ltd.* (3) ((1951), 115 J.P. 469). That was a case about the provision of safe means of access. It was a prosecution in which the justices held that the occupiers of the factory had not failed to provide a safe means of access; they had provided an adequate supply of suitable ladders within a reasonable distance of the platform. In that case, which was decided, it is true, under a different section (s. 26 (1) of the Factories Act, 1937) and in regard to a different phrase, namely, " safe means of access ", it was held that the justices had the evidence on which they could rightly find that a safe means of access was reasonably provided when the supply of suitable ladders was made available at some distance (some fifty yards) away. That was the view of LORD GODDARD, C.J., and ORMEROD, J.; they were inclined to say not only that there was evidence on which the justices could so find, but they tended to agree with the finding. HILBERY, J., tended to take a different view, and he said this (115 J.P. at p. 472):

> " I feel that I should have come to another conclusion on this case for the reasons I have endeavoured to indicate . . . Until a ladder is placed in the position which is appropriate for its use as a way of getting to a particular place of work, it appears to me to be no more than something which, if used for that purpose and in that way, can become a safe means of access. On the other hand, if it was shown that the occupier of the factory had laid on the ground alongside this scaffolding the ladder ready to be erected, I should have said that was providing a reasonably safe means of access. I do not wish . . . to be thought to be expressing the view that anything

so absurd might result as that, if once the ladder is provided as a safe means of access, when the workman changes to some extent the place of work, he is not himself to move the ladder and is not being provided by the occupier with a safe means of access merely because he has to move that ladder to another situation." A

So the question here is whether there was a "providing" of the boards within the meaning of reg. 31 (3) (a). It was argued by counsel for the plaintiff that it was not a sufficient "providing" merely to say, if this is the right view of the facts: "Here you are; here are the boards in the store just beside this building. Come and help yourself if you want them". Counsel said that one must go further than that and "provide" at the place of work. He pointed to the words "which shall be securely supported", in reg. 31 (3) (a) and his argument was that the duty of the person "providing" was actually to place the board in position on the roof. That argument may be right in relation to some other material or safety device, but it is faced with an insuperable difficulty here in that the board has to be moved from place to place on one side of the roof, and, indeed, from one side of the roof to the other; therefore, it seems impossible to regard that obligation as being imposed on the employer. The employer's obligation is to "provide" in a reasonable sense of the word; of course, it is not sufficient if the boards are in a place which is locked, the key to which has to be fetched by the workman; but in this case boards had to be placed from time to time on different sides of the roof and on different sides of the building. In the present case there was a builder's yard, used as a store, within a few feet of the building in question, and the boards in that store would be as convenient as the men could require. In my view, there was a sufficient "providing" on the Thursday evening [July 29, 1954] when the Pirelli company's men pointed these boards out in the store and said: "Here you are; you can help yourself". If that view is wrong, there is the further finding at which I have arrived on the balance of probabilities, namely, that two of the duckboards were, in fact, lifted up and placed beside the building on the Friday evening. I think that it is true that the attention of the Belmont company's men was not specifically called to their having been placed there, but the plaintiff said that, if they had been placed there, he would have seen them and it can be inferred that, if they were there (as I have found), he must have seen them. B C D E F

I do not think that there is any hard and fast meaning of the word "provided"; it must depend on the circumstances of the case as to what is "provided" and how what is "provided" is going to be used. It is a very material circumstance here that the boards had to be used in different places. They must be nearby; they must be shown to the person requiring them and placed at his disposal; he must know that they are there for him to use, and he must know that he can put them where he wants. No doubt it should be added that they must not be far away, but *Farquhar* v. *Chance Bros., Ltd.* (3) decides that fifty yards is not too far away, and there is a much shorter distance in the present case. In these circumstances, therefore, I find that there was a sufficient "providing" of the boards in this case to satisfy reg. 31 (3) (a), and, accordingly, there was no breach in that respect by the Belmont company. G H

The position as between the plaintiff and the Pirelli company depends, I think, really on s. 26 (2) of the Factories Act, 1937, because counsel for the plaintiff was hardly urging that there was any breach of common law obligations as between the plaintiff and the Pirelli company. Section 26 (2) raises to my mind a rather similar question. The sub-section reads: I

"Where any person is to work at a place from which he will be liable to fall a distance more than ten feet, then, unless the place is one which affords secure foothold and, where necessary, secure handhold, means

A shall be provided, so far as is reasonably practicable, by fencing or otherwise for ensuring his safety."

That is not a provision which applies very easily to the present case, because we are not here concerned with fencing; but the words " or otherwise " appear in the section, and I think that there was an obligation here to provide the means B of ensuring the safety of these men. The appropriate means would be the boards, and under this sub-section also there was an obligation to provide the boards. The obligation under the sub-section rested on the Pirelli company as the occupier of the factory. For the reasons already stated and on the facts already found, I find that there was a compliance by the Pirelli company with the sub-section. The Pirelli company also relied on s. 119 of the Factories C Act, 1937, which applies to operations such as this. Section 119 (1) reads:

" No person employed in a factory or in any other place to which any provisions of this Act apply shall wilfully interfere with or misuse any means, appliance, convenience or other thing provided in pursuance of this Act for securing the health, safety or welfare of the persons employed in the factory or place, and where any means or appliance for securing health or safety D is provided for the use of any such person under this Act, he shall use the means or appliance."

The material words are:

" . . . where any means or appliance for securing health or safety is E provided for the use of any such person under this Act, he shall use the means or appliance."

I have already held that the boards were provided for the use of the plaintiff and that he failed to use them; therefore, there was a contravention by him of s. 119 (1). There is also s. 119 (2), which reads:

F " No person employed in a factory or in any other place to which any provisions of this Act apply shall wilfully and without reasonable cause do anything likely to endanger himself or others."

It is part of the hardship of this case that the plaintiff, for reasons which one can fully understand, because he wanted to proceed with the work and to get G it done quickly, took a risk. He did that wilfully, knowing that he was acting in breach of instructions and regulations, and I must hold that without reasonable cause he stepped on the roof without using boards—in other words, he did something which was likely to endanger his safety. So I must hold that there was a breach of s. 119 (2) also.

What is the upshot of all that ? This accident was caused manifestly by the H plaintiff working on an asbestos roof, which was a fragile roof, without using boards. The special feature of this case is that that wrongful act of his constitutes a breach by him of his instructions and of the regulations as they apply to him; but it also constitutes, technically at any rate, a breach by his employer under his obligation under reg. 31 (3) (a) to use the boards. The actual wrongful act was the plaintiff's wrongful act, but in one aspect it constitutes a breach by I himself and in another aspect it constitutes a breach by his employer. So what is the position ?

There has been a number of cases, to which I shall refer in a moment, in which it has been considered whether or not the employer delegated to the employee the performance of the statutory duty. In my view, the law which is applicable here is clear and comprehensible if one does not confuse it by seeking to investigate this very difficult and complicated question whether or not there was a delegation. In my view, the important and fundamental question in a case like

this is not whether there was a delegation, but simply the usual question: Whose fault was it? I shall refer to some of the decided cases to demonstrate what I have said. If the answer to that question is that in substance and reality the accident was solely due to the fault of the plaintiff, so that he was the sole author of his own wrong, he is disentitled to recover. But that has to be applied to the particular case and it is not necessarily conclusive for the employer to show that it was a wrongful act of the employee plaintiff which caused the accident. It might also appear from the evidence that something was done or omitted by the employer which caused or contributed to the accident; there may have been a lack of proper supervision or lack of proper instructions; the employer may have employed for this purpose some insufficiently experienced men, or he may in the past have acquiesced in some wrong behaviour on the part of the men. Therefore, if one finds that the immediate and direct cause of the accident was some wrongful act of the man, that is not decisive. One has to inquire whether the fault of the employer under the statutory regulations consists of, and is co-extensive with, the wrongful act of the employee. If there is some fault on the part of the employer which goes beyond or is independent of the wrongful act of the employee, and was a cause of the accident, the employer has some liability. I have stated what, in my view, the proper rule is. For this rule several explanations can be given and several bases can be provided, and I will mention three. First, there is the common law principle that a person cannot derive any advantage from his own wrong. As applied to this case, that means that a person cannot by his own wrongful act impose on his employers the liability to pay damages to him. On that, I will refer to a recent case, *Goulandris Bros., Ltd.* v. *B. Goldman & Sons, Ltd.* (4) ([1957] 3 All E.R. 100), in which that principle of the common law was considered in relation to a different subject-matter.

Secondly (and this is, at any rate, closely allied to the first explanation or principle which I have mentioned), let us consider the effect of the plaintiff's own negligence at common law, that is, before the passing of the Law Reform (Contributory Negligence) Act, 1945. If the accident was caused wholly or in part by the plaintiff's own negligence, he was barred from recovering anything, and his action failed. The Law Reform (Contributory Negligence) Act, 1945, s. 1 (1), modified that position and provides:

> " Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage . . ."

That applies only in a case where the accident is caused partly by the fault of the plaintiff and partly by the fault of somebody else; but the peculiarity of a situation such as we have here is that the accident is caused wholly by one wrongful act, and that act constitutes in one aspect a breach of obligation by the plaintiff and in another aspect a breach of obligation by his employer. Therefore, although one could say that the accident was wholly caused by the fault of the plaintiff, one could also say that the accident was wholly caused by the fault of the first defendant. In my view, that takes a case of this kind outside the scope of the Law Reform (Contributory Negligence) Act, 1945, and one has to revert to common law principles to see what the position is. If one does that, the common law principle is still valid to this extent, that, if the accident is wholly caused by the plaintiff's own fault, he is disentitled to recover.

Then there is a third explanation, or basis, which can be provided; that is the need for avoiding circuity of action. Circuity of action would arise in this

way. Suppose that the plaintiff said that his employer committed a breach of statutory obligation whereby damage was caused to him, and he was entitled to recover damages from his employer. The employer would reply that by the contract of employment the employee owed a duty to his employer, who, therefore, was entitled to recover damages against the employee, and that the amount of damages which the employer was entitled to recover was equal to the amount of the damages which the employee was supposedly entitled to recover against the employer. If that were the position, the litigation would go round in a circle, and for that reason there is, in my view, a valid plea of circuity of action. The plea of circuity of action is not usually found in these days because that situation is usually sufficiently provided for by the modern provisions for set-off and counterclaim; but it is a valid plea, and again I would cite *Goulandris Bros., Ltd.* v. *B. Goldman & Sons, Ltd.* (4), and certain previously decided cases which are mentioned in that case.

Those are three explanations of the rule, which, in my view, is a valid one, and there may be other explanations too. I ought to say that I think the theory of delegation of the performance of the employer's statutory duty is not a sound explanation. It may be that another explanation suggested, namely, the principle " ex turpi causa non oritur actio ", is also unsound.

Having stated those propositions, it is right that I should seek to establish them by means of decided cases. In *Vincent* v. *Southern Ry. Co.* (5) ([1927] A.C. 430), which was decided long before the Law Reform (Contributory Negligence) Act, 1945, was enacted, the principle was shortly stated by VISCOUNT CAVE, L.C. (ibid., at p. 437):

> " The duty of a company in any case of danger is an absolute duty to provide a look-out man and to see that he is instructed to act; and if in any case it were proved that the foreman to whom, under the company's regulations, this duty was entrusted had failed in his duty and had not appointed a look-out man, the company might well be held liable for injury happening to any member of the gang other than the foreman himself."

The next case, *Smith* v. *Baveystock & Co., Ltd.* (6) ([1945] 1 All E.R. 531), is the one in which the supposed doctrine of delegation really originates. In LORD GODDARD'S judgment in that case there is a reference to this factor of delegation of the statutory duty; but I think that, when one reads that passage in LORD GODDARD'S judgment by itself, without having in mind what has been said subsequently, one finds that he was examining the particular facts of the particular case from a common-sense point of view and that he was not intending to lay down a new principle of law, or inventing a new plea—he was just examining the facts in a particular case. I would also call attention to this, however, that DU PARCQ, L.J., delivered a concurring judgment, and he said in the concluding passage of his judgment ([1945] 1 All E.R. at p. 535), referring to the employers:

> " I think they are entitled to say: ' The fault is really yours and not ours. We were quite entitled to rely on you. True, if somebody else had been injured by any failure on your part to fulfil your obligation we should have had to pay the penalty, we should have been responsible to him. We cannot rid ourselves of our obligation. But it is quite absurd to think that if you, who are really the person to blame because you were reasonably and properly entrusted by us with this duty, failed to carry it out, therefore, we have got to pay damages to you '."

There is the principle stated more broadly, and, in my view, it embodies the rule which has been stated.

Next there was *Gallagher* v. *Dorman, Long & Co., Ltd.* (7) ([1947] 2 All E.R. 38). There was a discussion as to what is meant by this word " delegation "

in that context, and this is the headnote (ibid., at p. 39), starting from the words " Per curiam ":

> " The word ' delegation ' when used in connexion with the statutory duty of the employer does not mean the same thing as ' employment '. An employer does not, merely by employing his servant to work a crane, delegate to him the statutory duty of seeing that the crane is not overloaded. The theory of delegation of a statutory duty is intelligible where the duty is a positive duty such as to keep the guard of a power saw in adjustment. In the case of a negative duty, such as not to overload a crane, the conception of delegation presents considerable difficulty. The question which arises is whether it can be inferred from the evidence."

Then there was another case, *Cakebread* v. *Hopping Bros. (Whetstone), Ltd.* (8) ([1947] 1 All E.R. 389). That was a case in which there was really blame on both sides. It was held that the employers were in continuing breach of reg. 21 of the Woodworking Machinery Regulations, 1922, by having a guard incapable of proper adjustment fitted to the machine, and, further, through their foreman, by permitting the workman to work at the machine when the guard was not in the safest position possible to it; that that breach of statutory duty by the employers was an independent and contributory cause of the accident which the workman could set up against them; and that the workman was not in breach of his duty; under reg. 23 of the Regulations of 1922, to maintain the guard in proper adjustment since it was not capable of such adjustment, but that he was guilty of contributory negligence. I venture to think that that is the right way of approaching such a question, namely, to consider who was really at fault.

Then there was *Barcock* v. *Brighton Corpn.* (9) ([1949] 1 All E.R. 251). There again that case shows that one has to consider the whole facts of the case for the purpose of discovering who is really to blame for the accident. In that case it was held that, even if the plaintiff, to whom the duty of making the tests without supervision had been delegated, was himself guilty of a breach of the statutory regulations, he was, nevertheless, entitled to recover at common law. The defendants had not provided a safe system of working merely by handing the plaintiff a copy of the relevant regulations with instructions to comply with them, and, even if those acts had constituted the provision of a safe system, by a long usage that paper system had been entirely disregarded by the plaintiff's superiors and he was not guilty of contributory negligence because he did not break away from the method of doing the work in the way in which he had always seen it done. That was a decision of HILBERY, J., and the importance of it on the theoretical side is that there one has the learned judge deciding that performance of a statutory duty was delegated by the employers to the employee in such a case, yet the plaintiff was not debarred from recovering, because of the other facts in the case. In substance and reality, in spite of that delegation, when the whole facts are examined, it was the defendants who were really responsible and they were there held liable.

The next case is *Beal* v. *E. Gomme, Ltd.* (10) ((1949), 65 T.L.R. 543). The important passage is where TUCKER, L.J., examines the question. He said (ibid., at p. 546):

> " I think that the plaintiff was guilty of negligence which contributed very materially to the injuries that he suffered. I do not think that it is a ninety-nine per cent. case, for it is a fact that the defendants must on the evidence be held to have been aware to some extent of the fact that it was known in this factory that the men did not always comply strictly with this regulation. Although the defendants' witness said that he had never actually seen anybody using the machine unadjusted, he did know that it was done, and steps do not appear to have been taken to reprimand those who acted in that way. Furthermore, as I have said,

A the fact that there was no actual delegation is an element to be taken into consideration. In all the circumstances, I would hold the plaintiff responsible for his injuries to the extent of eighty per cent., and to that extent this appeal succeeds."

In the same case EVERSHED, L.J., pointed out some of the difficulties with
B which courts are faced in seeking to apply the supposed doctrine of delegation. In *Hilton* v. *F. H. Marshall & Co., Ltd.* (11) ([1951] W.N. 81), HARMAN, J., sitting as an additional judge of the King's Bench Division, also pointed out the considerable difficulties which are involved in seeking to apply the supposed doctrine of delegation. Then in *Manwaring* v. *Billington* (12) ([1952] 2 All E.R. 747) there is a passage at the very end of the judgment of MORRIS, L.J.,
C which brings out the point very clearly. MORRIS, L.J., said (ibid., at p. 750):

"The mere fact that the employer must be held to have been in breach of the Building Regulations would not in this case by itself warrant our concluding that the judge's holding was wrong. Particularly is this so when it is remembered that the employer only became in breach of the regulations because of the omissions of the plaintiff to perform duties which were properly
D and reasonably assigned to him. This employer could not be expected personally to fix every ladder used by his men during painting operations, nor personally to supervise every operation in the course of which the use of ladders was necessary. If he gave clear and adequate directions as to lashing and securing ladders, he was doing what a reasonable employer was entitled to do. I would deem it incongruous and irrational if, on the facts as found by the
E learned judge, the plaintiff could, in effect, successfully say to his employer: 'Because of my disregard of your reasonable instructions I have brought about the position that you are in breach of your statutory obligations, and so I claim damages from you because of such breach'."

The next case is *Stapley* v. *Gypsum Mines, Ltd.* (13) ([1953] 2 All E.R. 478).
F which went to the House of Lords. My attention was called to a passage in LORD REID'S speech. LORD REID said simply this (ibid., at p. 485):

"In these circumstances it is necessary to determine what caused the death of Stapley. If it was caused solely by his own fault, then the appellant [who was his widow and personal representative] cannot succeed. But if
G it was caused partly by his own fault and partly by the fault of Dale, then the appellant can rely on the Law Reform (Contributory Negligence) Act, 1945. To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation, it is quite irrelevant in this connexion. In a court of law, this question must be decided as a properly instructed and
H reasonable jury would decide it."

Finally, there is *Johnson* v. *Croggon & Co., Ltd.* (14) ([1954] 1 All E.R. 121). In the judgment there was a discussion of the question whether there was a delegation or not, but it was also said (ibid., at p. 125):

"I am satisfied that the only person who was to blame in this matter
I was the plaintiff. He was negligent and also in breach of the statutory duty imposed on him under the Building (Safety, Health and Welfare) Regulations, 1948, and it was his own negligence and breach of duty which immediately caused the accident and resulting injury. The defendants were not at fault in the popular sense."

Reference was made to the maxim ex turpi causa non oritur actio, but it seems to me that it is unnecessary to bring that principle in; one has the broad common law rule.

That being the position, we have here the case in which the fault of the employer—and it is a fault under the definition of "fault" contained in the definition section, s. 4, of the Law Reform (Contributory Negligence) Act, 1945—was a breach of statutory obligation by the employer because, through the employee, the employer did not use the boards; but that fault of the employer consisted of, and was co-extensive with, that of the plaintiff, and in substance this unfortunate accident was due to the fault of the plaintiff in breach of, and in defiance of, his instructions and of regulations which were well known to him. He decided to do the work on this roof without the use of boards. It would not be right, however, to take too severe a view; he was not in any direct sense going to gain anything for himself; he was taking the risk for himself with a view to getting the work done. Yet it is quite impossible to impose a liability on his employer, because the plaintiff himself decided to take the risk and not to use the boards, and in those circumstances the plaintiff must fail.

Judgment for the defendants.

Solicitors: *W. H. Thompson* (for the plaintiff); *Greenwoods* (for the first defendant); *Ponsford & Devenish, Tivendale & Munday* (for the second defendant).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

NOTE.

Re BRITISH CONSTRUCTIONAL STEELWORK ASSOCIATION'S AGREEMENT.

[RESTRICTIVE PRACTICES COURT (Devlin, J., Upjohn, J., Pearson, J., Sir Stanford Cooper, Mr. W. L. Heywood, Mr. W. Wallace and Mr. W. G. Campbell), January 19, 20, February 2, 1959.]

Restrictive Trade Practices—Reference—British Constructional Steelwork Association—Determination of price fixing scheme after reference by registrar—Remainder of agreement of no substantial economic significance—Representation by registrar to Board of Trade—Removal from register—Restrictive Trade Practices Act, 1956 (4 & 5 *Eliz.* 2 *c.* 68), *s.* 12 (1).

Restrictive Trade Practices—Undertaking—Restrictions agreed to be contrary to the public interest—Application by registrar for injunction—Form of undertaking by respondents—Restrictive Trade Practices Act, 1956 (4 & 5 *Eliz.* 2 *c.* 68), *s.* 20 (3).

[For the Restrictive Trade Practices Act, 1956, s. 12 and s. 20, see 36 HALSBURY'S STATUTES (2nd Edn.) 946, 952.]

Reference.

Pursuant to the Restrictive Trade Practices Act, 1956, s. 20 (2) (a)* the Registrar of Restrictive Trading Agreements referred to the Restrictive Practices Court

* Section 20, so far as relevant, provides:

"(1) The court shall have jurisdiction, on application made in accordance with this section in respect of any agreement of which particulars are for the time being registered under this Part of this Act, to declare whether or not any restrictions by virtue of which this Part of this Act applies to the agreement (other than restrictions in respect of matters described in paras. (b) to (d) of s. 8 (8) of this Act) are contrary to the public interest.

"(2) An application to the court under the foregoing sub-section may be made—(a) in any case, by the registrar; . . ."

the agreement between the members of the British Constructional Steelwork Association, and contained in the constitution of the Association, the published list of members, all resolutions of the Association made pursuant to the constitution and all recommendations made by the Association to the members. The agreement comprised a scheme and certain schedules of structural steelwork pricing procedure, and included a number of recommendations, most of them operating independently of the pricing scheme, but one or two of them being recommendations as to price. On Nov. 13, 1957, the Association filed a statement of case seeking to justify all the restrictive arrangements, including the price fixing scheme, and on Feb. 21, 1958, the registrar filed his answer. On Aug. 19, 1958, the Association passed a resolution that the pricing scheme should be determined with effect from Sept. 18, 1958. On Nov. 14, 1958, the Association passed a resolution withdrawing the previous recommendations and substituting for them a new list of recommendations with effect from Nov. 18, 1958. On Nov. 19, 1958, the Association filed an amended statement of case which sought only to defend the new list of recommendations, and on Dec. 31, 1958, the registrar filed an amended answer. Of the new list of recommendations, recommendation (1) recommended a practice of attaching to quotations standard conditions of sale for structural steelwork, adopted by the Association, as a condition on which the tenders were based. Recommendation (2) recommended that the members, when acting as sub-contractors to a general contractor, should decline to accept any conditions of contract other than those contained in a standard form of sub-contract issued under the sanction of and approved by the Federation of Associations of Specialists and Sub-Contractors and the National Federation of Building Trades Employers. Recommendation (3) recommended that the members should adhere to an arrangement made between the National Coal Board and the Association, which was freely negotiated and agreed in 1952. Under this arrangement, the National Coal Board agreed to amend certain of its standard conditions of purchase (which applied to general stores) in relation to structural steelwork when supplied but not erected by members. Recommendation (4) recommended that where a member wished to tender for structural steelwork for delivery in the home market at a price subject to variation, he should qualify his tender by including the Association's standard variation clause known as C.F.2; but this recommendation did not apply to tenders to government departments. Recommendations (5) and (6) were designed to bring into effect agreements made by the Association with the British Electricity Authority (now the Central Electricity Generating Board), and the contracts co-ordinating committee for government contracts respectively. Recommendation (7) was designed for occasions when the Ministry of Works introduced into the tender document sent to members, at a date when wage increases might be announced, a clause to the effect that the tender was deemed to cover all wage awards announced at the date of the tender, including awards that took effect after that date. The recommendation was that if, by reason of the time factor, members had not been able to take account of the award in calculating the tender price they should in their tender state specifically that such award had not been taken into consideration. The Association submitted that, in respect of each of the recommendations, s. 21 (1) (b)* of the Act of 1956 applied, in that the removal of

* Section 21, so far as relevant, provides:

"(1) For the purposes of any proceedings before the court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied of any one or more of the following circumstances, that is to say— . . . (b) that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom; . . ."

the recommendations would deny to the public as purchasers, consumers or users of structural steelwork specific and substantial benefits and advantages enjoyed or likely to be enjoyed by them as such, by virtue of the recommendations themselves or of any arrangements or operations resulting therefrom. A

B. J. M. MacKenna, Q.C., and *D. A. Grant* for the British Constructional Steelwork Association. B

J. R. Cumming-Bruce for the registrar.

Jan. 19. *B. J. M. MacKenna, Q.C.*, said that, the court's powers under s. 20 of the Act of 1956 not being affected by the determination of the pricing scheme, the Association was prepared to submit to an order declaring that the pricing scheme was contrary to the public interest in the sense put on these words by the Restrictive Trade Practices Act, 1956. The Association had also agreed with the registrar to give an undertaking in the following terms:— C

"The respondents who are identified in the list annexed hereto and marked . . . undertake

"(a) not by themselves their servants or agents or subsidiary companies or otherwise to give effect to or enforce or purport to enforce the agreement adopted by the executive committee of the British Constructional Steelwork Association on Nov. 9, 1956, which is set forth in Parts I and II of the Scheme for Procedure for Pricing Structural Steelwork and in the Pricing Procedure for Structural Steelwork schedules B-G, H, M and P (hereinafter referred to as 'the pricing scheme') contained in the document annexed hereto* and marked . . . in respect of any of the restrictions numbered 1 to 5 set forth in Part I of the document entitled 'Agreed List of terms and restrictions within the meaning of s. 6 of the Restrictive Trade Practices Act, 1956', annexed hereto* and marked . . . without giving to the Registrar of Restrictive Trading Agreements full particulars of their intention so to do not less than twenty-eight days before any of the respondents their servants or agents or subsidiary companies or otherwise give effect to or enforce or purport to enforce the said pricing scheme in respect of any of the said restrictions. D E F

"(b) not by themselves their servants or agents or subsidiary companies or otherwise to enter into any other agreement or arrangement, whether or not it is intended to be enforceable by legal proceedings, to the like effect to the pricing scheme in respect of the said restriction without giving to the Registrar of Restrictive Trading Agreements full particulars of such other agreement or arrangement not less than twenty-eight days before such other agreement or arrangement is formed or comes into force whichever is the earlier. G

"(c) that the British Constructional Steelwork Association will not by itself or by any person acting on its behalf or otherwise make any recommendation to its members or to any of them that when members are selling plain material from stock they should adhere to the prices established by the National Association of Iron and Steel Stockholders without giving to the Registrar of Restrictive Trading Agreements full particulars of any such recommendations not less than twenty-eight days before the recommendation is made." H I

Jan. 20. *J. R. Cumming-Bruce* said that, in the light of what had happened, it would not appear that the recommendations set out in the resolution of Nov. 14, 1958, were of any substantial economic significance, and the registrar would invite the court to adjourn the proceedings so that the registrar could make

* Not printed in this report.

representation to the Board of Trade under s. 12 of the Act of 1956*. He further invited the court to indicate that it was their view that the recommendations were of no substantial economic significance.

DEVLIN, J., said that the court did feel able to give that indication. The court was prepared to say that this was a proper case for a representation to be made by the registrar. The court would grant an adjournment until Feb. 2.

Feb. 2. *J. R. Cumming-Bruce* said that the Board of Trade, on a representation by the registrar, had given a direction that the particulars of the Association's recommendations should be removed from the register and that had been done. He asked the court, with reference to that part of the Association's agreement, to make no order in the proceedings.

The agreement to give effect to the price fixing scheme, which had been originally on the register, had involved restrictions and remained on the register as a terminated agreement. The parties were in agreement that the court might make a declaration that

> " This court being of opinion that the restrictions contained in Parts I and II of the Scheme for Procedure for Pricing Structural Steelwork and in the Pricing Procedure for Structural Steelwork . . . all of which said restrictions are set out in the list annexed hereto . . . are contrary to the public interest, doth declare accordingly."

DEVLIN, J.: I do not like the court to express an opinion about a matter that we have not investigated†. If we were to make no order, there would be nothing on the record, and, if a similar scheme were introduced, there would be nothing to prevent the Association from arguing not merely that the similar scheme was not contrary to the public interest but also that the old scheme had not been contrary to that. If, on the other hand, the order recites or records either that the Association admits that for the purposes of the Act the agreement is contrary to the public interest or that the Association does not defend, then that provides a point of departure for any future proceedings that may be necessary.

PEARSON, J.: It is admitted that the agreement contains restrictions. One wants to bring into play the prima facie presumption of s. 21‡, which predicates that there shall be a restriction accepted in pursuance of an agreement, and which provides that the restriction shall be deemed prima facie to be contrary to the public interest. If there were no evidence to displace that, I suppose that the registrar would claim to have succeeded.

J. R. Cumming-Bruce: The necessary minimum is an admission by the Association that there are registrable restrictions on the register.

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* Section 12 (1) of the Restrictive Trade Practices Act, 1956, provides:

" The Board of Trade may, upon the representation of the registrar, give directions authorising him to remove from the register particulars of such agreements of which particulars are for the time being entered therein as appear to the Board to be of no substantial economic significance."

† Similarly, in the Chancery Division the court makes declarations on construction only when the matter has been argued by counsel on each side and has been the subject of adjudication; see per LORD MAUGHAM, L.C., in *New Brunswick Ry. Co.* v. *British & French Trust Corpn., Ltd.* ([1938] 4 All E.R. at p. 756, letter B). In the present case, however, the declaration followed from the statutory presumption under s. 21 (1) in the absence of defence.

‡ Under s. 21 (1) of the Restrictive Trade Practices Act, 1956, restrictions are deemed to be contrary to the public interest unless the tests laid down by that sub-section are satisfied: see footnote on p. 429, ante.

B. J. M. MacKenna, Q.C.: I have no objection to there being a recital in the order that the agreement is admitted to contain restrictions within the meaning of the Act. A

DEVLIN, J.: If, then, the order includes a recital that the agreement has been terminated, the court will merely declare it to be contrary to the public interest. The court have not power, having declared it to be contrary to the public interest, to say whether it should be void. The ordinary way of bringing in the undertaking would be that the registrar should make an application for an injunction, on which, on the giving of the undertaking by consent, we should make no order. B

J. R. Cumming-Bruce: After making the declaration, the order might recite— " The registrar applying for an order under s. 20 (3) (a) and (b)*, and [the Association by their counsel] giving an undertaking in the form set out† . . . the court makes no order on the said application ". C

DEVLIN, J.: Yes. It may be desirable to say " no order by consent " as the undertaking is one to which these parties have consented. Though no doubt it is a very useful form, it has never been considered by the court, and parties in the future should not be precluded from objecting to the terms of it or to giving it. A draft should be submitted, which the court can consider in chambers and, if satisfied, make in that form. D

Order embodying the declaration and undertaking accordingly.

Solicitors: *Bristows, Cooke & Carpmael* (for the British Constructional Steelwork Association); *Treasury Solicitor.*

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

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* Section 20 (3) of the Restrictive Trade Practices Act, 1956, provides:

"Where any such restrictions are found by the court to be contrary to the public interest, the agreement shall be void in respect of those restrictions: and without prejudice to the foregoing provision the court may, upon the application of the registrar, make such order as appears to the court to be proper for restraining all or any of the persons party to the agreement who carry on business in the United Kingdom—(a) from giving effect to, or enforcing or purporting to enforce, the agreement in respect of those restrictions; (b) from making any other agreement (whether with the same parties or with other parties) to the like effect ".

† The form of undertaking is set out at p. 430, letters D to I, ante.

THE HOLIDAY FELLOWSHIP, LTD. *v.* VISCOUNT HEREFORD.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), January 28, 1959.]

Landlord and Tenant—Repair—Landlord's covenant to repair "main walls" of dwelling-house—Whether windows form part of main walls.

The lease of a dwelling-house contained a covenant by the landlord to keep the main walls and roofs of the dwelling-house in good repair and condition. Other repairs to the house were the responsibility of the tenant. On the question whether the landlord was under an obligation to repair the windows, i.e., the glass panels and the wooden window frames,

Held: though windows might, in the context of a particular lease or in a particular building, be part of the main walls of the building, yet these windows were not part of the "main walls" of the house within the meaning of this lease; therefore, the landlord was not liable for their repair under the landlord's covenant in the lease.

Boswell v. *Crucible Steel Co.* ([1925] 1 K.B. 119) and *Taylor* v. *Webb* ([1936] 2 All E.R. 763) distinguished.

Appeal dismissed.

[As to covenants by the landlord to repair the external parts of premises, see 23 HALSBURY'S LAWS (3rd Edn.) 586, para. 1268; and for cases on the subject, see 31 DIGEST (Repl.) 344, 345, *4752-4766.*]

Cases referred to:

(1) *Boswell* v. *Crucible Steel Co.*, [1925] 1 K.B. 119; 94 L.J.K.B. 383; 132 L.T. 274; 31 Digest (Repl.) 210, *3429.*

(2) *Ball* v. *Plummer*, (1879), "The Times", June 17; 31 Digest (Repl.) 344, *4756.*

(3) *Taylor* v. *Webb*, [1936] 2 All E.R. 763; [1937] 2 K.B. 283; *revsd.*, C.A., *on other grounds*, [1937] 1 All E.R. 590; [1937] 2 K.B. 283; 106 L.J.K.B. 480; 156 L.T. 326; 31 Digest (Repl.) 296, *4332.*

Appeal.

This was an appeal by the plaintiffs, The Holiday Fellowship, Ltd., from a judgment of HARMAN, J., dated July 18, 1958.

By a lease dated Dec. 31, 1946, premises including a dwelling-house were demised to the plaintiffs by the predecessor in title of the defendant, Viscount Hereford, for a term of twenty-one years from Apr. 15, 1946. By cl. 3 (1) of the lease the landlord covenanted to keep "the main walls" of the demised premises in good repair and condition. By their originating summons, dated July 8, 1958, the plaintiffs applied, under R.S.C., Ord. 54A, for a declaration that, on the true construction of the lease, the defendant was liable to keep in good repair and condition (including all necessary painting) the main walls (including the windows and window frames) of the premises demised by the lease. The actual dispute between the parties was in regard to the repair and painting of the windows and window frames of the dwelling-house. HARMAN, J., held that the defendant was not liable to keep in good repair the windows and window frames because they were not part of the "main walls" of the demised premises.

M. O'C. Stranders for the plaintiffs, the tenants.

J. L. Arnold, Q.C., for the defendant, the landlord.

LORD EVERSHED, M.R.: By a lease dated Dec. 31, 1946, the predecessor in title of the present landlord (the respondent) granted a lease to the appellant tenants of certain premises at Tregoyd and Velindre, in the county of Brecon, consisting of a messuage or dwelling-house, called "Tregoyd", and two cottages. The lease contains no covenant on either side as to painting. In cl. 2 there are the tenant's obligations, which include, in sub-cl. (3), the following:

" To maintain and keep the demised buildings and the said fixtures and fittings therein (except the roofs and main walls of the said dwelling-house . . .) . . . in good repair and condition . . ." A

Complementary to that is the landlord's covenant in cl. 3 (1): " To keep the main walls roofs . . . in good repair and condition . . ." The photograph which is before the court shows the mansion house, " Tregoyd ". It is a large building B and, on the two sides which are shown on the photograph, there are what might be described as bays, or similar structures, jutting out from the walls and containing windows. A question has arisen (and I take this from the note of the judgment of HARMAN, J.), who is responsible for repair, by way of painting, of the wooden surrounds of the windows and the sashes. It was conceded by the tenants that, except in so far as an obligation was expressed to be on the landlord, C the tenants must undertake repairs. The tenants contended, however, that, in the absence of any specific reference to painting, or, indeed, to windows, the obligation to paint the windows fell on the landlord, on the ground that the windows were part of the main walls and should be treated as such for the purposes of the lease.

I wish to be a little careful in the meaning that I am attaching to the word D " windows ". I have described the bays or similar structures, which are, at any rate to judge from the photograph, made of the same material as the walls, in the ordinary sense of that term. We are not concerned with any question of repair to the brick or stone structures containing the actual windows. For the purposes of this case and of the question raised in the originating summons, I take " windows " to mean, and to be confined to, the glass panels and the E wooden framework and apparatus in which the glass is placed; and the question is whether, for the purposes of the lease, " main walls " ought to be treated as including the windows as I have attempted to define them.

If I looked at this matter without any guidance from authority, I should unhesitatingly say, in ordinary language, that the windows as I have defined them are distinct from the walls. No doubt they are *in* the walls. Walls may F have eyes as well as ears. But I would say that they are, as physical things, distinct from the walls in which they are inserted; and that was the view, plainly, of HARMAN, J. Various illustrations from ordinary conversational usage have been cited; and I confess that, to my mind, it is plain that, apart (again) from the effect of any authority, the windows in the walls would be treated as something distinct from the walls themselves. It was, however, G contended with force by counsel for the tenants that certain authorities which are binding on us, being authorities of this court, put a different light on the matter. The first case was *Boswell* v. *Crucible Steel Co.* (1) ([1925] 1 K.B. 119). The question in that case arose out of the obligation on the part of the tenant to repair " landlord's fixtures ". It was said that by virtue of that obligation the tenant was bound to repair the windows, which had been broken by mischievous H persons throwing stones through them. The premises were shop premises and, as was pointed out in the judgment of BANKES, L.J., far the greater part of what was called " the skin of the house " consisted of the shop windows. The phrase " the skin of the house " was taken from *Ball* v. *Plummer* (2) ((1879), " The Times ", June 17). In the county court it was held in *Boswell* v. *Crucible Steel Co.* (1) that these shop windows were " landlord's fixtures " and, therefore, I within the express language of the tenant's covenants, and the Divisional Court affirmed that view. In the Court of Appeal counsel for the tenant opened his argument thus ([1925] 1 K.B. at p. 120): " These windows were not fixtures at all. They were part of the walls of the house ". In the course of the argument he invoked the assistance of *Ball* v. *Plummer* (2), which was an action by the tenant of a public-house against his landlord for breach of covenant to do " outside repairs ". This court had held that in that case the " outside repairs " included " window repairs ", the windows being part of " the skin of the house ".

Counsel for the tenants in the present case did not suggest that *Ball* v. *Plummer* (2) governed either this case or *Boswell* v. *Crucible Steel Co.* (1); nor did counsel in *Boswell* v. *Crucible Steel Co.* (1) suggest that that case was governed by *Ball* v. *Plummer* (2). The argument was (and is) that, in so far as windows were part of the skin of the house, then it was a step towards the point that they were part of the walls of the house, which were, so to speak, the "skin" in that sense. So this court held, in *Boswell* v. *Crucible Steel Co.* (1), on the facts of the case, that the windows could not be regarded as "landlord's fixtures" because they were part of the structure of the building, and in that sense part of "the skin of the house"—of the walls of the house. SCRUTTON, L.J., said ([1925] 1 K.B. at p. 122):

> "... it seems to me clear that that expression [landlord's fixtures] cannot include a thing which forms part of the original structure of the building."

ATKIN, L.J., said (ibid., at p. 123):

> "As these windows were part of the original structure, representing the walls of the house, so that without them there would be nothing that could be described as a warehouse at all, they cannot come under the head of landlord's fixtures."

Therefore, although it was a county court appeal, this court said that the judge had misdirected himself, that it was a question of law, there being no evidence (I take it) to support a contrary conclusion, and they allowed the appeal.

Counsel for the tenants in the present case relied, not unnaturally, somewhat strongly on *Boswell* v. *Crucible Steel Co.* (1); and he was, if I may say so, encouraged to do so by the use and citation of it in WOODFALL ON LANDLORD AND TENANT (25th Edn.) (1954), at p. 760, where there is the following sentence:

> "It would appear that windows in the outer walls of a building are themselves to be regarded as part of the walls and therefore of the external parts."

That passage is based, and based exclusively, on *Boswell* v. *Crucible Steel Co.* (1). With all respect to the learned editor, I think that that is an over-statement or over-simplification of the matter. I think that it would be correct to say: "It would appear that windows in the outer walls of a building may, in certain contexts and for certain purposes, be regarded as part of the walls"; but I do not think that *Boswell* v. *Crucible Steel Co.* (1) justifies any more extensive proposition. Nor can I agree with counsel for the tenants that, because in *Boswell's* case (1) the conclusion is regarded as a matter of law, therefore it is impossible to say, as a matter of fact or degree in another case and in another context, that windows are not to be regarded as part of the main wall: the one thing by no means follows from the other. So far, therefore, I am unable to hold (and I agree entirely with HARMAN, J., that *Boswell* v. *Crucible Steel Co.* (1) does not bind us to hold) that these windows are part of the main walls of this edifice for the purposes of this lease.

A third case, *Taylor* v. *Webb* (3) ([1936] 2 All E.R. 763) was cited. In that case, a somewhat similar problem arose. There was an obligation to keep "outside walls and roofs" in good and tenantable repair, and the question was: What of skylights: were they part of the roof? The building was a somewhat unusual one. It appears that there had been at some time an addition to the original structure: a passage had been built over the roof of the back ground floor premises leading to some upper storey behind. The passage and the upper storey behind were only lit from above, and the facts seem to show that the so-called "skylights" constituted a very substantial part of the roof—certainly of the passage. DU PARCQ, J., said ([1936] 2 All E.R. at p. 766):

> "I have no doubt that the skylights are part of the building, and I also think that they are part of the roofs, and that that was the intention of the parties."

The view of DU PARCQ, J., on this matter was affirmed by the Court of Appeal*, but once again it is, to my mind, a fallacy to suggest that that case leads to the proposition that all skylights for all purposes are part of the roofs in which they appear. I conclude, therefore, as did HARMAN, J., that these cases do not have a binding and conclusive effect. In any case, I would add that there is no evidence in the present case whether the windows were or were not part of the original structure of this house; but that is, perhaps, immaterial.

If I am right so far in thinking that the matter is not concluded by these authorities, then the question comes back to that of the construction of the lease and of asking and answering the question: Are the windows illustrated in this photograph, and limited by my definition, part of the main walls, within the meaning of cl. 2 (3) and cl. 3 (1)? Applying the ordinary standards of common sense and interpretation of language, I conclude, unhesitatingly, that they are not. On that view (which was the view of HARMAN, J.), it follows that this appeal must fail. I do not think that I shall improve the matter by further elaboration; and my refraining from so doing will not, I am sure, be taken by counsel for the tenants as disrespectful to his argument. It is a question of construing the lease in the light of the facts and the usage of language; and so doing, I reach the conclusion that the windows which are the subject of the application are not part of the main walls and are, therefore, outside the scope of the landlord's obligation to repair.

ROMER, L.J.: I agree. The tenant's contention before the learned judge was described by the judge, in the note of the judgment which we have, as being that glass and wooden window frames were part of the main walls of a house; and that is the substance of the contention of counsel for the tenants before us. At first sight it appears to be a surprising one. As my Lord has pointed out, it has, apparently, the support of WOODFALL ON LANDLORD AND TENANT (25th Edn.) (1954) in a passage at p. 760 which is based on *Boswell* v. *Crucible Steel Co.* (1) ([1925] 1 K.B. 119). In my opinion, *Boswell* v. *Crucible Steel Co.* (1) did not decide anything of the kind. The decision in that case is accurately stated in the headnote, to this effect:

> " In a lease of a house the term ' fixture ' means something which is affixed to the premises after the structure of the house is completed. It does not include things which form part of the original structure itself."

That was the decision, and at the beginning of his judgment, BANKES, L.J., said this (ibid., at p. 121): " The question [before the court] depends upon what the original structure of the house was ". He came to the conclusion which is shown by the headnote. I think that counsel for the tenants would recognise that that was so: but he relied on certain observations which were made, particularly by BANKES, L.J., and ATKIN, L.J., as showing that windows form part of the walls. Those observations, I think, cannot be divorced from the facts of the case which was before the court, and the facts were that, the premises being business premises, practically the whole of the sides fronting the street in question consisted of plate glass windows; the windows were of the usual kind, and were not made to open. Those being the facts—and BANKES, L.J., condescended to detail in the matter of measurements—it is not surprising to find that all the members of the court regarded it in that case as being not an abuse of language to say that those plate glass windows could be regarded as, in the language of ATKIN, L.J. (ibid., at p. 123), " representing the walls of the house ". I think that that shows what, indeed, is obvious—that questions of this kind are questions of degree and not, as counsel would have us hold, pure questions of law.

I ventured to suggest in the course of the argument that it would not be a misuse of language to describe, for example, the walls and roof of the old Crystal

* See per SCOTT, L.J. ([1937] 2 All E.R. at p. 595).

A Palace as being made of glass, and if they were regarded as a series of windows the latter would form the walls, because the whole structure was glass. On the other hand, in the case of a small house with ordinary windows, it does not appear to me to be possible to say that the windows form part of the walls of the house, still less that they form part of the " main walls " of the house, " which ", as the learned judge said, " support the structure of the building or have directly B to do with its stability ". Consequently, I think that, in so far as there are observations to be found in *Boswell* v. *Crucible Steel Co.* (1) supporting the contention of counsel for the tenants, they are to be read in the light of the particular facts which were before the court and were not intended to be of general application. I accordingly agree with LORD EVERSHED, M.R., in the opinion which he has expressed as to the modification which should be introduced C into the passage from WOODFALL ON LANDLORD AND TENANT (25th Edn.), at p. 760. As for *Taylor* v. *Webb* (3) ([1936] 2 All E.R. 763), I have nothing to add to what my Lord has said. I agree that this appeal must be dismissed.

ORMEROD, L.J.: I also agree, and I have nothing to add to what has been said about *Boswell* v. *Crucible Steel Co.* (1) ([1925] 1 K.B. 119) and *Taylor* v. D *Webb* (3) ([1936] 2 All E.R. 763). Those are cases which were decided on their own special facts and are of little avail to the tenants on the particular facts of the present case. The issue is whether the windows in the walls of this house—a photograph of which we have before us—can be regarded as part of the " main walls " of the building. HARMAN, J., in his judgment, defined the " main walls " as " those which support the structure of the building or have directly to do with its stability "; and I suppose that, in addition, they go further than that in E that they are a necessary part of the building, as they inclose, or help to inclose, the area on which the building or structure is erected. But they may well perform another function. In most buildings it is necessary to have means of ingress and egress, and, of course, some means of admitting light: therefore, the walls form the setting for the necessary doors and windows which certainly a dwelling-house and a very large number of other buildings must have. But to F say that those doors and windows, inserted in those settings, are part of the main walls of the building seems to me to be going very much further than the ordinary use of language would require or allow. It is, as ROMER, L.J., has said, a matter of degree. There may be cases where the walls are built so much of glass that it would be impossible to say whether they are walls or windows. In the sense that they admit light they are windows, and in the sense that they G inclose the premises they are walls. In the case of a house of this kind, however, an ordinary house with walls and the normal amount of windows, that position of course cannot apply. I am satisfied here that, on the ordinary use of language, it would not be a proper construction of the terms of the covenant to say that the windows form part of the main walls of the structure. I would therefore dismiss the appeal.

Appeal dismissed.

Solicitors: *Eric P. Hanney* (for the tenants); *Nicholl, Manisty & Co.* (for the landlord).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

R. *v.* CLUCAS. R. *v.* O'ROURKE.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Donovan and Ashworth, JJ.), February 2, 1959.]

Gaming—Fraud in wagering—Betting transactions with bookmaker—Bookmaker induced to accept bets by false pretence as to identity—Intention not to pay losses—Gaming Act, 1845 (8 & 9 *Vict. c.* 109), *s.* 17.

The appellants, C. and O., operating together, induced a number of bookmakers to accept bets from them by pretending that they were placing small bets for a number of persons and that, therefore, credit for substantial sums could be given to them, whereas they were in fact making large bets on behalf of themselves alone. The method followed by them was that one of them, C. or O., would speak to a bookmaker on the telephone, giving a false name and pretending that he was, for example, a foreman on a local building site and that he wished to place bets for a number of the workmen employed there; and the bookmaker would accept him, under the assumed name, as a client for the purpose of placing bets on behalf of a number of workmen. If the appellants won they collected the money, but if they lost they moved to another locality (except that on two occasions O. paid small losses). The appellants were charged with fraud in wagering, contrary to s. 17 of the Gaming Act, 1845*, and were convicted. On appeal it was contended on their behalf that they were not guilty of any offence against s. 17 because it had not been shown that there was some fraud in the winning of the money, e.g., in the race itself in respect of which a wager was made.

Held: the appellants were guilty of fraud in wagering, within the meaning of s. 17 of the Gaming Act, 1845, because, (a) at the time when they placed bets they were fraudulently representing, or continuing the fraudulent representation, that they were acting for a number of men, thus inducing the bookmakers to accept their bets without further inquiry, and (b) they had no intention of paying losses, if the losses were of a substantial amount.

R. v. *Leon* ([1945] 1 All E.R. 14) followed.

Appeals dismissed.

[As to fraud in wagering, see 10 HALSBURY'S LAWS (3rd Edn.) 822, para. 1587. For the Gaming Act, 1845, s. 17, see 10 HALSBURY'S STATUTES (2nd Edn.) 755.]

Cases referred to:

(1) *R.* v. *Leon*, [1945] 1 All E.R. 14; [1945] K.B. 136; 114 L.J.K.B. 140; 172 L.T. 28; 109 J.P. 58; 30 Cr. App. Rep. 120; 15 Digest (Repl.) 1195, *12,129*.

(2) *R.* v. *Brixton Prison (Governor), Ex p. Sjoland & Metzler*, [1912] 3 K.B. 568; 82 L.J.K.B. 5; 77 J.P. 23; 15 Digest (Repl.) 1194, *12,127*.

(3) *R.* v. *Moore*, (1914), 10 Cr. App. Rep. 54; 15 Digest (Repl.) 1195, *12,128*.

Appeals.

The appellants, Baden Geoffrey Clucas and George Peter O'Rourke, were indicted at Hampshire Assizes, on Sept. 23, 1958, on an indictment containing nine counts. The first six counts charged them both with obtaining money by fraud in wagering on the events of horse races, contrary to s. 17 of the Gaming Act, 1845. The particulars of the first count were that on a day between June 2 and June 6, 1958, in Hampshire, by fraud in wagering on the events of horse races, the appellants won and obtained the sum of £27 19s. 7d. from Leslie Charles Eustace, a bookmaker, by a false pretence. The particulars of the second, third, fourth, fifth and sixth counts related to other sums alleged to have been similarly obtained from other bookmakers in Hampshire and in Dorset. The seventh count charged a similar offence against Clucas alone. The eighth count charged both appellants with conspiracy to defraud, the particulars being

* The relevant terms of s. 17 are printed at p. 439, letter I, post.

that on divers days between June 2 and Aug. 2, 1958, in Hampshire, they conspired together and with other persons unknown to defraud such bookmakers as should thereafter be induced to bet with them by false representations that they were placing small bets on behalf of a number of persons and that, therefore, credit for substantial sums could be given safely by such bookmakers, whereas in fact they intended to make, and did make, large bets on behalf of themselves alone. The ninth count charged both appellants with a similar offence, in Dorset, on divers days between July 28 and Aug. 2, 1958.

On Sept. 24, 1958, the appellant Clucas was convicted on all counts and the appellant O'Rourke was convicted on all the counts against him excepting count 2. Clucas was sentenced to seven years' preventive detention, and O'Rourke was sentenced to two years' imprisonment. Both the appellants appealed against their conviction, and Clucas also appealed against his sentence.

I. S. Hill for the appellant Clucas.
N. R. Blaker for the appellant O'Rourke.
Michael Lee for the Crown.

LORD PARKER, C.J., delivered the judgment of the court: The appellants were tried at Hampshire Quarter Sessions on seven substantive offences of fraud in wagering contrary to s. 17 of the Gaming Act, 1845, and also on two charges of conspiracy to defraud bookmakers. The reason why there were two alleged conspiracies was that one course of conduct concerned Hampshire and another course of conduct concerned Dorset. As regards the seven substantive offences, both appellants were charged jointly on six of them and Clucas on the seventh.

What happened in this case was that Clucas and, as the jury found, O'Rourke set about defrauding bookmakers. There is no doubt that Clucas, at any rate, is a complete menace, as his convictions show and as, indeed, one of the law reports shows*. Their scheme was this: they would go to some place—they started at Aldershot—and one or other of them would ring up the local bookmaker, giving a false name and pretending that he was a foreman, or at any rate engaged on some works contract, and that the men on the site wanted to place bets, and he would ask whether the bookmaker would accept him, under the assumed name, as his client for the purpose of placing bets on behalf of workmen. It is also quite clear that in all cases the appellants never intended to pay losses, if the losses were of any substantial amount. I say that because O'Rourke did pay two small losses. Generally, however, when they won they collected their bets, and when they lost they moved on to the next place. Having exhausted Hampshire they went and did the same thing in Dorset. As soon as a bookmaker asked for the payment of losses or asked for a deposit or made further inquiries, they moved on, and it was not until fairly late in the day that the police were brought in and laid a trap, and the appellants were finally caught.

The main point in this appeal taken by both the appellants is that, whatever anybody may think of their conduct and whether it is criminal or not, it does not come within the words of s. 17 of the Gaming Act, 1845, as charged. They were charged

> ". . . with obtaining money by fraud in wagering on the events of horse races, contrary to s. 17 of the Gaming Act, 1845 . . ."

Section 17, so far as relevant, is in these words:

> " Every person who shall, by any fraud . . . in wagering on the event of any game, sport, pastime, or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence . . ."

* *R.* v. *Clucas* ([1949] 2 All E.R. 40), where the appellant was sentenced to twelve months' imprisonment for conspiring with another man to defraud a bookmaker.

It is said that it is necessary in any charge under this section to show that money has been won by fraud as opposed to obtained by a fraud. The winning, it is said, must have been through some fraud in the play, the gamble or the sport, whatever it may be. If I may give an example, it is said that fraud in inducing bookmakers to accept bets, as in the present case, by pretending that one is acting for other people, acting in a false name, and with no intention of paying losses, is not a fraud in wagering, because there must be some fraud in the race itself. It is clear that that is a view which has been taken by certain of the text-books, in particular RUSSELL ON CRIME (11th Edn.) (1958), pp. 1373-1376. At p. 1376 the author quotes the vital words of the section as being these:

> " Every person who shall, by any fraud, or unlawful device or ill practice . . . win from any other person to himself . . . any sum of money . . ."

I venture to think that those are not all the vital words because what is omitted from that quotation is the fraud which is laid down in the section, namely, either a fraud in playing at the game in question or

> ". . . in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering . . ."

It is perfectly true that the money is won by the horse winning, but it was held by this court in *R.* v. *Leon* (1) ([1945] 1 All E.R. 14) that, although that is true, it is enough to justify a person being found guilty under this section that there was fraud in the actual wagering. In *R.* v. *Leon* (1) the facts were much the same as those in the present case. The fraud there consisted of a representation to the bookmakers that the accused had means enough to pay losses of £500 a week. That was a representation which was made dishonestly in order to persuade the bookmaker to accept the bets. OLIVER, J., a judge of very great experience in criminal matters, summed up to the jury in these words ([1945] 1 All E.R. at p. 19):

> " Do you regard that as money that he had won by cheating in the circumstances of this case? Before you come to that conclusion, it seems to me you would have to come to the conclusion that you are satisfied upon the evidence . . . that when he entered into those three sets of transactions he never intended to pay if he lost; that he intended to put the money in his pocket if he won, but he never intended to pay if he lost."

There was an appeal to this court, and the decision of the court was given by SINGLETON, J. He referred to s. 17 and, having quoted the relevant words of the section, he said ([1945] 1 All E.R. at p. 18):

> " It is to be observed that something more than what is commonly known as obtaining money by false pretences is contemplated by the legislature."

Then, having referred to certain facts, he went on (ibid.):

> " The difficulty is to see what ' in wagering ' means. For the purposes of this appeal it must be taken that the jury, who had this case before them for some time, were all satisfied that the appellant was fraudulent throughout. Counsel for the appellant cited to us authorities under this section which were all dealing with games of cards. They were *R.* v. *Brixton Prison (Governor), Ex p. Sjoland & Metzler* (2) ([1912] 3 K.B. 568) and *R.* v. *Moore* (3) ((1914), 10 Cr. App. Rep. 54). In those cases it was said that in a game of cards or a game such as a three card trick, it was not sufficient to show that there was fraud before the game started, but there must be shown fraud in the course of the game itself. Of course, a game of cards is not quite the same thing as wagering. The act of making a wager is done by a word or a few words, an offer and an acceptance. Counsel for the respondent submitted that unless in the circumstances of this case the offence of fraud in wagering was committed, it was difficult to see when it could be, and, as he remarked, wagering is instantaneous, and he submitted that the circumstances of this

A case showed that there was evidence on which it was open to the jury to find fraud in wagering."

SINGLETON, J., then quoted the words of the summing up and went on to say ([1945] 1 All E.R. at p. 19):

"The real question which was put to the jury was: Was the appellant B fraudulent throughout, and they said: Yes, he was. That seems to us to mean, and necessarily to mean, that at the time that the appellant made each of these bets with the bookmaker, he intended to cheat; he was fraudulent and at the moment of making the bet, he intended to cheat and defraud the bookmaker."

That was a decision of this court, and, if any members of the court felt that there C was any doubt with regard to the conclusion arrived at and the law laid down in that case, the court would adjourn and have a court of five to consider the matter, because this court will depart from one of its own decisions only if it is clear that some wrong principle has been laid down. The court, however, has no reason to think that *R.* v. *Leon* (1) was wrongly decided.

In the present case it is abundantly clear, if one looks at the moment when D these bets were placed, that the appellants were fraudulently representing and continuing the representation that they were acting for a number of men, thus inducing the bookmakers to accept their bets without further inquiry. It is also clear that, at the time when they placed their bets, they had no intention of paying losses. That being so, there was clearly a fraud in wagering within the principle laid down in *R.* v. *Leon* (1), and the appeal on that ground must fail.

E Counsel for O'Rourke took a number of other points. In particular, he maintained that O'Rourke had been prejudiced by a ruling admittedly given, but at a very late stage, in regard to a statement by Clucas. Clucas had made a statement to the police in which he said that he and O'Rourke were acting together in this matter. No ruling was obtained as to the admissibility of that evidence against O'Rourke until after the evidence had been given. No doubt that was because the F deputy chairman was not asked to rule on it earlier. When he was asked to do so, he did rule in the presence of the jury that the statement of Clucas was not, in any sense of the word, evidence against O'Rourke. There followed the speeches of counsel, and in his summing-up the deputy chairman said:

"You have heard a great deal of discussion in the course of this case about G the statement that Clucas made, which has been proved by the police officer. You heard me rule this morning that that statement is no evidence of conspiracy against O'Rourke; it is only evidence against Clucas. On the other hand, you have also heard me rule that, in my judgment, there is ample evidence for you to consider quite apart from that statement which you will put out of your minds when you consider the case against O'Rourke— H on the conspiracy, and it will be for you to weigh that evidence, the whole of it, and consider Aye or No, does it point irresistibly to one conclusion only."

There was thus a clear ruling and a direction to the jury that the statement of Clucas had to be put out of their minds completely when they were considering the case of conspiracy against O'Rourke. They were, however, left, in the opinion of this court, with abundant evidence on which they could hold O'Rourke I a party to the conspiracy. Counsel for O'Rourke pointed out that the pattern of operation of the two appellants was slightly different, but here were two men, living and working together, each apparently found with lists of the other's bets, and, broadly speaking, the pattern was the same. In the opinion of this court there was ample evidence on which the jury could convict O'Rourke of conspiracy. For these reasons the court feels that there is nothing in this case and that, as regards conviction, the appeals fail.

The first appellant, Clucas, also appeals against sentence. He was sentenced to seven years' preventive detention concurrent on each count. He is a man of

forty-eight. In 1949 he was sentenced to twelve months' imprisonment for conspiracy, in 1950 to two years for attempted false pretences and conspiracy, in 1953 to three years for attempted false pretences, and in 1957, in Scotland, to six months for attempted fraud. As has been said before, this man is a menace to bookmakers and the court can see no reason to interfere with the sentence. Accordingly, the appeal against sentence is also dismissed.

Appeals dismissed.

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellants); *W. Bradly Trimmer & Son*, Alton (for the Crown).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re DUKE OF WESTMINSTER (*deceased*). KERR AND OTHERS *v.* DUCHESS OF WESTMINSTER.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), January 27, 28, 1959.]

Income Tax—Annuity—Annuity free of income tax—Statutory variation of tax burden—When "provision" made—Deed—Benefit contingent and future on Sept. 3, 1939—*Income Tax Act*, 1952 (15 & 16 *Geo.* 6 & 1 *Eliz.* 2 *c.* 10), *s.* 486 (1).

By a deed of appointment dated Feb. 19, 1930, W., in contemplation of his marriage to the defendant, (a) irrevocably appointed by way of jointure to the defendant during her life, if the intended marriage should be solemnised within six months, a clear yearly rentcharge of £6,000, to commence from W.'s death; and (b) covenanted with the defendant and with the trustees that if the intended marriage should be solemnised within six months from the date thereof and if the defendant should survive W., his executors or administrators would during her life pay to her such a yearly sum as, together with the said rentcharge, would, after deduction of all income tax and surtax for the time being payable in respect of the said yearly sum and rentcharge, leave the net yearly sum of £6,000 free from all death duties and deductions whatsoever, such yearly sum to commence from the death of W. On Feb. 20, 1930, the marriage was solemnised. On Feb. 3, 1947, the marriage was dissolved, and on July 19, 1953, W. died leaving the defendant surviving. The yearly sums payable under the covenant at (b) above would be reduced to smaller sums if the covenant was a "provision . . . made before Sept. 3, 1939," within s. 486 (1) of the Income Tax Act, 1952.

Held: the deed of Feb. 19, 1930, created, by the covenant at (b) above, a right to an annuity on a future contingency and this, being an irrevocable obligation, was a "provision made" by the deed within s. 486 (1) of the Income Tax Act, 1952, before Sept. 3, 1939, though the contingency did not occur until after that date; therefore, s. 486 applied.

Berkeley v. *Berkeley* ([1946] 2 All E.R. 154) explained.

Appeal allowed.

[As to the modification of tax free provisions, see 20 HALSBURY'S LAWS (3rd Edn.) 420-422, paras. 786-790; and for cases on the subject, see 2nd DIGEST Supp.

For the Income Tax Act, 1952, s. 486, see 31 HALSBURY'S STATUTES (2nd Edn.) 460.]

A Cases referred to:

(1) *Berkeley* v. *Berkeley*, [1946] 2 All E. R.154; [1946] A.C. 555; 115 L.J.Ch. 281; 175 L.T. 153; 2nd Digest Supp.

(2) *Re Waring, Westminster Bank, Ltd.* v. *Awdry*, [1942] 2 All E.R. 250; [1942] Ch. 426; 111 L.J.Ch. 284; 167 L.T. 145; 2nd Digest Supp.

B (3) *Inland Revenue Comrs.* v. *Saunders*, [1957] 3 All E.R. 43; [1958] A.C. 285; 3rd Digest Supp.

Appeal.

This was an appeal of the plaintiffs, executors of the will of the late Duke of Westminster, from an order of DANCKWERTS, J., dated June 27, 1958. The plaintiffs by their originating summons dated May 29, 1956, asked for the determination of the following questions: (i) whether on the true construction of a C deed of appointment, charge and covenant dated Feb. 19, 1930, and of the Income Tax Act, 1952, the provisions of s. 486 of that Act were applicable to the yearly sums payable by the plaintiffs as executors of the late Duke of Westminster to the defendant during her life under the covenant contained in cl. (B) of the deed; (ii) if question (i) should be answered in the affirmative whether "the D stated amount" subject to reduction in accordance with the provision of s. 486 was (a) £6,000 or (b) the additional sum to make up the jointure rentcharge to £6,000 net after payment of income tax and surtax on the said rentcharge and on such additional sum, or (c) some other and what sum; (iii) how the gross liability under the said covenant should be ascertained. DANCKWERTS, J., held that s. 486 of the Income Tax Act, 1952, did not apply.

E *John Pennycuick, Q.C.*, and *E. I. Goulding* for the plaintiffs.

Charles Russell, Q.C., and *D. C. Miller* for the defendant.

LORD EVERSHED, M.R.: By a deed of appointment dated Feb. 19, 1930, the late Duke of Westminster, in contemplation of his marriage with the defendant, made (and I deliberately use the expression which I venture to think is F natural for a lawyer) certain provisions in favour of the defendant in the event of the marriage being solemnised. By cl. (A) (1) of the deed, he irrevocably appointed by way of jointure to the defendant during her life if the intended marriage should be solemnised within six months a clear yearly rentcharge of £6,000, to commence from the appointor's death and to issue out of the hereditaments specified in the schedule, being the subject of a certain resettlement. Then under cl. (B) the G Duke covenanted with the defendant and also separately with the trustees and each of them that if the said intended marriage should be solemnised within six months from the date thereof and if the defendant should survive the appointor, then his executors or administrators would during her life pay to her such a yearly sum as, together with the jointure rentcharge by cl. (A) thereinbefore appointed and for the time being actually payable to her under the resettlement H and that clause, would, after deduction of all income tax and surtax for the time being payable in respect of the said yearly sum and jointure rentcharge, leave the net yearly amount of £6,000 free from all death duties and deductions whatsoever, such yearly sum to commence from the death of the appointor and to be payable as therein mentioned; and the appointor thereby charged irrevocably the hereditaments specified in the schedule with the payment of the yearly sum. I We were informed that the effect of the resettlement (which is dated 1901 and is referred to in the passages I have read) was that the estate subject thereto passed to the son of the Duke of Westminster if he had a son, but in default of a son (as happened) became the property of the Duke.

The marriage was solemnised in fact on the following day after the deed, viz., on Feb. 20, 1930; on Feb. 3, 1947, it was dissolved. On July 19, 1953, the Duke died, leaving the defendant surviving.

The question raised by the summons and argued on this appeal is a question of the effect on the appointment of what is now s. 486 of the Income Tax Act, 1952

(formerly s. 25 of the Finance Act, 1941). I will read the relevant parts of s. 486. Sub-section (1) provides: A

> " Subject to the provisions of this section, any provision, however worded, for the payment, whether periodically or otherwise, of a stated amount free of income tax . . . being a provision which—(a) is contained in any deed or other instrument, in any will or codicil, in any order of any court, in any local or personal Act, or in any contract, whether oral or in writing; and (b) was made before Sept. 3, 1939; and (c) has not been varied on or after that date, shall, as respects payments falling to be made during any year of assessment the standard rate of income tax for which exceeds 5s. 6d. in the pound, have effect as if for the stated amount there were substituted an amount equal to the appropriate fraction thereof." B C

The definition of " appropriate fraction " is to be found in sub-s. (5), but I need not read it because it is conceded that " the appropriate fraction " in this case (if the section is applicable) is 23/29ths. It is also conceded that, if the section is applicable, the " stated amount " referred to is not the sum total of the obligations under the deed of appointment but what may be called the " making up " figure contained in cl. (B). D

At first sight, it would seem (with all respect) that the question is not a difficult one; for by the deed " provision " was " made " (and I use again the natural terms that I used at the beginning of this judgment) for the payment of a " stated amount " free of income tax, that provision being contained in a deed made before Sept. 3, 1939 (which hereafter, for brevity, I will call " the war date ") and not afterwards varied. It has, however, been argued in this court, and in the court below (and before DANCKWERTS, J., the argument succeeded) that on more accurate use of language it is not true to say, in the circumstances of this case, that provision for payment of the sum in question was made before the war date. E

In the court below, the conclusion in favour of the defendant was largely influenced (as I follow the judgment of the learned judge) by *Berkeley* v. *Berkeley* (1) ([1946] 2 All E.R. 154), which DANCKWERTS, J., thought bound him to hold as he did. In this court, the argument of counsel for the defendant has been put on a somewhat different ground, but it will be convenient for me to turn first to *Berkeley* v. *Berkeley* (1). It was a case (stating the facts quite briefly) in which, as a result of a will, made before the war date, by a testator who died afterwards, certain provisions for payment of annual sums in favour of his wife were contained; and the question was whether it could be said that the appointment in favour of his wife contained in the testator's will made, i.e., executed, before the pre-war date, though the testator survived that date, constituted a provision made before the war date within the meaning of the section (then s. 25 of the Act of 1941). The House of Lords answered that question negatively. As I read the speeches of the noble Lords, the ground on which they founded their conclusion was, briefly, this: that a will in no sense is effective until the testator's death: until that date the will is liable at any time to be wholly revoked: it is a mere expression of intention at the time that it is made. Though a man might, no doubt, say, in ordinary conversation, during his life, that he had " made provision " for his wife by his will, that in truth is not an accurate use of words: it only means, more strictly construed, that he has executed a will which, if unrevoked, will make provision for his wife on his death. F G H I

The view which I have tried to summarise is also supported (as the noble Lords pointed out) by the presumed intention of the legislature, viz., to remedy an injustice caused by the effect of war-time increases in taxation to heights undreamed of in pre-war philosophy. There is, indeed, no doubt that the effect of the high rate of taxation is to impose a very great burden, or is liable to impose a very great burden, on estates which are under obligation to pay tax-free amounts of income. Nevertheless (as was pointed out in the House of Lords), one still living was always able, when new taxation was brought to his attention—and,

as LORD SIMONDS observed, he would not be likely not to notice it—to alter his will; and if he did not do so he should be presumed to have intended the consequences. On the other hand, if the donor had already bound himself irrevocably, then there was no means whereby he himself could remedy the situation, except by obtaining with the consent of the beneficiary, if the consent could be obtained, a variation of his obligation, a situation contemplated and dealt with expressly by s. 486 (1) (c) of the Act of 1952.

I do not wish to take too much time by multiplicity of citations; but I would like to make some references first to the speech of LORD SIMONDS. He said (ibid., at p. 166):

> "The question is whether, for the purpose of s. 25, provision is made by will for an annual payment when the will is duly signed, or when, by the death of the testator, the will becomes operative. The question here is not when the will was made but when provision was made, a distinction which escaped the notice of MACKINNON, L.J., and, as I think, led him into error in *Re Waring* (2) ([1942] 2 All E.R. 250) . . . It would have been easy for the draftsman to refer the date to the document and combine the first and second conditions. He did not do so and I think that one good reason for not doing so was that, if he had, the section might have had just the meaning for which the respondents contend. But there would have been this odd result that, whereas in every other case than a provision by will the section would have dealt with rights known to the law which had accrued at the war date, in the excepted case of a provision by will it would have purported to operate on an ambulatory document which had no force or validity whatever at the war date and could have none until the testator died. By introducing the date in a separate condition and providing that the provision in question must be made before a certain date he postulates of every provision, however made, a common content, viz., that it has a legal effect before that date . . . Until a testator is dead, the beneficiaries under his will have no better provision than have the next of kin from their intestate ancestor. In my view, s. 25 must be read as dealing not with a spes successionis, nor with an expectation which rests upon a document liable at any moment to be torn up and having no force in the law, but with rights known to the law and enforceable by one man against another."

LORD UTHWATT, after referring to the presumed legislative intention to which I have already made allusion, said ([1946] 2 All E.R. at p. 169):

> "One further general observation may be made. Testamentary instruments appear in s. 25 (1) of the Act in the middle of a list of other instruments all of which were in effective operation on Sept. 3, 1939, and the section applies in the same way as respects the effect of the provision whatever be the character of the instrument in which the 'provision' is contained. The general lay-out of the section, as well as the substance of the matter, suggests that the legislature was dealing with a closed series of transactions involving, therefore, only the testamentary dispositions of testators who died before the war date."

Finally, I go back to the leading speech of VISCOUNT SIMON, on which I think DANCKWERTS, J., perhaps most particularly relied, since he made a citation from it immediately before the statement of his conclusion. VISCOUNT SIMON said (ibid., at p. 157) (and this is the passage, or part of it, which DANCKWERTS, J., cited):

> "There is a clear distinction drawn in the section between a provision 'contained' in a document irrespective of date and a provision 'made' before Sept. 3, 1939. Language is very ineptly used if one speaks of 'making' a clause. It is not the instrument, but the provision, for which a latest date is

prescribed. Moreover, all the other documents mentioned, except a will or codicil, are such as would confer a vested right to the payment of the annuity free of tax—a benefit created at a time when income tax at 10s. in the pound was in no one's thoughts . . . The will of a living testator, on the other hand, confers no right on anyone to any benefit therein mentioned. Even if it existed side by side with a covenant not to revoke, the covenantee has no rights under the will until the testator is dead."

It will be noticed, from the passages which I have read (and it may be taken that the same is applicable to the passages which I have not read), that there are in the speeches no expression of opinion at all on what the effect of the section would be in such a case as the present. It was pointed out by counsel for the defendant that if the matter was as simple as counsel for the plaintiffs suggested, then one would perhaps have expected to find a statement of the simple contrast; but in truth it is clear that their Lordships adhered strictly, from beginning to end, to the sole point which was before the House for its determination.

DANCKWERTS, J., took it, I think, that the effect of the speeches was to lay it down, not only in the case of a will but in all cases, that a " provision made " meant, for the purposes of the section, a provision which had become effective in possession or enjoyment. Counsel for the defendant did not go quite so far as that. His main argument was based on the contingencies in the relevant clauses of the appointment which I have read. Counsel accepted the proposition that the word " payment " in sub-s. (1) must include payments in the future as well as present payments; and in any case I am satisfied that that must be so. Further, counsel was prepared to accept arguendo, without conceding the point, that the case might be otherwise if, for example, A covenanted, at a pre-war date, to pay to B X pounds per annum free of tax for ten years from some post-war date. But (as he said) that was not this case; and he contended (and with some truth) that this was not a matter where one could find some neat, logical pattern to cover all cases. All that counsel was concerned with in this case (as he pointed out) was this: that here the only effect that the deed could be said to have had on its execution before the war date was that there was a covenant or obligation, subject to two contingencies, to pay future annual sums; the two contingencies being, first, the contingency that the marriage should take effect in six months, and secondly, that the defendant should survive the appointor. Counsel did refer to a third contingency, as to availability of the subject-matter; but about that I do not take further time.

I agree entirely so far with counsel for the defendant that we are only concerned with this case. Thus, I express no view, on the one hand, what would be the effect of the case intimated by LORD SIMON, to which he did not give an answer, so far as relevant to this case—viz., the case where a man had executed a will containing a provision such as one finds here and at the same time executed a covenant not to revoke it. Equally, I express no view what the effect of the section would be if there were an appointment somewhat in the same form as that in the present deed, but where the deed contained an unqualified power of revocation at any time during the appointor's lifetime. I also express no view what the situation would have been if the period of the marriage contingency had been extended to cover Sept. 3, 1939, and the marriage had not in fact been solemnised on that date. The fact is, in the present case, that on Sept. 3, 1939 —on the war date—the marriage had been solemnised, and that on that date the Duke had bound himself irrevocably, and charged his estates in support of his executors' obligations, to the respondent to pay her a stated amount if she survived him—that is, from the date of his own death—for the rest of her life. Applying the ordinary tests of language, according, that is, to its ordinary common-sense usage, which is, I apprehend, appropriate to an Act of Parliament, in the absence of something special, I think that a " provision " had been " made" before Sept. 3, 1939, for payment of a " stated amount ".

A I accept the test which counsel for the plaintiffs put in the course of his reply: the defendant is now in receipt of certain annual sums, and if the question be asked by virtue of what right is she being paid, the answer is, surely, by virtue of the right which was created by the execution of the appointment before the war date.

It will be noticed that the other view would lead to very extraordinary B anomalies. I take as an example the distinction (if the argument of counsel for the defendant is right and if the concession that he made in argument be made) between these two cases: first, a right to receive X pounds contingent on the recipient attaining twenty-one or surviving a particular date, and second, an absolute right to receive, from some future date, whether the beneficiary survives or not, a stated amount, or to receive such a stated amount subject to C some prior interest. If the test is applied which was applied in *Berkeley* v. *Berkeley* (1), that of considering the purpose of the legislation, it is plain that there can be no distinction whatever between the two cases which I have suggested: in both cases an obligation has been entered into which would result in a liability which, regarded from this standpoint, could not have been intended, and from which there can be no escape—apart from voluntary variation or as a D result of the legislation. Similarly, ORMEROD, L.J., in the course of the argument, put the case of a will, not only made, but proved, before the war date, but containing a provision for payment of some future stated amount. Once again it is plain that, if the evil which the legislature intended to remedy be looked at, that is a case where legislation is as much required as it would be in E the straightforward case of an obligation, which had become effective in possession by the pre-war date, to pay a stated sum in a certain event.

I should add that reference was made in the course of the argument to *Inland Revenue Comrs.* v. *Saunders* (3) ([1957] 3 All E.R. 43). There was in that case some reference to *Berkeley* v. *Berkeley* (1), but in my judgment the references do not carry the matter any further.

F I, therefore, conclude, for my part, first, that there was nothing in the reasoning or the speeches in *Berkeley* v. *Berkeley* (1) which binds this court to hold in favour of the defendant; and secondly, that, the matter being treated, therefore, as res integra, the case falls clearly (as I think) within the terms of the section, construed according to the ordinary standards of language. I would therefore, G for those reasons, allow the appeal.

ROMER, L.J.: I agree. In *Berkeley* v. *Berkeley* (1) ([1946] 2 All E.R. 154) the House of Lords held (in effect) that " provision ", in relation to s. 486 (1) (b) of the Income Tax Act, 1952, means the beneficial interest created by an instrument and not the instrument itself or a clause thereof. That being so, it appears H to me that in the present case two questions arise: (i) what beneficial interest, if any, was created in the Duchess's favour by the deed of 1930? and (ii), was such interest one within the scope of the section?

As to the first question, the interest which had been created by the covenant in favour of the Duchess was the right, on a future contingency, to receive a tax-free annuity out of the Duke's estate. There is no doubt but that, at the I relevant date, viz., Sept. 3, 1939, there was an irrevocable future obligation on the Duke's legal personal representatives to pay the annuity out of the assets of the estate if the contingency occurred, i.e., if the Duke died leaving the Duchess surviving; and a corresponding right was vested in the Duchess to receive it. There was no power reserved by the Duke under which the Duchess could be deprived of the right to receive the annuity if she survived her husband, and no power to release the Duke's estate from the liability to pay it. It follows, therefore, that a beneficial interest was conferred on the Duchess by the deed.

The second question that arises is whether that interest is one to which the modifying provisions of the section apply. If the section were confined to a right created before the relevant date to receive immediate payment of a tax-free annuity, then the Duchess's right to her future annuity would remain unaffected. In other words, a question posed by counsel for the defendant during the course of the argument would require a negative answer. That question was (as counsel put it): In this case, had there been provided before Sept. 3, 1939, a tax-free annuity for the Duchess? Counsel said the answer must be "No", and that only the Duke's legal personal representatives were or might become under an obligation to provide it. It seems to me that that was a somewhat formidable way of putting the Duchess's case; but I think the true answer to it is that the section is not, in its terms, confined to annuities immediately payable, and I can see no warrant for reading in a qualification which would in great measure whittle down—and for no intelligible reason—the effect of the section. Nor can I see anything in the speeches in *Berkeley* v. *Berkeley* (1) to suggest that the section is only concerned with annuities immediately payable, so that it excludes annuities payable on future contingencies. On the contrary, all their Lordships seem to have recognised that a right to a tax-free annuity, whether at law or in equity, which had been created before Sept. 3, 1939, was within the section, so long as it really was a right; and none of them suggested that the annuity must be presently payable.

On Sept. 3, 1939, the Duchess's position was that the interest which she then had under the deed was a contingent legal right to a future annuity which would ripen into a right to present payment if she survived her husband; and I agree with counsel for the trustees that the relevant date to consider is the date when this contingent right to receive the annuity was conferred and not the date when the annuity should become presently payable, if it became payable at all.

In conclusion, I would say that it is quite clear to me that the learned judge himself would have given effect to this view had he not thought himself precluded from so doing by the speeches in *Berkeley* v. *Berkeley* (1). For my part, I am satisfied that the speeches do not have that result; and I accordingly agree that this appeal must be allowed.

ORMEROD, L.J.: I agree, and although we are differing from the learned judge there is nothing that I wish to add to the reasons which have been given by my Lords.

Appeal allowed. Declaration accordingly. Leave to appeal to the House of Lords granted.

Solicitors: *William Charles Crocker* (for the plaintiffs); *Sydney Morse & Co.* (for the defendant).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

DIXON *v.* B.R.S. (PICKFORDS) LTD.

[Queen's Bench Division (Lord Parker, C.J., Donovan and Ashworth, JJ.), February 3, 1959.]

Road Traffic—Motor vehicle—Special type—Two tractors carrying abnormal indivisible load—Whether one vehicle—How many attendants necessary—Road Traffic Act, 1930 (20 & 21 *Geo.* 5 *c.* 43), *s.* 17 (1)—*Motor Vehicles (Authorisation of Special Types) General Order*, 1955 (*S.I.* 1955 *No.* 1038), *art.* 18.

B. Ltd. transported a heavy load, a cylindrical section, through Leeds. The maximum width of the load was more than nine feet six inches. In order to transport the cylindrical section it was mounted on bogies, one in front and one at the rear. A motor tractor was attached to the front bogies and another at the back was attached to the rear bogies. There were never less than four men, including the drivers of the tractors, in direct attendance on the load. Informations were preferred against B. Ltd. under the Motor Vehicles (Authorisation of Special Types) General Order, 1955, art. 18 (1)*, in that there were not at least three persons in attendance on each tractor. On appeal against the dismissal of the informations on the ground that the tractors and the load were one vehicle,

Held: the word "vehicle" in art. 18 (1) of the Order of 1955 did not include a combination of vehicles, nor did the singular "vehicle" include the plural; therefore the informations would be remitted for reconsideration.

Appeal allowed.

[For the Road Traffic Act, 1930, s. 17, see 24 Halsbury's Statutes (2nd Edn.) 590; and for a summary of the Motor Vehicles (Authorisation of Special Types) General Order, 1955, see Halsbury's Statutory Instruments (Interim Service) 475.]

Case Stated.

This was an appeal by way of Case Stated from the adjudication of the stipendiary magistrate for the City of Leeds sitting as a magistrates' court before whom the respondents were charged with two offences contrary to the Motor Vehicles (Authorisation of Special Types) General Order, 1955. On June 17, 1958, an information was preferred against the respondents in that on Mar. 4, 1958, they were guilty of an offence under s. 3 of the Road Traffic Act, 1930, in that they did unlawfully use a vehicle, to wit, motor Scammel tractor, on a road in the City of Leeds in contravention of art. 18 (1) of the order duly made by the Minister of Transport and Civil Aviation under the said Act called the Motor Vehicles (Authorisation of Special Types) General Order, 1955, in that the width of the load of the said vehicle being in excess of nine feet six inches, there were not at least three persons inclusive of the driver or drivers in attendance while the vehicle was being driven to attend to the vehicle and its load contrary to the said Act and the order. On the same day a second information was preferred against the respondents in the same words but relating to a Leyland tractor. The two charges were heard together on June 27, 1958, and judgment was given on July 10, 1958.

The following facts were found. (a) The respondents were the owners of the vehicle or vehicles in question and were on Mar. 4, 1958, using the same on a road in the City of Leeds for the purpose of transporting a heavy load described as a cylindrical section; (b) the maximum width of the vehicle including the load exceeded nine feet six inches; (c) at all material times there were never fewer than four men including the drivers of the tractors hereinafter mentioned in direct attendance on the load and what carried it; (d) the respondents, in giving notice as required by law to the Leeds City Police of their intention to

* Article 18 (1), so far as it is relevant, is printed at p. 451, letter B, post.

use the vehicle or vehicles to transport the load therein described referred to the tractors as separate motor vehicles, also to twin 8-wheeled pneumatic tyred bogies and the cylindrical section; (e) the load and vehicle or vehicles consisted of the following parts—(1) the load itself, that is the cylindrical section, which was not borne on a trailer in any usually accepted sense but was rigged in such a way as to act as its own " trailer " in that inside the cylindrical section there was a construction from which there protruded, at each end of the cylindrical section, two metal girders, so that the extremities of such girders were attached to the fore and hind bogies next referred to; (2) there was a bogie at the front of the cylindrical section and a second bogie at the rear; (3) there was a motor tractor at the front of the cylindrical section attached to the front bogie and a second motor tractor at the rear attached to the rear bogie; —(f) the whole of the transport, consisting of the load and machines above referred to, was connected up so as to move as one in bearing and transporting the load.

It was contended for the appellant that: (i) each of the vehicles mentioned in each of the informations was a vehicle within the meaning of art. 1 of the order; (ii) therefore at least three persons, inclusive of the driver or drivers, should have been in attendance on each vehicle; (iii) on the facts as found or agreed the offences alleged had been committed. For the respondents it was contended that: (i) under art. 18 (1) " any vehicle " must contemplate more than one mechanically propelled vehicle because in the same article it referred to " driver or drivers " but never to a " vehicle or vehicles " and there could be only one driver at any one time of a mechanically propelled vehicle; (ii) in any event there was only one mechanically propelled vehicle with a " load "; (iii) article 14 (f) stated:

> " The overall width of a heavy motor car, locomotive or tractor shall not exceed nine feet six inches and the overall width of a trailer shall not exceed nine feet six inches except where a greater width (but in no case exceeding twenty feet) is necessary for the safe carriage of the particular load carried by the trailer."

Therefore when it stated in art. 18 (1) " where the overall width of any vehicle, the use of which upon roads is authorised by this part of this order, and its load or of the vehicle or its load exceeds nine feet six inches " the word " vehicle " could only apply to the trailer portion of the combination because it was only a " trailer " which could exceed nine feet six inches in width, from which it would follow that the order really required that there should be three people to attend to the load; (iv) even if all these contentions were incorrect the respondents could not be guilty under both informations because there were four people in attendance including the " driver or drivers " and there was therefore the necessary number to attend to one mechanically propelled vehicle and its load.

The stipendiary magistrate held that the motor tractors used in the transport formed, together with the bogies and cylindrical section, one vehicle and load within the meaning of art. 18 of the Motor Vehicles (Authorisation of Special Types) General Order, 1955; and found the respondents not guilty on both charges. The question for the opinion of the High Court was whether or not, in the light of the facts found, he was right in so holding.

J. P. Widgery, Q.C., and *N. C. Bridge* for the appellant.
J. D. May for the respondents.

LORD PARKER, C.J.: The respondents were minded to move a very large steel cylinder which was in diameter over nine feet six inches, and they gave, as they had to give, notice of this. They moved it by means of two tractors, one a Scammel and the other a Leyland. As appears from photographs the cylinder itself was mounted at each end on bogies. The bogies in turn were

A attached at the forward end to one tractor and at the rear end to another tractor, and by that means as I understand it one tractor would pull the bogies and the cylinder and the tractor at the back would merely guide it round corners. The exact method of the attachment of the tractor to the bogies is not found in the case.

Article 18 (1) of the Motor Vehicles (Authorisation of Special Types) General B Order, 1955 (S.I. 1955 No. 1038) provides so far as is relevant:

> " Attendants. Where the overall width of any vehicle, the use of which upon roads is authorised by this part of this order, and its load or of the vehicle or its load exceeds nine feet six inches, at least three persons inclusive of the driver or drivers shall while the vehicle is being driven be in attendance to attend the vehicle and load . . ."

C

The learned magistrate found in effect that this combination of vehicles was, within the article, one vehicle, and since there were two drivers and two attendants, four people in all, the respondents had fulfilled their obligation for one vehicle, that is to say, three persons inclusive of the driver or drivers. The learned magistrate found that as a matter of law on the construction of the D order. He says in para. 5 of the Case Stated:

> " Article 18 envisages only two factors in relation to a transport within its provisions—(a) the load and (b) that which carries it, therein called ' the vehicle '. (c) The article nowhere uses the term ' vehicle or vehicles ' but it does use the term ' driver or drivers '. (d) It is reasonable to infer that the expression ' driver or drivers ' imports the use of more than one E self-propelled motivating vehicle inasmuch as such a vehicle must be driven by one person at one time, notwithstanding that he may have assistants either to take his place or for any other purpose."

The question which he leaves to the court is:

> " Whether or not I was right in law in holding that, in the light of the F facts found and the terms of art. 18 of the Motor Vehicles (Authorisation of Special Types) General Order, 1955, the motor tractors used in the transport formed, together with the bogies and cylindrical section, one vehicle and load within the meaning of the article."

In my opinion it is quite impossible to read the word " vehicle " where it occurs in art. 18 as in effect meaning vehicles or a combination of vehicles. G Such a construction not only does violence to the language actually used, but also is to be contrasted with other provisions in the order which explicitly provide either for vehicles or for a combination of vehicles. Thus, art. 14 (k) provides " no vehicle or combination of vehicles shall carry more than one abnormal indivisible load at any one time ". Article 21, which is providing for vehicles carrying abnormal indivisible loads over bridges, specifically pro- H vides " that in this article . . . a combination of vehicles carrying an abnormal indivisible load shall be deemed to be one vehicle ". Further it would appear, from the passage which I have read, that the learned magistrate attached considerable importance to the expression " the driver or drivers ", because he said that although " vehicle " was only used in the singular, the presence of those words denoted that more than one self-propelled vehicle was being con- I sidered under the term " the vehicle ". Counsel for the appellant has drawn our attention to various passages in the Road Traffic Act, 1930, under which this order was made, and it is to be observed that in s. 17 (1) it is provided that " In the case of heavy locomotives and light locomotives, two persons shall be employed in driving or attending the locomotive whilst being driven on any highway . . .". Therefore, one starts with this, that the Act under which this order was made is dealing with a case where a single vehicle might well have more than one driver. Accordingly, on the plain reading of art. 18 one must give " any vehicle " its ordinary meaning, and must not consider that term

as including a combination of vehicles. The ordinary meaning so to be given to the words " any vehicle " in this article clearly covers not merely a vehicle that is a motor-propelled vehicle but also a trailer itself. That being so, it is enough for this court to answer the question raised by the magistrate in the negative. It is not right to hold that as a matter of law a combination of vehicles is a vehicle nor, I might add, on the facts of this case as far as they are known, could it conceivably be possible to hold that this method of transport, which I have described, consisted merely of one vehicle. Accordingly, in my judgment this case must go back to the learned magistrate to consider the matter afresh. What the exact position is in this case it is quite impossible for this court to say. There are many alternatives which will be for the magistrate to decide. It may be—but we do not know—that the bogies are attached to the tractors at each end in such a way as to form part of the tractors, in which case there would be two vehicles each of which is carrying as its load a load which was in excess of nine feet six inches. It may be, on the other hand, that each of the sets of bogies forms a vehicle in itself, and a third alternative may be that the cylinder resting as it does on the bogies at each end and attached by iron girders to them forms itself a trailer, in which case there would be a single vehicle. In that event, however, even if it were to be treated as a single vehicle, a trailer of more than nine feet six inches would have to have three attendants quite apart from the necessary drivers of the two tractors. It will be for the magistrate to find the facts and, in particular, to see whether these respondents have been rightly charged, and in that connexion he will no doubt pay attention to any application which may be made to him to amend.

For these reasons it is sufficient to answer the question raised in the negative and to remit the matter to the magistrate.

Counsel for the respondents raised the point that it was unnecessary to send the case back because, as he put it, in any event whatever the findings were the result must be in his clients' favour. His argument, quite shortly, was that in construing art. 18 one could read for " vehicle ", " vehicles " in the plural and that accordingly whatever the number of vehicles, be they two, three, four or five, it would never be necessary in any case to have more than three persons inclusive of the driver or drivers. It is sufficient to say that in my judgment that argument fails. It seems to me that in the context here it is quite impossible to read the plural for the singular; indeed, if that had been the intention nothing would have been more easy than to provide that however many vehicles were used for a single load no more than three attendants were necessary.

DONOVAN, J.: I entirely agree.

ASHWORTH, J.: I agree.

Appeal allowed. Case remitted.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Leeds (for the appellant); *Goldingham, Wellington & Co.*, agents for *Morrish & Co.*, Leeds (for the respondents).

[*Reported by* E. Cockburn Millar, *Barrister-at-Law.*]

CADAM AND OTHERS *v.* BEAVERBROOK NEWSPAPERS, LTD.

[COURT OF APPEAL (Hodson and Morris, L.JJ.), January 28, 29, 1959.]

Libel—Justification—Newspaper report of issue of writ alleging conspiracy—Particulars of justification repeating fact of issue of writ—Whether sufficient to support justification.

Libel—Pleading—Amendment—Appeal against leave granted—Test.

The defendants published in their daily newspaper a statement that a writ claiming £350,000 damages for alleged conspiracy to deprive a former company director of his interests in certain limited companies had been issued by the company director against the plaintiffs. In an action for damages for libel brought against them by the plaintiffs in respect of the statement, the defendants pleaded in their defence that the words did not bear and were incapable of bearing any meaning defamatory of the plaintiffs. They subsequently obtained leave from a judge to amend the defence by adding a plea that the words were true in substance and in fact, with particulars as follows: " On or about Mar. 20, 1957, one [P.O.] of Sutton Coldfield, a former company director, caused to be issued on his behalf and subsequently served a writ . . . claiming against the plaintiffs herein damages for conspiracy to defraud and to deprive the said [O.] wrongfully of his interests and rights in certain limited companies ". On appeal by the plaintiffs against the judge's order giving leave,

Held: the test to be applied in determining the appeal was whether the amended defence ought to be struck out and, as pleas would be struck out (under R.S.C., Ord. 25, r. 4 and Ord. 19, r. 27) only in plain and obvious cases, the leave to amend should stand; for (per HODSON, L.J., at p. 455, letter F, post) the question whether, if the words published bore a defamatory meaning, a defence of justification could be supported by a plea that the defendants had merely stated truly that a writ had been issued and its contents was an arguable question.

Appeal dismissed.

[As to particulars on a plea of justification in an action for libel, see 24 HALSBURY'S LAWS (3rd Edn.) 93-95, para. 168; and for cases on the subject, see 32 DIGEST 99-101, *1308-1318*.

As to liability in libel for the repetition of defamatory statements, see 24 HALSBURY'S LAWS (3rd Edn.) 42.]

Cases referred to:

(1) *Morse* v. *Times-Republican Co.*, (1904), 124 Iowa Rep. 707.

(2) *De Crespigny* v. *Wellesley*, (1829), 5 Bing. 392; 2 Moo. & P. 695; 7 L.J.O.S.C.P. 100; 130 E.R. 1112; 32 Digest 87, *1171*.

(3) *Kemsley* v. *Foot*, [1951] 1 All E.R. 331; [1951] 2 K.B. 34; *affd.* H.L., [1952] 1 All E.R. 501; [1952] A.C. 345; 3rd Digest Supp.

(4) *London Corpn.* v. *Horner*, (1914), 111 L.T. 512; 11 Digest (Repl.) 191, *587*.

(5) *Hubbuck & Sons* v. *Wilkinson, Heywood & Clark*, [1899] 1 Q.B. 86; 68 L.J.Q.B. 34; 79 L.T. 429; 32 Digest 209, *2599*.

(6) *Hennessy* v. *Wright*, (1888), 57 L.J.Q.B. 594; 59 L.T. 795; 32 Digest 100, *1315*.

Interlocutory Appeal.

The plaintiffs appealed against an order of PAULL, J., made on Nov. 6, 1958, giving leave to the defendants to amend their defence to the plaintiffs' action for libel. On Mar. 22, 1957, the defendants published an article in the " Daily Express " containing the following:

" Zena Daniels gets a writ. Mr. Percy Oakley, 67 year old former company director of Sutton Coldfield, said last night that his solicitor had

issued a writ claiming £350,000 damages for alleged conspiracy to deprive him of his interests in certain limited companies. He named . . ." A

There followed the names of the four plaintiffs, a statement by Mr. Oakley that the writ* had been issued and that he had been told by his solicitor that it had been served, that the companies were four named companies, that he had been managing director of them and that two of the plaintiffs took over by arrangement. On Apr. 30, 1958, the plaintiffs issued a writ against the defendants, claiming damages for libel in the article. By their defence the defendants pleaded: B

" The said words do not bear and are incapable of bearing any meaning defamatory of the plaintiffs or of any of them."

On Nov. 6, 1958, PAULL, J., made an order reversing an order of Master HARWOOD made on Oct. 8, 1958, and giving leave to the defendants to amend their defence by adding the following clauses: C

" Further or in the alternative the said words are true in substance and in fact. Particulars: On or about Mar. 20, 1957, one Percy Oakley of Sutton Coldfield, a former company director, caused to be issued on his behalf and subsequently served a writ of this Honourable Court, claiming against the plaintiffs herein damages for conspiracy to defraud and to deprive the said Oakley wrongfully of his interests and rights in certain limited companies." D

The plaintiffs appealed to the Court of Appeal.

Colin Duncan and *Paul Sieghart* for the plaintiffs. E

Gerald Gardiner, Q.C., and *H. P. J. Milmo* for the defendants.

HODSON, L.J.: This interlocutory appeal is in a pending libel action, and on the assumption that the action has to be tried it would be wrong for this court to express any opinion on any matters which are not strictly necessary for the determination of the appeal. F

The order appealed from is an order of PAULL, J., dated Nov. 6, 1958, giving the defendants to the action, Beaverbrook Newspapers, Ltd., leave to amend their defence by adding a plea of justification supported by a paragraph containing the particulars of justification. The four plaintiffs by their writ are claiming damages for libel in an article which appeared on p. 7 of the " Daily Express " of Mar. 22, 1957. The gist of that article was that the four plaintiffs were defendants in an action on a writ claiming damages against them for alleged conspiracy. The article is merely a repetition of the writ. By their defence, the defendants first of all said that the words did not bear and were incapable of bearing any meaning defamatory of the plaintiffs, or any of them. The defendants had second thoughts, and do not now seek only to rely on the defence that the words to which I have referred are incapable of bearing any meaning defamatory of the plaintiffs, but seek to say in addition that the words are true. It is in this connexion that the controversy has arisen. G H

It is said that leave to amend was rightly refused by the master before whom the matter first came, because the particulars of justification do not justify any defamatory contents of the libel. To put the matter plainly, the particulars of justification merely say: I

" On or about Mar. 20, 1957, one Percy Oakley of Sutton Coldfield, a former company director caused to be issued on his behalf and subsequently served a writ . . . claiming against the plaintiffs herein damages for con-

* A copy of a writ is filed in the Central Office (R.S.C., Ord. 5, r. 13; Annual Practice, 1959, pp. 64, 65). Documents filed at the Central Office are accessible to the public on payment of the usual fee (R.S.C., Ord. 61, r. 17; and see notes thereto, Annual Practice, 1959, p. 1773, and " The Times ", Feb. 20, 1959, p. 3).

A spiracy to defraud and to deprive the said Oakley wrongfully of his interests and rights in certain limited companies."

The words " to defraud " were not in the original article but appear on the face of the writ. The plaintiffs say that those particulars cannot justify a libel on the footing that the words have a defamatory meaning, since the defendants are only saying that they had published defamatory matter which has come from B another source.

The principle is:

" ' Every republication of a libel is a new libel, and each publisher is answerable for his act to the same extent as if the calumny originated with him '. It is no defence to an action for such republication that the defendant received the libellous statement from another whose name he C disclosed at the time of publication."

I am reading from GATLEY ON LIBEL AND SLANDER (4th Edn.), p. 106*. The first sentence is an extract from the judgment of the court in *Morse* v. *Times-Republican Co.* (1) ((1904), 124 Iowa Rep. 707 at p. 717). The justification for the second sentence is given as *De Crespigny* v. *Wellesley* (2) ((1829), 5 Bing. 392), D to which we were referred. For the reasons indicated at the beginning of my judgment, I do not propose to refer in detail to that case, where no question of the administration of justice was concerned, as indeed BEST, C.J., pointed out. The position, therefore, is that if one chooses to repeat a calumny, one must take the responsibility for so doing, and, if the words are not in themselves defamatory, the question of justification does not arise. It is only if the words are defamatory of the plaintiffs that the plea of justification arises, and it is said the defendants E have given no support for that by merely stating that what they have said is derived from a writ.

It is sufficient to say that, although experienced counsel have been engaged on both sides in this case, so far as the court knows there is no authority directly in point. The question is open to argument whether, on the footing that the words are capable of being defamatory and are found to be defamatory of the plaintiffs, F the defence of justification can be supported by a reference to the issue of a writ. The plea is an alternative plea. There is no embarrassment to the plaintiffs in the alternative plea standing as it is, although, as counsel for the plaintiffs rightly says, and as necessarily must be the case in every libel action, in the forefront of this case will be the question whether the words bear or are reasonably capable of bearing a defamatory meaning. That question is primarily for the judge, G though it may become ultimately a question for the jury whether the words in fact are defamatory.

I have endeavoured to avoid expressing any view on what, perhaps, on the face of it, may seem to be a somewhat surprising contention on the part of the plaintiffs, that merely setting out the contents of the writ and publishing it in the newspaper in circumstances such as these is defamatory. There may not H be any general answer to that question. As counsel for the defendants submitted, it may depend on the circumstances of each particular case. It may perhaps depend on the nature of the proceedings. These two pleas, however, the plea of justification and the plea that the words are incapable of bearing a defamatory meaning, are interlocked to some extent, although they will have to be dealt with separately by the judge who directs the jury on this matter. I It is clear to my mind that, on this appeal, the question is not one of merely considering whether the learned judge has exercised his discretion in the sense that he has, rightly or wrongly, given leave to amend too late in time or without imposing any adequate safeguards: the question is whether, as a matter of law, this amended plea, supported by the particulars, ought to be allowed to stand.

The plaintiffs made their position quite clear, because, as soon as the amended plea was submitted to them, they considered it, and asked for particulars of the

* See also 24 HALSBURY'S LAWS (3rd Edn.) 42.

facts and matters relied on in support of the allegation that the plaintiffs conspired to defraud Mr. Oakley; other similar questions were contained in the letter asking for particulars, but those particulars were refused. The defendants, so far as it was possible for them to do so, confined themselves to stating that they were merely relying on the fact that charges had been made and were not purporting to say that there was any substance in those charges. As I see it, the position being that the learned judge had to decide, as a matter of law, whether this defence ought to be allowed to stand or not, it is the same as if the application before him had been an application to strike out the amended plea. The problem is the same and has to be looked at in the same way.

The relevant rule in considering the matter is R.S.C., Ord. 25, r. 4:

> "The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

It is agreed on all sides that it is only in plain cases that the court will act under that rule. Various authorities were referred to, and I will refer to some of the observations made by SOMERVELL, L.J., in *Kemsley* v. *Foot* (3) ([1951] 1 All E.R. 331 at p. 333), in which he considered not only R.S.C., Ord. 25, r. 4, but R.S.C., Ord. 19, r. 27, which is also concerned with striking out.

> "The type of case appropriate for application under these rules was considered, among other cases, in *London Corpn.* v. *Horner* (4) ((1914), 111 L.T. 512) and *Hubbuck & Sons* v. *Wilkinson, Heywood & Clark* (5) ([1899] 1 Q.B. 86), a decision of this court. These cases are referred to in the ANNUAL PRACTICE under R.S.C., Ord. 25, r. 4, and counsel for the plaintiff at one time submitted that so strict a principle did not apply to R.S.C., Ord. 19, r. 27. An examination of the latter case makes it, I think, clear that, although the application, as here, was under both rules, it was R.S.C., Ord. 19, r. 27, that was substantially in question. The effect of the cases is accurately summarised in the ANNUAL PRACTICE, and I think applies to both rules. They should be applied only in plain and obvious cases, and, if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under R.S.C., Ord. 25, r. 2."

As counsel pointed out to us in the course of the argument, the difference between the two orders is that under R.S.C., Ord. 25, r. 2, a point of law can be ordered and dealt with by the judge, whose decision is subject to appeal, whereas under the provisions of R.S.C., Ord. 25, r. 4, as contrasted with the provisions of R.S.C., Ord. 19, r. 27, there is no appeal without leave. That is an indication of the view taken by the courts that it is only in the most obvious cases that this drastic step of striking out can be taken.

We were referred to a decision of *Hennessy* v. *Wright* (6) ((1888), 57 L.J.Q.B. 594), a decision of the Court of Appeal where a kindred question arose, which I merely refer to in passing to show that I have it in mind. In that case the question was whether the plaintiff was entitled to the information whether the defendant intended to justify more than one meaning of the words, i.e., whether the libel was capable of meaning either that a charge had been made against the plaintiff or that a charge had been made and was true. The Court of Appeal confirmed the order which had been made by the Divisional Court that the plaintiff should be given that information. However, as counsel for the plaintiffs rightly says, the only thing that can fairly be said about that case is that no one took the point that there could not be any justification in merely stating that a charge had been made. The matter was not considered by the court. The members of the court were COTTON, BOWEN and FRY, L.JJ. COTTON, L.J., at the end of his judgment said (ibid., at p. 596):

A "... I think it will be a sufficient compliance with the order of the court if the defendant informs the plaintiff whether he intends to say the report is a true one, or whether he also intends to say that the facts charged against the plaintiff are true."

In my view, the course which this court ought to take on such an interlocutory application as this is quite plain, and that is that the appeal should be dismissed.

B

MORRIS, L.J.: I entirely agree. The plaintiffs in this case do not allege that the words " were used in a defamatory sense other than their ordinary meaning "—I quote the language of R.S.C., Ord. 19, r. 6 (2). It will be for the learned judge at the hearing to decide whether the words are capable of a defamatory meaning. It will be for the jury to say whether the words in fact do C bear a defamatory meaning. The plaintiffs do not specify, and are not obliged to specify, what is the ordinary meaning, or what are the ordinary meanings of the words that they allege; but they say that the words complained of are in their ordinary meaning defamatory.

In a case of this kind leave to amend would normally be given without any difficulty. An appropriate test, in the problem now before us, is to consider D whether, if the defence as originally delivered had been in the form for which leave has now been given, the part added by amendment and contained in para. 5 could have been struck out. That involves the question whether that paragraph discloses a reasonable answer, or whether it discloses no reasonable answer to the claim. That must involve a submission on the part of the plaintiffs that para. 5 could be no answer to any conceivable defamatory meaning which a jury might E find. The defendants at this stage do not know what is the ordinary meaning which the plaintiffs ascribe to those words, and they certainly do not know what is the ordinary meaning which a jury might ascribe to those words. It is quite clear that in giving particulars of justification the defendants are bound by the particulars that they have given: they cannot go beyond those particulars.

As I followed the submissions made before us, if it were thought that the F words complained of meant that the defendants were saying that the plaintiffs had in fact been guilty of a conspiracy to defraud or deprive Mr. Oakley of his interests, the defendants are not by their particulars as delivered saying that they justify that meaning. If the words have some other meaning, could those particulars as delivered possibly justify some other meaning? It is sufficient at this stage to say that at the trial the issues which have been referred to in the very G interesting arguments on both sides will have to be debated, and the learned judge who tries this case will have to give a careful direction to the jury; but this is certainly not the time to express any opinion on those matters that have been debated. It is certainly not a plain and obvious case. In my judgment, it could not be said that these particulars could not justify some conceivable defamatory meaning that somebody might say was the ordinary meaning of those H words.

I agree that this appeal fails.

Appeal dismissed.

Solicitors: *Basil Greenby & Co.* (for the plaintiffs); *Oswald Hickson, Collier & Co.* (for the defendants).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

ESPRESSO COFFEE MACHINE CO., LTD. *v.* GUARDIAN ASSURANCE CO., LTD.

[COURT OF APPEAL (Lord Evershed, M.R., Romer and Ormerod, L.JJ.), February 5, 6, 1959.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Intention to occupy premises on termination of current tenancy—Resolution of board passed—Landlord negotiating for lease of other premises—Undertaking given to court to occupy—Intention—Landlord and Tenant Act, 1954 (2 & 3 *Eliz.* 2 *c.* 56), *s.* 30 (1) (*g*).

The tenants were the assignees of business premises for the residue of a term of years expiring on Mar. 25, 1958. On Sept. 24, 1957, the tenants applied for a new tenancy to begin at the end of their existing lease, and subsequently the landlords (a well-known insurance company) served notice of opposition under the Landlord and Tenant Act, 1954, s. 30 (1) (g), on the ground that on the determination of the current tenancy they intended to occupy the premises for the purposes of a business to be carried on by themselves therein. In January, 1958, the tenants issued an originating summons applying for an order for the grant of a new tenancy under the Act of 1954. On Feb. 19, 1958, the board of directors of the landlords passed resolutions expressing their intention that the landlords would occupy the demised premises for the purposes of their business in the event of their obtaining possession of them, and authorising counsel on their behalf to give an undertaking to that effect to the court or to the tenants on the hearing of the tenants' application. The landlords were also negotiating with a view possibly to obtaining accommodation in other premises which were being erected nearby, and it was alleged that, if they obtained this, it would render unnecessary the occupation by them of the demised premises. At the hearing of the tenants' application, the landlords' undertaking was offered to and accepted by the court, and an order for the grant of a new tenancy was refused on the ground that the resolution of Feb. 19 and the undertaking given to the court showed at the time of the hearing an intention on the part of the landlords, sufficient to satisfy s. 30 (1) (g) of the Act of 1954, to occupy the premises for their own business. On appeal by the tenants,

Held: a new tenancy should not be granted to the tenants because the landlords had satisfied the requirements of s. 30 (1) (g) of the Landlord and Tenant Act, 1954, in that (a) they had shown that at the time of the hearing of the application they intended on the termination of the current tenancy to occupy the premises for the purposes of their own business, and (b) their intention was a real, fixed and settled intention, notwithstanding their negotiations to obtain accommodation in other premises.

Per LORD EVERSHED, M.R.: the undertaking given by the landlords and accepted by the court should be included in the order made.

Decision of HARMAN, J. ([1958] 2 All E.R. 692) affirmed.

[As to a landlord's objecting to the grant of a new tenancy of business premises on the ground that he intends to occupy them on the termination of the current tenancy, see 23 HALSBURY'S LAWS (3rd Edn.) 894, para. 1718.

For the Landlord and Tenant Act, 1954, s. 30 (1), see 34 HALSBURY'S STATUTES (2nd Edn.) 414.]

Cases referred to:

(1) *Lennox* v. *Bell*, (May 31, 1957), unreported.

(2) *Betty's Cafés, Ltd.* v. *Phillips Furnishing Stores, Ltd.*, [1957] 2 All E.R. 223.

Appeal.

This was an appeal by the tenants, Espresso Coffee Machine Co., Ltd., from

A an order of HARMAN, J., dated June 27, 1958, and reported [1958] 2 All E.R. 692, dismissing an application by the tenants for an order for the grant of a new tenancy of premises comprising the ground floor and basement of Nos. 227/228, The Strand, London, W.C.2, for a term of fourteen years from Mar. 25, 1958, at a rent of £3,500 per annum exclusive. The learned judge held that the landlords, Guardian Assurance Co., Ltd., had shown at the time of the B hearing an intention, sufficient to satisfy s. 30 (1) (g) of the Landlord and Tenant Act, 1954, to occupy the premises for their own business.

J. P. Widgery, Q.C., and *L. A. Blundell* for the tenants.
R. E. Megarry, Q.C., and *C. J. S. French* for the landlords.

LORD EVERSHED, M.R.: As HARMAN, J., said at the beginning of his C judgment ([1958] 2 All E.R. at p. 692), "This is a very peculiar case . . ." Its peculiarity arises from what I might call an oblique effect of the legislation in question, which (as will appear) put the respondent landlords, Guardian Assurance Co., Ltd., in something of a difficulty—I might almost say an artificial difficulty. None the less, I have, for my part, come to a clear conclusion, in accordance with that which HARMAN, J., reached.

D We are concerned with certain premises, Nos. 227/228, The Strand, which at the moment are occupied by the applicants, Espresso Coffee Machine Co., Ltd. (referred to hereinafter as "the tenants"). The history of the interest of the tenants and of the landlords in those premises is, briefly, as follows. In August, 1951, the landlords completed their purchase of 227/228, The Strand, an edifice which consists of a basement and six superjacent floors. In February, 1953, E they granted to British Bamboo Cane Co., Ltd., a lease of the ground floor and basement, for five and a quarter years from Dec. 25, 1952, at a certain rent. In October, 1955, with the consent of the landlords, British Bamboo Cane Co., Ltd., assigned the remainder of their term to the tenants. If no other matters had supervened, the lease of the ground floor and basement would have expired in the ordinary course on Mar. 25, 1958. The Landlord and Tenant Act, 1954, F was passed in July, 1954, and, therefore, I assume, was much present to the minds of both landlords and tenants. It is not, therefore, surprising that, as shown by the evidence (which I need not take time to read), what I may call "negotiation" took place between the landlords and tenants, from the early part of 1956. Nothing which is relevant came of that negotiation, and, on Sept. 24, 1957, the tenants gave formal notice, pursuant to the Act, asking that, at G the expiration of their term, they should be given a fresh lease, of fourteen years, at a very much enhanced rent. In further accordance with the provisions of the Act, the landlords gave a notice, in which they said that they would oppose the grant of any further lease, on the ground which is stated in s. 30 (1) (g) of the Act—namely,

H > "... that on the termination of the current tenancy the landlord intends to occupy the holding for the purposes . . . of a business to be carried on by him therein . . ."

In those circumstances, the originating summons was issued in January, 1958. Were it not for one circumstance (and it is from this that the peculiarity in the case arises), it would, I think, be quite plain that, whatever may have I been in the minds of the landlords before, they did at all relevant dates "intend" to move their insurance offices and business to 227/228, The Strand as soon as they could get possession. There was good reason for doing so since (as counsel for the tenants conceded from the evidence) the premises at which the landlords have carried on what is called the "Law Courts branch" of their business for some seventy-five years have become manifestly too confined. At about the time of the issue of the summons, however, it appears that a new star was seen in the firmament. Certain other premises, known as No. 199, The Strand, had been much damaged by enemy action. The Huddersfield Building Society

owned either the freehold or a long leasehold interest in the premises, and that society proceeded, about this time, to undertake work of reconstruction. The reason why this star fascinated the landlords—not unnaturally—was that here would be quite a new building, which might be even better than that provided by the ground floor and basement of Nos. 227/228, and negotiation of some sort then began between the landlords and the Huddersfield Building Society.

The relevant date for determining whether there was an " intention " such as would satisfy s. 30 (1) (g) of the Act of 1954 is now held to be at the hearing*; and it is not in doubt that when that date arrived the negotiation, such as it was, with the Huddersfield Building Society was very far from complete. The building itself was still in course of reconstruction, and there had been nothing in the shape of draft leases or contracts put before the landlords.

Before I look at the evidence (because this case really turns on a short point), I observe that it is in this respect that the Act may be said to have created, for someone in the position of the landlords, a peculiar and artificial difficulty. No one doubts, in this case, the complete bona fides of the landlords. Nobody suggests that they have ever pretended, for the purpose merely of getting rid of the tenants. Since, however, Parliament had said that at the relevant date a landlord, in order to prevent the grant of a new tenancy, must prove " intention "—as that word is understood when such epithets as " firm ", " fixed ", " real ", are applied to it—it will be seen at once that a difficulty is created if there is presented a possible and better alternative in the future. A landlord in that position obviously has to say to himself: " Of course, if I pin my hopes on this new building of the Huddersfield Building Society, I shall for certain lose any chance of recovering possession of No. 227, and then, in the end, I may not get No. 199 either ". As counsel for the tenants rightly pointed out, motive is something quite different from intention; and a landlord, placed in that position, has, as a matter of business, to say to himself: " For better or worse I shall have to make up my mind whether to pin all my hopes on No. 199, or whether to decide here and now to move to No. 227, even though I shall afterwards say ' What a pity: I would have done better to have relied exclusively on No. 199 ', or even though I may make another move thereafter ". He must, in common business sense, choose one or the other of the two alternatives which I have stated. It is the burden of the argument of counsel for the tenants that, yielding to natural human temptations, the landlords in the present case tried to have their bun and their penny and hesitated between the two, and, therefore, did not decide definitely one way or the other. It was the view of HARMAN, J., that that submission was incorrect—that the landlords did reach a firm decision, come what might thereafter, and, as I have earlier indicated, I think that that was the right conclusion, as I read the evidence.

At this stage I should refer, in deference to the arguments of counsel for the tenants, to one or two passages in the transcript of the shorthand note. First it should be stated that the only witness was a Mr. Bigland, who was not a director of the landlords, but was their deputy general manager and secretary at the time when he gave his evidence. On Mar. 11, 1958, he swore an affidavit which contained, among other things, these statements. In para. 10 he said:

> " The [landlords] for the reasons hereinafter stated [have] now made a definite decision to occupy the demised premises for the purposes of [their] said business on the termination of the term created by the lease."

Then, by way of underlining that statement, he said, in para. 16:

> " The [landlords have] decided that, even taking into consideration the disadvantages mentioned above, the demised premises are greatly more suitable for the carrying on of [their] business than the Fleet Street premises.

* See *Betty's Cafés, Ltd.* v. *Phillips Furnishing Stores, Ltd.* ([1958] 1 All E.R. 607).

A At a meeting of the general court of directors of the [landlords] held on Feb. 19, 1958 (at which meeting I . . . was present) the following resolutions were duly passed: '1. That in the event of the [landlords] obtaining possession of those parts of the premises . . . now occupied by the [applicants] as tenants the [landlords] will as soon as practicable perform all necessary works . . . and when these works are completed will forthwith take B up occupation of these parts for the said purpose; 2. That counsel appearing for the [landlords] in the application by [the tenants] now proceeding in the Chancery Division be authorised to give an undertaking either to the court or to [the tenants] that in the event of possession being obtained as aforesaid the [landlords] will as soon as practicable perform the works aforesaid and when they are completed will forthwith take up occupation of the C said parts of the premises . . ."

The resolutions were passed on Feb. 19. The affidavit was sworn on Mar. 11. The hearing before the learned judge was on June 27, and, for reasons already stated, it is to that date that it is necessary to direct attention. I, therefore, come back now to the evidence which Mr. Bigland gave in the witness-box when cross-examined on his affidavit. The learned judge had asked:

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> "Supposing you did decide to sign a contract for No. 199, would you then abandon the proposed move into No. 227 ?"

Mr. Bigland replied:

> "No, we would not abandon it. We have every intention of moving from our present address to No. 227, The Strand. We cannot get possession, E I think, even on the most optimistic estimate, of the 199 premises until well into next year at the very earliest."

There were other passages, no less unqualified, by way of expressing the then present intention. Learned counsel for the tenants, however, drew our attention to certain other answers given, particularly at the end of the cross-examination. It will suffice to refer to one. Counsel for the tenants was making the point F that, as a fact, assuming that the tenants took advantage of, for example, s. 64 (1) of the Act of 1954 which entitled them to stay on until a certain period had passed since the final determination of the application, it would be quite clear that the landlords would not be able to get possession of No. 227 until some date round about the present time. He, therefore, asked Mr. Bigland this question and got the following answer:

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> "Q.—If the situation arises that you cannot get possession of No. 227 until some date between November and February next, would you agree with me that obviously your board would then have to readdress its mind to this question, and decide whether it wished to go ahead with moving into No. 227 first, and then out and into No. 199 ? A.—Yes, I would agree with you that they would have to re-assess the position, but, of course, we have not H yet signed the contract for the lease of No. 199, so we do not really know the exact terms of that."

On the basis of that answer (and there are one or two others which may be said to be in the same vein), there was founded the argument which I have already stated—namely, that, in real truth, all that the directors had done I was to say "Assuming that we get possession about now—June—or soon thereafter, we have made up our minds to move in; but we are still keeping on with our negotiation, and, if the truth is that we are not going to get possession, on any view, until February, 1959, then, of course, we are not sure what the position would be." If that were a right assessment of the view of the landlords, it might be said, as counsel for the tenants contended, that, when one had examined it, and when one had analysed the extent of what they had said that they would do, it did not amount to a fixed intention of the necessary quality to satisfy s. 30 (1) (g).

Mr. Bigland, no doubt, could fairly state what the views of the board were because he would, in his capacities as deputy general manager and secretary, know them; but in fairness to him, it should be pointed out that it must always be a little difficult for someone in his position to be assertive at every point, and it is not surprising that in the course of a skilful cross-examination he agreed with counsel that, given certain facts, the board would, no doubt, "re-assess the position". Notwithstanding those answers, the learned judge (who saw Mr. Bigland) clearly came to the conclusion that, notwithstanding the delay and the possibilities, it was not correct to say that the landlords had still kept an open mind. The truth was (he found) that they had made up their minds to go into possession, come what might—even though the consequence might be that, as a matter of business, No. 199 would have to be abandoned, or, alternatively, that a double move would have to take place.

I cannot agree with the submission of counsel for the tenants that it was an essential characteristic of a decision to occupy No. 227 come what might, that the landlords would have to abandon the negotiations for No. 199. I cannot see that that follows. It might be (as I have indicated) that, as a practical business matter, even though the negotiations might be fruitful, they would cease to be worth while. I am, however, unable to accept the view that an intention to occupy No. 227 is inconsistent with still pursuing negotiations as regards No. 199—bearing particularly in mind, of course, the date to which we must direct our attention, June, 1958; and the view which I have formed is plainly (as I think) very much reinforced by the circumstance that, in addition to the resolution of February, 1958, Mr. Bigland's statement in his affidavit in March, 1958, and his further statements in the witness-box, learned counsel for the landlords gave in court to the learned judge the undertaking, the language of which I have read from para. 16 of the affidavit. That undertaking is quite unqualified and is given by counsel on behalf of a responsible company.

In the light of those circumstances, the learned judge expressed his conclusion as follows. Observing that the word which he had to construe was "intention" (more strictly, if I may be forgiven for the slight correction, it is "intends", but that does not matter), without any qualifying epithet, he said ([1958] 2 All E.R. at p. 694) that an "intention", to satisfy the section, must be "honest", "present", and "real". I do not think that he left out any characteristic which he should have borne in mind. He then said (ibid.):

> "As I understand it, at the time of the resolution [February, 1958], the possibility of obtaining a lease of No. 199 had already been raised. Nevertheless, the board expressed the intention to occupy No. 227, not contingently, not in the event of nothing better turning up, but absolutely, and they were willing to offer an undertaking to the court, and authorised that to be done."

Then, after referring to other cases in which undertakings had been offered, the learned judge proceeded (ibid.):

> "If these landlords give an undertaking, there is no question but that they have the power to honour it, and I think that there is no doubt that they will honour it. They are not the sort of company whose undertakings in a suitable case the court would hesitate to accept. It is not suggested that they could not carry out the undertaking. Therefore, as counsel at the Bar today is still authorised to make this offer to me and to the tenants, I must take the offer at its face value. If that is the case, I do not see how I can any longer doubt that the intention today exists. Whether by the end of the year it will exist any longer, I do not know. The tenants may so harass the landlords that they will change their mind . . ."

Well, the end of the year has passed, and counsel for the landlords is still instructed, if necessary, to repeat the undertaking: the same intention continues

A to exist. That, however, is not the point which has to be decided. The question is: Was the judge entitled to find as a fact, as he did, that at the date of the hearing before him—June 27, 1958—the landlords intended to occupy No. 227 for the purposes of their own business? I think, for the reasons which I have stated, that the learned judge was amply justified in concluding that they did.

Counsel for the tenants, in presenting the case, did not contend that a lease B in the tenants' favour for the full term of fourteen years, for which his notice had asked, should be granted. He said that a fair and just, and, therefore, the right, result would have been for the learned judge to have granted a short term—twelve months, or eighteen months, or something of that kind—which would have covered the period until the negotiations in respect of No. 199 could have been concluded, and then the matter could have been reconsidered. That C might have been a sensible thing to do, either by order or by agreement. It might have paid the landlords, because, if that had happened, presumably the tenants would have paid more than the rent which they had in fact paid since March, 1958. But that course, for one reason or another, was not really debated —it may have been too late in June—and nothing of that kind happened. Therefore, we have to decide the single question: On the date when the matter D was before HARMAN, J., was he justified in finding, as he did, that the requisite intention was then established? I repeat that, in my judgment, he was, and I therefore think that this appeal should be dismissed.

ROMER, L.J.: I entirely agree, and there is very little that I can add to what LORD EVERSHED, M.R., has said. If a landlord desires to rely on E s. 30 (1) (g) of the Landlord and Tenant Act, 1954, he has to show that on the termination of the current tenancy he "intends" to occupy the holding for business purposes; and it has been well established now, on the authorities, first that such an intention must exist at the hearing of the tenant's application, and, secondly, that the intention must be a real intention, fixed and settled. Having regard to the affidavit of Mr. Bigland and to his evidence in F the witness-box—to which my Lord has referred—one would have thought, prima facie, that even on that alone the two requirements to which I have referred were satisfied. Nothing could be clearer than the evidence which Mr. Bigland gave, and he repeated more than once, in categorical terms, in the evidence which he gave on behalf of the landlords, that the landlords did intend, if they got possession of No. 227, to go into occupation. When one G adds to that the fact that learned counsel was authorised to offer, and did offer, to the court the undertaking in the form which my Lord has read*, the matter really seems to be put beyond any doubt. Some undertakings, of course, are unacceptable. In *Lennox* v. *Bell* (1) ((May 31, 1957), unreported), one of the cases to which HARMAN, J., referred, the court was offered an undertaking but knew perfectly well that the person who offered it was incapable H of carrying it out. When the undertaking is offered by a responsible body like the landlords in this case, no such criticism can be levelled. It was an undertaking which the learned judge was prepared to accept, and which he did accept; and in regard to such an undertaking I would only quote a passage, to which counsel for the landlords referred, from the judgment of DANCKWERTS, J., in *Betty's Cafés, Ltd.* v. *Phillips Furnishing Stores, Ltd.* (2) ([1957] I 2 All E.R. 223 at p. 225), where he said: " . . . the undertaking seems to me to compel fixity of intention . . ." I know of no better way of describing it than that description given by DANCKWERTS, J., and it appears to me that, the undertaking having been given and accepted, it is perfectly decisive of the fixity of intention which, I agree, is a requisite element. For those reasons, and for the reasons which LORD EVERSHED, M.R., has stated, I entirely agree with HARMAN, J., in thinking that the landlords had established their case.

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* Ante, at p. 461, letter B.

ORMEROD, L.J.: I also agree, and I have nothing to add. A

R. E. Megarry, Q.C. (for the landlords): I do not know whether any steps should be taken at this stage to write the undertaking into the order?

LORD EVERSHED, M.R.: I think that it ought to have been in the order. If an undertaking is given to the court and is in terms accepted, I do not think that it is right that it should not be in the order. The order should B be amended so that the undertaking is read into it.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *Charles Caplin & Co.* (for the tenants); *Trower, Still & Keeling* (for the landlords).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*] C

INDEPENDENT TELEVISION AUTHORITY AND ANOTHER *v.* INLAND REVENUE COMMISSIONERS. D

[COURT OF APPEAL (Jenkins, Romer and Pearce, L.JJ.), January 14, 15, February 9, 1959.]

Stamp Duty—Bond, covenant, or instrument—Security—Executory agreement creating obligation—Agreement providing for services—Total amount ultimately payable ascertainable—Specified sum subject to increase or decrease in certain eventualities—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *Sch.* 1. E

By an agreement under seal dated May 23, 1955, a programme contractor was to provide programmes (which might include advertisements) to be broadcast by Independent Television Authority from stations, on days and within hours specified in the agreement. Broadcasting was to commence on a date between Aug. 15, 1955, and Nov. 15, 1955, to be determined F by the authority by giving notice to the contractor, and the contractor was to continue as a programme contractor under the agreement until July 29, 1964. The contractor was to pay the authority a fee of £495,600 per annum until Mar. 31, 1958, or the expiration of two and a half years from the commencement of broadcasting, whichever was the later, and a fee G of £536,900 p.a. thereafter. These payments might be increased or decreased in the event of an increase or decrease of five per cent. or more in a half-yearly index figure defined in the agreement compared with the index figure for all items in the interim index of retail prices published by the Board of Trade. The Commissioners of Inland Revenue assessed the stamp duty payable on the basis of the ad valorem stamp duty chargeable on a " bond, H covenant, or instrument of any kind whatsoever: (i) Being the only or principal or primary security for any annuity . . . or for any sum or sums of money at stated periods " under Sch. 1 to the Stamp Act, 1891, and computed the amount on the total of the sums specified as annual fees (£495,600 and £536,900) for the period Nov. 15, 1955, to July 29, 1964. On appeal,

Held: the stamp duty was properly computed because— I

(i) the agreement fell within the head " bond, covenant, or instrument " in Sch. 1 to the Stamp Act, 1891, notwithstanding that the payments were in consideration of services to be rendered (*Jones* v. *Inland Revenue Comrs.* ([1895] 1 Q.B. 484), *National Telephone Co.* v. *Inland Revenue Comrs.* ([1899] 1 Q.B. 250, [1900] A.C. 1), *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Comrs.* ([1909] 2 K.B. 604) and *British Italian Corpn., Ltd.* v. *Inland Revenue Comrs.* (SERGEANT ON STAMP DUTIES (3rd Edn.) 334) followed) and,

(ii) the sum of £495,600 per annum payable in the first two and a half years and the sum of £536,900 per annum payable thereafter were ascertained sums on the aggregate of which for the period of the agreement the stamp duty should be computed, notwithstanding that they might be increased or reduced in certain events.

Underground Electric Rys. Co. v. *Inland Revenue Comrs.* ([1905] 1 K.B. 174; [1906] A.C. 21) and *Underground Electric Rys. Co. of London, Ltd.* v. *Inland Revenue Comrs.* ([1914] 3 K.B. 210; [1916] 1 K.B. 306) applied.

Decision of WYNN-PARRY, J. ([1958] 3 All E.R. 126) affirmed.

[For stamp duty payable on a bond, covenant or other instrument, see 28 HALSBURY'S LAWS (2nd Edn.) 477, para. 1008, and 3 HALSBURY'S LAWS (3rd Edn.) 330, para. 621; and for cases on the subject, see 39 DIGEST 275, 276, *604-612.*

For the Stamp Act, 1891, Sch. 1, "Bond, covenant, or instrument", see 21 HALSBURY'S STATUTES (2nd Edn.) 662.]

Cases referred to:

(1) *Jones* v. *Inland Revenue Comrs., Sweetmeat Automatic Delivery Co.* v. *Inland Revenue Comrs.*, [1895] 1 Q.B. 484; 64 L.J.Q.B. 84; 71 L.T. 763; 39 Digest 276, *607.*

(2) *National Telephone Co.* v. *Inland Revenue Comrs.*, [1899] 1 Q.B. 250; 68 L.J.Q.B. 222; 79 L.T. 514; *affd.* H.L., [1900] A.C. 1; 69 L.J.Q.B. 43; 81 L.T. 546; 39 Digest 276, *608.*

(3) *Underground Electric Rys. Co. of London, Ltd., & Glyn, Mills, Currie & Co.* v. *Inland Revenue Comrs.*, [1914] 3 K.B. 210; *affd.* C.A., [1916] 1 K.B. 306; 85 L.J.K.B. 356; 114 L.T. 111; 39 Digest 276, *614.*

(4) *British Italian Corpn., Ltd.* v. *Inland Revenue Comrs.*, [1921] W.N. 220; SERGEANT ON STAMP DUTIES (3rd Edn.) 334; 39 Digest 277, *615.*

(5) *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Comrs.*, [1909] 2 K.B. 604; 78 L.J.K.B. 1158; 101 L.T. 51; 73 J.P. 425; 39 Digest 276, *613.*

(6) *Underground Electric Rys. Co.* v. *Inland Revenue Comrs.*, [1904] 2 K.B. 198; *revsd.* C.A., [1905] 1 K.B. 174; *affd.* H.L., [1906] A.C. 21; 75 L.J.K.B. 117; 93 L.T. 819; 39 Digest 282, *655.*

Appeal.

This was an appeal by Independent Television Authority (herein called "the authority") and Associated-Rediffusion, Ltd. (hereinafter called "the contractor") from a judgment of WYNN-PARRY, J., on July 15, 1958 ([1958] 3 All E.R. 126), dismissing their appeal on Case Stated by the Commissioners of Inland Revenue under s. 13 of the Stamp Act, 1891. By the Case Stated the decision of the court was sought on the amount of stamp duty chargeable on an agreement under seal dated May 23, 1955, and made between the authority of the one part and the contractor of the other part, which had been presented to the commissioners under s. 12 of the Stamp Act, 1891, for their opinion as to the stamp duty with which the instrument was chargeable. By the agreement the authority appointed the contractor to be a programme contractor to the authority for the purposes of the Television Act, 1954. WYNN-PARRY, J., upheld the assessment of the commissioners computing the stamp duty at £11,431. The facts appear in the judgment.

Geoffrey Cross, Q.C., and *J. G. Monroe* for the appellants.

John Pennycuick, Q.C., and *E. Blanshard Stamp* for the Crown.

Cur. adv. vult.

Feb. 9. **JENKINS, L.J.**, read the following judgment of the court: A copy of the agreement, dated May 23, 1955, between the authority and the contractor is annexed to the Case*, which states the circumstances in which

* The terms of the Case Stated are substantially given at [1958] 3 All E.R. 127, 128.

the agreement was made and summarises its main provisions in the following paragraphs: A

" 3. The authority was established under the Television Act, 1954 (hereinafter called ' the Act ') with the function of providing in accordance with the provisions of that Act for the period of ten years from July 30, 1954, television broadcasting services additional to those of the British Broadcasting Corporation. B

" 4. It is provided by s. 2 of the Act that subject as therein provided the programmes broadcast by the authority shall so far as may be consistent with the observance of the requirements of the Act be provided not by the authority but by persons who under contracts with the authority have in consideration of payments to the authority and subject to the provisions of the Act the right and the duty to provide programmes or parts of programmes to be broadcast by the authority which may include advertisements. C

" 5. The agreement is such a contract.

" 6. Clause 4 of the agreement provides (by sub-cl. (1)) that in consideration of the payments to the authority to be made by the contractor thereunder and upon the terms and subject to the conditions thereinafter contained and subject to the provisions of the Act the contractor shall for the term mentioned in cl. 10 of the agreement be a programme contractor and shall have the right and be subject to the duty to provide programmes to be broadcast by the authority and that accordingly the contractor shall provide and without prejudice to the exercise by the authority (subject as therein mentioned) of its powers under s. 2 (2) (a) of the Act (being powers conferred on the authority to arrange for the provision of parts of programmes so as to include items of particular classes to secure a proper balance and which cannot, or cannot as suitably, be provided by programme contractors) the authority shall broadcast programmes provided by the contractor from the station or stations and on the days and within the hours and otherwise in accordance with the terms and conditions set out in Part 1 of Sch. 1 to the agreement (which sets out particulars, inter alia, of the stations from which programmes were to be broadcast and the hours and times of broadcasting and laid down the period within which broadcasting was to commence as the period between Aug. 15, 1955, and Nov. 15, 1955) as from a date or dates (being a date or dates within the periods for commencement of broadcasting) to be determined by the authority by not less than twenty-eight days' prior notice to the contractor. The said sub-clause contains a proviso for variation of programmes and substitution of stations and a proviso for discontinuance of broadcasting in the circumstances respectively mentioned. D E F G

" By sub-cl. (2) of cl. 4 it is provided that subject as aforesaid and subject to the contractor duly performing its obligations under the agreement and subject to any lawful exercise by the authority of its right pursuant to sub-s. (2) of s. 2 of the Act to arrange for the provision of or itself provide programmes for the purposes and in the circumstances mentioned in paras. (a) and (b) of the said sub-section the contractor shall have the sole and exclusive right to provide the programmes broadcast from the said station or stations or either of them or from any station substituted therefor during the days respectively provided in Part 1 of Sch. 1 to the agreement. H I

" 7. Under cl. 9 of the agreement the contractor is bound to make payments to the authority as provided in Sch. 3 thereto and by that schedule it is provided (para. 1) that the contractor shall as from the date of commencement of broadcasting from the station described in the table set out at the end of the first part of Sch. 1 to the agreement (thereinafter called ' the commencement date ' and being a date within the period between Aug. 15, 1955, and Nov. 15, 1955) pay to the authority a fee at the rate of £495,600

per annum until Mar. 31, 1958, or the expiration of two and a half years from the commencement date (whichever is the later) and a fee at the rate of £536,900 thereafter. As hereinbefore appears the table set out at the end of Sch. 1 to the agreement provides (in col. 13) that the period within which broadcasting is to commence is to be between Aug. 15, 1955, and Nov. 15, 1955. Paragraph 2 of Sch. 3 provides for an increase or decrease of such payments in the event of an increase or decrease of five per cent. or more in the half-yearly index figure (thereby defined) compared with the basic index figure (defined as meaning the average of the index figures for all items in the Interim Index of Retail Prices published by the Board of Trade for the months therein specified). Paragraph 3 of Sch. 3 gives the authority the right to increase fees after the expiration of three and a half years from the commencement date (subject to an upper limit) and para. 4 provides for review of fees by arbitration in certain circumstances.

"8. Clause 10 of the agreement provides that the term for which the contractor shall be a programme contractor shall commence on the date thereof and shall (subject to avoidance or determination as therein provided) continue in force until July 29, 1964.

"Clause 10 also contains power for (i) the authority and (ii) the contractor to determine the agreement in the events mentioned."

The commissioners were of opinion that the agreement was chargeable with ad valorem duty under the head

"Bond, covenant, or instrument of any kind whatsoever: (1) Being the only or principal or primary security for any annuity . . . or for any sum or sums of money at stated periods . . ."

in Sch. 1 to the Stamp Act, 1891. They were further of opinion that the agreement was (within the meaning of this head of charge)

"for a definite and certain period, so that the total amount to be ultimately payable can be ascertained"

and was accordingly chargeable with

"the same ad valorem duty as a bond or covenant for such total amount."

The commissioners were of opinion that the definite and certain period for this purpose was the period from Nov. 15, 1955 (the last date at which broadcasting was to begin under the terms of the agreement) to July 29, 1964 (being the date to which the agreement, unless previously avoided or determined, was to continue in force under cl. 10). In accordance with these views, the commissioners assessed the duty at 5s. per £100 of the aggregate (viz., £4,572,193) of the sums of £495,600 per annum payable under para. 1 of Sch. 3 to the agreement for the period of two and a half years from Nov. 15, 1955, and the sums of £536,900 per annum payable under the same paragraph for the period from May 15, 1958, to July 29, 1964. With the addition of a 10s. deed stamp (on which nothing turns) the total duty chargeable on this basis of assessment amounts to £11,431.

To this assessment, upheld by the learned judge, counsel for the appellants raised in effect two objections.

First, he contended that the agreement was wholly outside the "Bond, covenant, or instrument" head of charge. He admitted that he could not, in view of the authorities, support this contention on the ground that the agreement itself created the obligation to pay the periodical sums in question as opposed to constituting a security for the due performance of some separate and distinct obligation to pay them. See *Jones* v. *Inland Revenue Comrs.* (1) ([1895] 1 Q.B. 484, per WRIGHT, J., at p. 492, and per COLLINS, J., at p. 495); *National Telephone Co.* v. *Inland Revenue Comrs.* (2) ([1899] 1 Q.B. 250, per A. L. SMITH, L.J., at p. 258 and per RIGBY, L.J., at p. 259); *Underground Electric Rys. Co. of London, Ltd. & Glyn, Mills, Currie & Co.* v. *Inland Revenue Comrs.* (3) ([1916] 1 K.B. 306, per SWINFEN EADY, L.J., at p. 313); and *British*

Italian Corpn., Ltd. v. *Inland Revenue Comrs.* (4) ([1921] W.N. 220 (adequately reported only in appendix I to SERGEANT ON STAMP DUTIES (3rd Edn.), p. 334) per ROWLATT, J., at p. 337 of SERGEANT ON STAMP DUTIES and per Lord STERNDALE, M.R., ibid., at p. 339). Counsel for the appellants did, however, albeit with some diffidence, advance as open to us in this court the proposition that the agreement was wholly outside the scope of this head of charge, because it was not an agreement securing the payment of periodical sums recoverable by the obligee as a debt merely on proof of the agreement and of the fact of non-payment, but was an agreement for the payment of periodical sums by way of remuneration for services to be rendered. We agree with the learned judge that on the authorities this argument is concluded against the appellants so far at all events as this court is concerned. See *Jones* v. *Inland Revenue Comrs.* (1); *National Telephone Co.* v. *Inland Revenue Comrs.* (2) ([1899] 1 Q.B. 250, and [1900] A.C. 1); *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Comrs.* (5) ([1909] 2 K.B. 604); *British Italian Corpn., Ltd.* v. *Inland Revenue Comrs.* (4) (SERGEANT ON STAMP DUTIES (3rd Edn.) 334, ROWLATT, J., at p. 337, and at pp. 338 et seq. in the Court of Appeal).

This line of authorities appears to us to cover contracts providing for periodical payments in consideration of services to be rendered as well as providing for payments for other forms of executory consideration. This appears from *Jones's* case (1), where the consideration for the periodical payments included the maintenance of the telephonic lines and apparatus to be erected by the National Telephone Co. and also from the *National Telephone Co.'s* case (2), in which *Jones's* case (1) was approved by the Court of Appeal, notwithstanding an argument by counsel for the appellant ([1899] 1 Q.B. at p. 254), clearly raising the contention that a contract for services in consideration of periodical payments was not within the " Bond, covenant, or other instrument " head of charge. According to the report of the *National Telephone Co.'s* case (2) in the House of Lords, their Lordships, in affirming the decision of the Court of Appeal, only dealt with the question whether a seal was necessary, and held that it was not; but reference to the printed record prepared for the purposes of the appeal shows that the appellants' case did in fact raise the argument advanced by counsel in the Court of Appeal.

Counsel for the appellants submitted that the inclusion of contracts for services, and by parity of reasoning contracts of service, in the " Bond, covenant, or other instrument " head of charge accords ill with the exemption numbered (2) under the heading " Agreement or any memorandum of an agreement " in Sch. 1 to the Stamp Act, 1891, which exempts from the fixed duty of 6d. an

> " Agreement or memorandum for the hire of any labourer, artificer, manufacturer, or menial servant."

He also referred to s. 7 of the Finance Act, 1907, which provides with respect to hire-purchase agreements that

> " Any agreement for or relating to the supply of goods on hire, whereby the goods in consideration of periodical payments will or may become the property of the person to whom they are supplied, shall be charged with stamp duty as an agreement, or, if under seal . . . as a deed, as the case requires, and the exemption numbered (3) under the heading ' Agreement or any memorandum of an agreement ', in Sch. 1 to the Stamp Act, 1891 (which exempts agreements for the sale of goods), shall not apply . . ."

to any such instrument. In counsel's submission, this enactment indicates that the legislature can hardly have regarded hire-purchase agreements as theretofore chargeable with duty under the heading " Bond, covenant, or other instrument ". Considerations such as these might, if the matter had been res integra, have afforded some support for the view that the limited construction for which counsel contends, and which ROWLATT, J., in the *British Italian*

case (4) would have been disposed to adopt if it had been open to him to do so, should be placed on this head of charge, but cannot justify us in departing from the wide construction which has actually been placed on it by decisions binding on this court.

The second point taken by counsel for the appellants was to the effect that, even if the agreement was not excluded from this head of charge on the grounds advanced in support of his first objection, the sums periodically payable were incapable of ascertainment at the date of the agreement save as regards the payment to be made in respect of the first half-yearly period ending on Mar. 31, 1956, owing to the provisions in Sch. 3 to the agreement for half-yearly increases or decreases in the sum payable by reference to any increase or decrease of five per cent. or more in the half-yearly index figure. Accordingly, while he accepted, notwithstanding the powers therein contained of avoiding or determining the agreement in certain events, the commissioners' view that the payments were to be made " for a definite and certain period " (viz., the period beginning on Nov. 15, 1955 (the latest date for the commencement of broadcasting), and ending on July 29, 1964 (being the date fixed for the expiration of the agreement)), counsel for the appellants submitted that it could not be predicated of them that they were to be made not merely for a definite and certain period but, as the head of charge requires,

> " for a definite and certain period, so that the total amount to be ultimately payable can be ascertained "

(i.e., at the date of the agreement). We agree with the learned judge that this argument cannot be maintained consistently with *Underground Electric Rys. Co.* v. *Inland Revenue Comrs.* (6) (the first Underground Railway case) ([1904] 2 K.B. 198, [1905] 1 K.B. 174, [1906] A.C. 21), read in conjunction with *Underground Electric Rys. Co. of London, Ltd., & Glyn, Mills, Currie & Co.* v. *Inland Revenue Comrs.* (3) (the second Underground Railway case).

The headnote to the report of the first *Underground Railway* case (6) in the Court of Appeal ([1905] 1 K.B. 174) is in these terms:

> " A company agreed to sell its undertaking to a new company in consideration of certain money and shares, and it was agreed that the profits of the new company in respect of each year should be applied, first, in the payment of a cumulative dividend of five per cent. per annum on the amount for the time being paid up on any shares for the time being issued by the new company; and, secondly, in paying to the original company, ' as a further part of the consideration for the said sale, such a sum as shall be equal to a dividend of three per cent. for such year on the amount for the time being paid up on such of the original ordinary share capital . . . in the new company as shall for the time being have been issued by the new company '. *Held*, that the further consideration, though payable contingently, was ' money payable periodically in perpetuity or for an indefinite period not terminable with life ' within the meaning of s. 56 (2) of the Stamp Act, 1891, and was chargeable with ad valorem duty.
>
> " Judgment of CHANNELL, J., [1904] 2 K.B. 198, reversed."

That being a case of sale, the relevant provision of the Stamp Act, 1891, was s. 56 (2) and not the head of charge with which the present case is concerned. Nevertheless, we think it has an important bearing on the question we have to decide. COLLINS, M.R., said this ([1905] 1 K.B. at p. 179):

> " It has been ascertained by the commissioners that, at the date of the agreement, a sum of £1,300,000 had been paid up on the share capital, and a dividend of three per cent. on that sum is £39,000. That being, on the terms of the bargain I have just read, part of the consideration, the question is whether the provisions of the Stamp Act, 1891, are sufficient to reach that, and the provision relied upon is contained in s. 56 (2) of the Act: ' Where

the consideration, or any part of the consideration, for a conveyance on sale consists of money payable periodically for a definite period exceeding twenty years or in perpetuity, or for an indefinite period not terminable with life, the conveyance is to be charged in respect of that consideration with ad valorem duty on the total amount which will or may, according to the terms of sale, be payable during the period of twenty years next after the day of the date of the instrument'. In this case a part of the consideration unquestionably is the payment which is provided for in the clause of the agreement which I have read: it consists of money, that is the sum of £39,000, payable annually for an indefinite period not terminable with life. Therefore it seems to me that so far that sum appears to fall within the words of the section, and to be chargeable with ad valorem duty, unless the contention of the company is correct. It is said on their behalf that the word 'payable' in s. 56 (2) refers to money payable absolutely, and cannot be taken to mean money which is payable only upon a contingency. Another point was taken that, before the question of contingency is reached, there must be an ascertained sum in respect of which this duty can be levied, and it is said that, in this case, there is absolute uncertainty about the sum upon which the three per cent. dividend would be payable, because that sum is paid-up capital, and the agreement contemplates more capital being paid up over and above the sum then paid up. Upon that ground, it is said, that sum is too indefinite to be the subject-matter of an ad valorem duty; and that a fixed factor is not available in the calculation, inasmuch as the amount is capable of being increased. That objection does not impress me, because if I once find that there is a fixed minimum already reached at the date of the agreement, it does not seem to me that the fact that the minimum may be afterwards exceeded alters the fixity of that which has already been ascertained, namely, the sum below which the capital cannot fall, and the sum, therefore, upon which the three per cent. dividend will have to be paid if the other contingencies, which I will deal with in a moment, arise. Therefore that factor of indefiniteness, so far as it rests on the fact that the capital is capable of increase, does not seem to introduce any such uncertainty into the calculation as to prevent the incidence of the taxation . . . [ibid., at p. 181:] The question remains that the section deals with 'money payable', and that expression, it is said, does not embrace money which is only payable on a contingency. If it is once arrived at that the money to which the section refers is money which may be payable on a contingency, I am not in the least pressed by the difficulty that several uncertainties combine to make one contingency. It does not seem to me to matter how many factors that contingency embraces; it is simply one contingency, although a number of things may have to happen in order to bring about the event on which this payment will have to be made. That being so, I think the question really narrows itself down to this—Do the words 'money payable' in the section embrace money payable on a contingency?

"The argument for the Crown drawn from the use of the word 'may' in the section, in support of the suggestion that payment on a contingency was included, has been successfully contested by the counsel for the company; and therefore I do not rely upon that word in coming to the conclusion that the words 'money payable' include money payable on a contingency."

Finally, he said (ibid., at p. 182):

"It seems to me, therefore, that the words 'money payable for an indefinite period' include money which may never become payable unless the particular event happens—that is, in this case, unless the amount of profits is sufficiently large to make all the preliminary payments before the

A obligation to pay a sum equivalent to a three per cent. dividend arises. Unless and until that condition is fulfilled the money will not be paid: still it is money which will become payable if that event happens, and therefore it is covered in my judgment by the wording of the section, and the duty is payable. In my opinion, therefore, this appeal succeeds."

STIRLING, L.J., said ([1905] 1 K.B. at p. 183):

B "The commissioners held that the dividend of three per cent. payable on that portion of the capital so paid up constituted money payable periodically either in perpetuity or for an indefinite period within the meaning of the section. I think that that conclusion was right. We start with this, that the consideration is to be payable periodically. Now it is insisted, and this is really the basis of the argument on behalf of the company, that the C expression 'money payable periodically' is limited to money payable absolutely; but I see nothing in the Act which compels us to arrive at that conclusion. The words seem to me capable of including money payable either absolutely or on a contingency, just as much as the word 'debt' occurring in various sections of the Stamp Acts has been held to include D a debt payable either certainly or upon a contingency. If that be so, there is nothing in the subsequent part of the sub-section which would narrow the meaning of the words 'money payable periodically'. In fact, the subsequent language is such as lends itself to the view that it includes money payable contingently as well as absolutely. I refer to the words 'will or may' which were relied upon by the Attorney-General in his opening, and which, at all events, do not tend to negative the construction which E was placed on the words 'money payable periodically' by the commissioners."

MATHEW, L.J., agreed without adding any further reasons.

It will be seen that COLLINS, M.R., founded himself wholly on the view that the words "money payable" in s. 56 (2) included money payable on a contin- F gency, rejecting the alternative argument for the Crown based on the words "will or may"; while STIRLING, L.J., took the same view as to the meaning of the words "money payable periodically" and only relied on the words "will or may" to the extent that they did not "tend to negative" that construction of the words "money payable periodically".

In the House of Lords LORD LINDLEY delivered the only reasoned opinion. G He said ([1906] A.C. at p. 22):

"This sum was a minimum sum and it was payable periodically for an indefinite time. The amount payable in future was liable to be increased, but not to be diminished, except in certain events, to which I will now allude. One of these events, and the only one in my opinion which creates any difficulty, was the possible insufficiency of the profits of the company to H pay the amount referred to after paying a dividend of £5 per cent. on the paid-up capital of the company. That dividend of five per cent. had to be paid out of the profits of the new company to its shareholders before any further payment became payable to the selling company. The minimum sum payable periodically was so payable subject to a contingency, viz., the existence of a sufficiency of profits to pay first a dividend of five per I cent. and then a further dividend of three per cent. We have therefore an ascertained minimum amount payable periodically as part of the consideration of the sale, but payable on a contingency. Is such a sum within s. 56 (2) of the Stamp Act, 1891? Its language is very wide.

"It is contended that the words 'money payable periodically' in that section do not apply to money payable on a contingency, because contingent payments are dealt with by s. 57. I do not myself see how s. 57 assists the appellants. Its effect seems to be that where the consideration for a

sale consists of money payable on a contingency, such money is to be taken into account in ascertaining the stamp duty to be paid on the conveyance of the property sold. I see nothing in s. 57 which either cuts down or excludes s. 56. It is also contended that the words ' money payable ' in s. 56 do not include money payable upon a contingency, because the contingency may never happen and no money may be payable. But the words of s. 56 appear to me to be wide enough to cover all moneys which may become payable, and the latter part of cl. 2 certainly favours this construction. Moreover, s. 57 says that money payable on a contingency is to be taken into account; and that, to my mind, removes any doubt which might otherwise arise as to the inclusion of contingent payments in s. 56."

This language appears to us to indicate that LORD LINDLEY, while agreeing with the Court of Appeal in his conclusion, founded himself to some extent on the words " will or may . . . be payable " in s. 56 (2). He did not, however, express any dissent from anything that had been said in the Court of Appeal, and so far as that court was concerned COLLINS, M.R., was positively of opinion without placing any reliance on the words " will or may " that the words " money payable periodically " in s. 56 (2) included money payable on a contingency, and STIRLING, L.J., did not differ from that view, while MATHEW, L.J., must be taken to have agreed with it.

The use of the word " minimum " in these judgments (see per COLLINS, M.R. ([1905] 1 K.B. at p. 180), and LORD LINDLEY ([1906] A.C. at pp. 22, 23)) is not altogether easy to understand, since less than the sum described as the minimum might in certain events have become payable. But we think that what was meant was that, if in the events which happened the full amount calculated according to the formula provided by the agreement became payable, it could not be less than three per cent. on the amount which at the date of the agreement had already been paid up on the shares in question.

However that may be, we think that the first *Underground Railway* case (6) does afford some authority for the view that the words " money payable periodically " in s. 56 (2), and therefore also the closely comparable words " any sum or sums of money at stated periods " in the head of charge with which we are now concerned, include money payable on a contingency.

The second *Underground Railway* case (3) was concerned with this head of charge. The headnote to the report of the case before SCRUTTON, J., is in these terms ([1914] 3 K.B. 210):

" By a deed executed by them the appellants agreed, provided a sufficient number of the holders of ordinary stock of the Central London Railway Co. would take guaranteed stock in exchange for their ordinary stock, to guarantee interest at four per cent. on such guaranteed stock, payable half-yearly, if and to the extent that the profits of the Central London Railway Co. were not sufficient to pay that amount of interest. At the date of the deed it was not known whether a sufficient number of holders of ordinary stock would accede to the arrangement or whether all would so accede, but if they all acceded and if the Central London Railway Co. made no profits in any year, the appellants would be liable to pay £120,000 in that year, being four per cent. on £3,000,000 stock:—*Held*, (i) that the deed was chargeable with ad valorem stamp duty under the heading ' Bond, covenant, or instrument of any kind whatsoever, being the only or principal or primary security for any annuity . . . or for any sum or sums of money at stated periods . . . for . . . [an] indefinite period ', on the maximum sum which might become payable under the deed; and (ii) that the amount on which the duty was chargeable was the yearly sum that might be payable, namely, £120,000 notwithstanding that it was payable at half-yearly periods."

SCRUTTON, J., said (ibid., at p. 220):

> " These and other cases seem to me to establish that there may be a sum, or a definite and certain sum, though it is payable on a contingency and may never become payable, and though the amount payable may depend on contingencies. It is said, however, that in all these cases there was a specified sum or sums at the date of the deed, and that if there is no sum specified at the date of the deed, no stamp duty is payable. I do not think this is true of the first *Underground Railway* case (6), where any sum up to three per cent. might be payable depending on amount of profits, and the deed was assessed on the maximum payment which might be required. This is what the commissioners have done in this case in assessing on the maximum payment which the deed may secure, though it depends on contingencies whether that payment may have to be made . . . I can understand that if you cannot ascertain from the instrument a fixed sum which may become payable, though on contingencies, you cannot stamp ad valorem. This is probably the reason why in *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Comrs.* (5) an agreement to supply electrical power for a term of years at a quarterly payment of £58 and 1d. per unit consumed was held liable to an ad valorem stamp on £58 a quarter for the term of years, but not on the 1d. per unit, which had no maximum limit. The same remark may explain the measure of taxation in the first *Underground Railway* case (6). For these reasons I am of opinion that under the heading ' Bond ' where the maximum sum which can be secured by the instrument is ascertainable from the instrument itself, the ad valorem stamp must be estimated with reference to that sum, though it never may become payable, and it cannot be told at the date of the instrument whether that sum, or any less sum, or any sum at all will in fact be payable."

We would amplify SCRUTTON, J.'s reference to *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Comrs.* (5) by noting that the fixed charge was liable in certain events to be reduced to a minimum of £50 per quarter, but that the assessment was nevertheless made on the full quarterly sum of £58 for the term of the agreement. The judgment of SCRUTTON, J., was affirmed in the Court of Appeal. SWINFEN EADY, L.J., said this ([1916] 1 K.B. at p. 314):

> " I am unable to draw any distinction between ' money payable periodically ' and ' money payable at stated periods ', and the fact that all the payments were contingent seems to me to be immaterial in considering whether there was a liability to pay under the deed. The proper number of shareholders had to assent and come in under the deed. Subject to that there was an absolute guarantee. It may well be that if and so long as the Central London Railway paid the full dividend of four per cent., then the Underground Railway would have no further liability under its guarantee, but from the date when the instrument was signed there was a binding obligation upon the Underground Railway in certain events that might happen to pay at stated periods certain sums of money. In my opinion the deed comes within the language of the schedule to the Stamp Act. It is immaterial whether it is the only, or principal, or primary security; it was the security in respect of the guaranteed dividend—it was the only security for ' any sum or sums of money at stated periods '. Then the duty is upon the sum periodically payable.
>
> " Therefore with regard to the first point I am of opinion that the deed was both in fact and in law a deed being ' a bond, covenant, or instrument ', coming within the language of this schedule, whereby certain sums were contingently made periodically payable. In these circumstances I am of opinion that the first point taken by the appellants fails and that the deed is liable to ad valorem duty."

BANKES, L.J., agreed without adding anything on the point here material. WARRINGTON, L.J., said (ibid., at p. 319):

> "Then it is said that the obligation imposed upon the Underground Co. is contingent in two ways: first if a certain proportion of stockholders do not accept the provisions of the deed by a certain date, the Underground Co. may declare the deed at an end; and secondly, that the profits of the Central London Railway Co. may be such that the actual obligation on the part of the Underground Co. to pay money will never in fact, or may not, take effect. In my opinion, neither of those considerations affects the question whether the deed is, within the meaning of the statute, a security for the payment of a sum of money. It is a security for the payment of a sum of money notwithstanding that events may happen which enable one or other of the parties to put an end to the obligation of which the security is a part, and notwithstanding that in the event the obligation may not result in the recovery from the obligor of any particular sum of money. That point is also covered by authority."

Counsel for the appellants agrees that the two *Underground Railway* cases (3), (6), constrain him to accept the position, so far at all events as this court is concerned, that the head of charge, "bond, covenant, or instrument" includes sums contingently payable, so that in effect the words

> "for a definite and certain period, so that the total amount to be ultimately payable can be ascertained"

should be construed as meaning "for a definite and certain period so that the total amount which will or may ultimately become payable can be ascertained". He says, however, that it is still necessary that the amount which may ultimately become payable must be capable of ascertainment at the date of the instrument, unless the sum in question can be treated (as in *County of Durham Electrical Power Distribution Co.* v. *Inland Revenue Comrs.* (5)) as made up of two distinct sums, the one fixed and certain (like the quarterly fixed charge of £58 in that case) and the other unascertainable (like the charge of 1d. per unit in that case) when the instrument can be stamped ad valorem by reference to the amount of the fixed payment. Here, he says, there is no ascertained sum contingently payable and no question of severing the periodical payment into two distinct sums, the one ascertained and the other unascertainable. He says that the agreement here in question secures an annual sum which after the first half-yearly period may be greater or less by an unpredictable amount than the annual sum specified in the agreement, according to any variations up or down of five per cent. or more in the half-yearly index figure. We cannot accept this as a ground for distinguishing the *Underground Railway* cases (3), (6). The contingencies to be considered are: (i) that the half-yearly index figure should be increased by five per cent. or more; (ii) that the half-yearly index figure should be reduced by five per cent. or more; and (iii) that the half-yearly index figure should remain constant within five per cent. either way. The agreement specifies a sum of £495,600 per annum as payable for the first two and a half years and £536,900 per annum thereafter. These are ascertained sums payable in the third of the three contingencies which we have mentioned, and we think that it follows that the ad valorem duty was, on the authority of the two *Underground Railway* cases (3), (6), correctly assessed on the aggregate of these yearly sums for the period fixed by the agreement. To put the matter in another way, these ascertained sums may be looked on as payable for the period fixed by the agreement subject to the possibility of their being increased or reduced in certain events. Whichever way it is put, we think that the authority of the two *Underground Railway* cases (3), (6) and, we would add, of the *County of Durham Electrical Power Distribution Co.'s* case (5) obliges this court to affirm the judgment of WYNN-PARRY, J., and to uphold the assessment accordingly.

A We find it unnecessary to say anything as to the views that we might ourselves have been disposed to take on the two points of counsel for the appellants if the matter had been res integra. In the present state of the authorities we do not see how we can properly do otherwise than dismiss this appeal.

Appeal dismissed. Leave to appeal to the House of Lords granted.

B Solicitors: *Allen & Overy* (for the appellants); *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

C

PRACTICE DIRECTION

HOUSE OF LORDS

D *House of Lords—Appeal to—Changes in practice—Time limit for appeals—Reproduction of cases and documents—Judgments of courts below—Poor person's limit of means—Refresher fees to counsel.*

Notice is given of the following alterations in the Standing Orders of the House of Lords and in its directions as to procedure:—

E 1. *Time limit for appeals.*

A petition of appeal from an order or final interlocutor made or pronounced on or after Apr. 1, 1959, must be lodged in the Parliament Office within three months from the date of the last order or interlocutor appealed from. The present time limit of six months will still apply to appeals from orders or interlocutors made or pronounced before that date.

F 2. *Reproduction of cases and documents.*

In regard to any appeal presented to the House after Apr. 1, 1959, parties may print or duplicate any or all of their cases or documents as may be agreed between them, in such form and style as may be approved by the Clerk of the Parliaments. In default of agreement, cases and all documents must be G duplicated.

3. *Judgments of the courts below.*

If the cause has been reported in a report which is ordinarily received in court, copies of the report may be lodged in lieu of the reproduction in the appendix of the judgments of the courts below in extenso.

H 4. *Poor person's limit of means.*

As from Apr. 1, 1959, the limit of means to be proved by a petitioner in support of a petition for leave to prosecute an appeal in formâ pauperis will be raised from £5 to £100.

5. *Party and party costs (refresher fees to counsel).*

I In regard to any appeal set down for hearing after Apr. 1, 1959, the taxing officer may in his discretion allow refresher fees to counsel in excess of ten guineas to a leader and seven guineas to a junior.

VICTOR M. R. GOODMAN,
Clerk of the Parliaments.

Feb. 19, 1959.

A

FINE-FARE LTD. *v.* BRIGHTON COUNTY BOROUGH COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J., Donovan and Ashworth, JJ.), January 27, 28, 1959.]

B

Shop—Hours of closing—Early closing day—Mixed shop—Closing order for different days for different trades—Shops Act, 1950 (14 *Geo.* 6 *c.* 28), *s.* 1 (2).

F.-F. Ltd. were the occupiers of shop premises in which several retail trades or businesses were carried on, the principal being those of a grocer, a greengrocer, a fishmonger and a butcher. The premises closed at 1.0 p.m. on Thursday for the weekly half-holiday. The local authority had made orders fixing weekly half-holidays for certain trades. Some of these fixed Wednesday as early closing day for shops carrying on the retail trades or businesses of a grocer, a greengrocer, a fishmonger or a butcher, while other orders fixed Thursday as the early closing day for some other businesses, which F.-F. Ltd. also carried on at their shop to some extent. The local authority had made no order fixing an early closing day for a shop where several different businesses were conducted. F.-F. Ltd. did not close their premises on Wednesday and were convicted of four offences (one in respect of each of the principal trades stated above) for contravening the Shops Act, 1950, s. 1 (2)* by not closing on a Wednesday. On appeal,

C

D

Held: the orders did not apply to the shop of F.-F. Ltd., which was one single shop in which a variety of businesses was carried on, not several shops in each of which one business was carried on, and the convictions would, therefore, be quashed.

E

Patrick Thomson, Ltd. v. *Somerville* (1917 S.C. (J.) 3) and *MacDonald* v. *Groundland* (1923 S.C. (J.) 28) followed.

Per LORD PARKER, C.J.: where there is a single hereditament consisting of self-contained premises laid out with counters, the whole of those premises constitutes the shop (see p. 479, letter G, post).

F

Appeal allowed.

[As to the fixing of the weekly half-holiday for shops, see 17 HALSBURY'S LAWS (3rd Edn.) 196, 197, para. 323; and for cases on the subject, see 24 DIGEST (Repl.) 1111-1114, *541-559*.

For the Shops Act, 1950, s. 1, see 29 HALSBURY'S STATUTES (2nd Edn.) 189.]

G

Cases referred to:

(1) *Patrick Thomson, Ltd.* v. *Somerville*, 1917 S.C. (J.) 3; 2 S.L.T. 172; 24 Digest (Repl.) 1109, *169*.

(2) *MacDonald* v. *Groundland*, 1923 S.C. (J.) 28.

(3) *Trickers (Confectioners), Ltd.* v. *Barnes*, [1955] 1 All E.R. 803; 3rd Digest Supp.

H

Appeal.

This was an appeal by Case Stated from a decision of the Justices for the County Borough of Brighton, before whom Fine-Fare Ltd., the appellants, were charged and convicted on May 5, 1958, of four offences against the Shops Act, 1950. Four informations were preferred on behalf of the respondents, the Council of the County Borough of Brighton, the first being for that the appellants being the occupiers of a shop situate at 166/168, Western Road, Brighton, wherein the retail trade or business of a grocer, tea dealer and provision merchant was carried on, unlawfully did fail to close such shop for the serving of customers not later than one o'clock in the afternoon of Wednesday, Mar. 12, 1958, contrary to s. 1 of the Shops Act, 1950 and the Brighton Weekly Half Holiday

I

* The relevant terms of s. 1 (1) (2) of the Shops Act, 1950, are printed at p. 479, letters A and B, post.

(No. 2) Order, 1912. Three other informations were preferred on behalf of the respondents against the appellants. These were in identical words save that they referred to the appellants' trade or business as that of fruiterer, greengrocer and florist, or fishmonger and poulterer, or butcher, and referred to breach of weekly half-holiday orders made in 1918, 1921 and 1922.

The following facts were found. On Mar. 12, 1958, and at all material times the appellants were the occupiers of premises at 166/168, Western Road, Brighton, which premises were assessed for rating purposes as a single hereditament. In the premises at all material times the appellants carried on the retail trades or businesses of (a) a grocer, tea dealer and provision merchant; (b) a fruiterer, greengrocer and florist; (c) a fishmonger and poulterer; and (d) a butcher. In addition at all material times they carried on (but to a much smaller extent) other retail trades or businesses including that of: (i) a domestic hardware merchant; (ii) a stationer; (iii) a confectioner; (iv) a baker; (v) a tobacconist, and (vi) a seedsman. On Nov. 1, 1912, Dec. 19, 1918, Mar. 17, 1921, and May 22, 1922, the respondents made weekly half-holiday orders, providing that every shop within the borough in which the trades or businesses (a) to (d) were carried on should be closed on Wednesday at 1.0 p.m., provided that the occupier of any shop, might at his option, close on Saturday, at 1.0 p.m. instead of Wednesday, on affixing in some conspicuous place in such shop a notice to that effect. Each of the orders was in force at all material times and was applicable to the appellants' premises, but no notice that the appellants substituted Saturday for Wednesday was affixed in the premises of the appellants and the premises were opened for serving customers after 1.0 p.m. on Saturday, Mar. 15, 1958. The respondents on various dates had made other orders relating to (i) the days of the week on which shops wherein certain retail trades or businesses are carried on either generally or in certain areas should be closed at 1.0 p.m.; (ii) the periods of the year during which shops as above should be exempt from the obligation to close at 1.0 p.m. on one day in each week; (iii) the exemption of shops where certain retail trades or businesses were carried on from the provisions of s. 1 of the Shops Act, 1950; (iv) the extension of the provisions of s. 1 to certain trades or businesses exempted therefrom by the provisions of sub-s. (6) of s. 1; (v) Sunday closing. The retail trades or businesses carried on in the appellants' premises fell into four groups: (1) those specified in orders providing for the closing of shops wherein they were carried on on Wednesday; (2) those specified in orders providing for closing of shops where they were carried on on Thursday; (3) those not specified in any order providing for weekly half-holiday closing and neither of a class mentioned in Sch. 1 to the Shops Act, 1950, nor specified in any order exempting the same from the provisions of s. 1 of the Act; (4) those of a class mentioned in Sch. 1 to the Act of 1950 or the subject of orders exempting shops so far as they were used for carrying on the same from the provisions of s. 1. On Wednesday, Mar. 12, 1958, whilst occupying the premises the appellants did not close the premises or any part of them for the serving of customers at or before 1.0 p.m. and after 1.0 p.m. all the retail trades or businesses habitually carried on in the premises were being carried on. The appellants habitually closed the whole of the premises not later than 1.0 p.m. on Thursday, throughout the year, as specified in a notice to that effect affixed in the premises. The respondents had made no order specifically relating to mixed shops.

For the appellants it was contended that they were the occupiers of one set of premises wherein there was one shop and that they fulfilled their obligation under s. 1 (1) of the Shops Act, 1950, to close the shop at or before 1.0 p.m. on one week day throughout the year by closing the whole shop at or before 1.0 p.m. on Thursday throughout the year. That they were under no obligation to close one part of the shop at 1.0 p.m. on one day throughout the year and other parts at 1.0 p.m. on another or other days; and that if they did so they would not thereby fulfil the obligation imposed by s. 1 (1) of the Shops Act, 1950. That if the appellants were obliged to close the whole shop on one day to fulfil the

requirements of s. 1 (1) of the Shops Act, 1950, and in addition to close part of the shop on another or other day so as not to infringe any order of the respondents made under the Act, an obligation was imposed on them which was greater than that which was imposed by the Act on shopkeepers. That if on the proper construction of the orders of the respondents a part of the shop had to be closed at or before 1.0 p.m. on one day and other parts had to be closed on another or other days; or alternatively if the whole shop was required to be closed on one day and a part or parts on another or other days, the orders were ultra vires the Shops Act, 1950. That in the absence of an order relating to mixed shops the appellants were at liberty to choose on which week day throughout the year the shop would close at or before 1.0 p.m. by affixing a notice specifying the closing day in the shop. That none of the orders referred to applied to the appellants' shop. That the appellants' premises were not a grocer, tea dealer and provision merchants' shop; nor a fruiterer, greengrocer and florist's shop; nor a fishmonger and poulterer's shop nor a butcher's shop within the meaning of the respective Brighton Weekly Half-Holiday Orders.

On behalf of the respondents it was contended that in the appellants' premises there was more than one shop within the meaning of the Shops Act, 1950, and those parts of the premises wherein the appellants carried on the retail trades or businesses of (i) a grocer, tea dealer, and provision merchant, (ii) a fruiterer, greengrocer and florist, (iii) a fishmonger and poulterer, and (iv) a butcher, comprised four separate shops. That, accordingly, the respondents were obliged to close for the serving of customers these parts of the premises wherein such trades or businesses were carried on at 1.0 p.m. on Wednesday; and, having failed to do so, they were guilty of each of the offences charged. Alternatively, that if in the appellants' premises there was only one shop, then the four retail trades or businesses referred to above were such that the appellants were obliged to close on Wednesday at 1.0 p.m. under one of the orders. As regards the parts where they sold bread, delicatessen, cakes, milk, cigarettes, sweets, ices, and toilet requisites they were exempt from the obligation to close on one day each week at 1.0 p.m. As regards the parts where they sold stockings, towels, tablecloths, shirts, ties, sheets and hardwear, the retail trades or businesses were not sufficiently extensive to consist in the carrying on of separate retail trades or businesses but were merely incidental to one or other of the above four trades or businesses; and accordingly the appellants were obliged to close the whole of the premises, except the parts which were exempt, for the serving of customers at 1.0 p.m. on Wednesdays and, having failed to do so, were guilty of all or one of the offences charged. That, in the further alternative if in the appellants' premises there was only one shop and if ihn te parts where they sold stockings, etc., separate retail trades or businesses were carried on, then the appellants were obliged pursuant to the order to close for the serving of customers those parts where the four above trades or businesses were carried on at 1.0 p.m. on Wednesdays. That the orders were intra vires the Shops Act, 1950.

On the findings of fact the justices were of the opinion that the appellants were guilty of the offences charged and accordingly they were convicted of each offence. The question for the opinion of the court was whether the justices came to a correct determination and decision in point of law.

L. G. Scarman, Q.C., and *R. O. C. Stable* for the appellants.

R. J. Parker for the respondents.

LORD PARKER, C.J.: The appellants occupy premises in Western Road, Brighton, which are self-contained and for rating purposes are a single hereditament. In those premises they carry on a mixed business. Their main business is fourfold, namely, (1) that of a grocer, tea dealer and provision merchant, (2) that of a fruiterer, greengrocer and florist, (3) that of a fishmonger and poulterer, and (4) that of a butcher. In addition, though on a smaller scale,

A they carry on other trades or businesses including those of a domestic hardware merchant, a stationer, a confectioner, a baker, a tobacconist and a seedsman.

The Shops Act, 1950, which is an amending and consolidating Act, provides by s. 1 (1):

> " Every shop shall be closed for the serving of customers not later than one o'clock in the afternoon on one week day in every week."

B The appellants have obeyed that injunction in that they have closed the whole of these premises on Thursday afternoon of every week. The Act then provides by s. 1 (2):

> " The local authority may, by order, fix the day on which a shop is to be so closed (in this Act referred to as ' the weekly half-holiday '), and any such
C order may either fix the same day for all shops, or may fix—(a) different days for different classes of shops . . . "

The local authority, the Council of the County Borough of Brighton, have made a number of orders which have been in existence now for a considerable time, some were made in 1912, 1921 and 1922. They were made under the Shops Act, 1912, but by s. 76 of the Shops Act, 1950, they remain in force as if made under
D the present Act. They provide that in regard to shops wherein the retail trade or business of a grocer, tea dealer and provision merchant is carried on the shop shall be closed on Wednesday, not Thursday, and the order for a fruiterer, greengrocer and florist also provides for a Wednesday closing; so does that in respect of shops wherein the trade or business of fishmonger and poulterer is carried on, and also that in respect of the trade of butcher. In regard to yet another
E order dealing with towels, tablecloths, sheets and the like, there was a provision for Thursday closing. Accordingly, the four informations in this case charged the appellants with failing to comply with the four orders that I have referred to which provided for a Wednesday closing.

I have very great sympathy with the justices who were called on to decide this case. I also have very great sympathy with any shopkeeper who has
F occasion to consider the Shops Act, 1950. Section 1 is extraordinarily difficult to construe. I will not go into it in detail, but clearly the first question is: What is a shop? One gets no assistance from the definition, which merely provides that it includes any premises wherein retail trade or business is carried on. Does " shop " there mean the physical self-contained premises? Can it be construed as applying to a department within those self-contained premises
G or, indeed, to a counter in a department? It seems to me that, reading the Act as a whole and the regulations, the term " shop " refers to the premises, and, although there is no specific finding in this case, I think that it is perfectly clear that where there is a single hereditament consisting of self-contained premises laid out with counters (as is shown on the plan of these premises) the whole of those premises constitutes the shop; it is impossible to say that any
H particular part of those premises or any particular counter constitutes the shop. Accordingly, prima facie each one of these orders, which apply to shops wherein the specified trade or business is carried on, applies to the premises, and the Shops Act, 1950, provides that every shop for which a day has been fixed shall be so closed, that is, closed for the serving of customers.

The argument for the appellants who have been convicted in this case, quite
I shortly, is that on those plain words it becomes their duty, if these orders apply to them, to close the whole of the shop on every day on which an order requires closing. In this case the four orders applied to a Wednesday and another order to a Thursday, and that would mean they would be obliged to close the whole of their shop every Wednesday and the whole of their shop every Thursday. As counsel for the appellants pointed out, a local authority might make orders which would cover almost every day of the week. Accordingly, he says that that construction reduces the whole matter to an absurdity. I should say that a shopkeeper always has the option, whatever the local authority think, to

close on Saturday instead of on the specified day. Therefore, the appellants would have to opt to close on Saturday instead of closing on Wednesday and Thursday, but that does not lessen the absurdity, because the option is no longer a free option, but in practice the appellants would have to close their shop on Saturday. On the other side, counsel for the respondents has urged, very plausibly, that if you read the Act as a whole it becomes clear that you are really only fixing a day for the closing of a shop in relation to a particular trade being carried on. He points to a number of other parts of the Act which clearly contemplate that the whole of the shop will not be closed but only certain counters or departments within the shop. From that he urges that the true construction of s. 1, and the only construction which will really make sense, is that if, for instance, an order provides for the Wednesday closing of a shop wherein a butcher's trade is carried on, then, in the case of these appellants, they would have to close that part of their counters where they ordinarily sell butcher's meat. I confess that for my part I have very grave doubts. I bear in mind that the provisions are penal provisions. I also bear in mind that unless the argument of counsel for the respondents is right there may be unfairness and competition between traders, which is clearly a matter to be taken into consideration under this Act; but I am still left in very considerable doubt if only for the reason that there is no irresistible inference towards that construction. That construction is merely the one which ought to be given to the enactment in order to produce a logical scheme. There is a difference between saying what would be a logical scheme and saying what the scheme is which Parliament has intended and which must be applied. I find it unnecessary to come to any conclusion in the matter for the reason that, as long ago as 1916, this point came before the Scottish courts. It arose under the Shops Act, 1912, but for all material purposes the wording is the same. In *Patrick Thomson, Ltd.* v. *Somerville* (1) (1917 S.C. (J.) 3) a large firm of retail drapers and general warehousemen carried on in single premises their business as such together with a hairdressing business. The hairdressing business was ancillary to their main business and formed only a small part of their business. The local authority made an order that hairdressing shops were to be closed on a particular day and that was challenged by the shopkeeper. The court held unanimously that the order applying to a shop wherein the business of hairdressing was carried out did not apply at all to the case of a mixed business where other businesses were carried on as well as hairdressing; in other words it only applied to premises where the sole business was hairdressing. The Lord Justice-General (LORD STRATHCLYDE) said this (ibid., at p. 7):

> " I think, from the description of the business which they carry on, that the appellants fall within the description given in s. 10 (1)* of the [Shops Act, 1912], viz., persons who are carrying on in the same shop several trades or businesses; and under s. 4 (2)†[of the Act of 1912] the local authority might have provided for the half-holiday being observed on a particular day in shops where a number of different trades or businesses are carried on. The local authority has not, however, thought fit to do so. The order in question is applied, apparently, to all barbers' and hairdressers' shops, and that may be quite legitimate; but it appears to me that it does not apply to a case like the present where the shop is in the occupancy of one person who carries on therein a variety of different trades or businesses. In such a state of matters the statute expressly authorises the occupant of the shop to go on with any one of his businesses, which chances to be one of the exempted businesses, but quoad all the rest the weekly half-holiday prescribed by the local authority must be observed."

Then he deals with the provisions of the particular order, and he ends in this way (ibid., at p. 8):

* The corresponding enactment is s. 13 of the Shops Act, 1950.
† The corresponding enactment is s. 1 (2) of the Shops Act, 1950.

A "On the ground, therefore, that the appellants occupy only one shop in which a variety of trades and businesses is carried on, I hold that the order in question does not apply to the present case, and accordingly that we ought to answer the question put to us in the negative."

The other two judgments given in *Patrick Thomson, Ltd.* v. *Somerville* (1) were to the same effect. That was in 1916, and it is true that in that case there was a finding that the hairdressing business was merely ancillary to the other business. In 1922, however, *MacDonald* v. *Groundland* (2) (1923 S.C. (J.) 28) came before the courts in Scotland. There the business carried on was that of a jewellers and tobacconist's business in the front of the shop, but at the back there was a hairdresser's business, and it is clear in that case that the hairdresser's business was a substantial part of the whole and not merely subsidiary. Again there was an order fixing a day, in that case Thursday or Saturday, as the weekly half-holiday for hairdressers' shops. The argument was that in that case by reason of the substantial character of the hairdresser's business it could be distinguished from *Patrick Thomson, Ltd.* v. *Somerville* (1), but the Lord Justice-Clerk (LORD ALNESS) said this (1923 S.C. (J.) at p. 31):

"Having given careful attention both to the argument and to the decision in *Patrick Thomson's* case (1), I am quite unable to see that any radical distinction, either in fact or in law, can be drawn between it and the case with which we are now concerned. The only distinction in fact which has been suggested is that, whereas we are here dealing with a business which forms a substantial part of small premises, the court was there concerned with a business which formed a small part of large premises. That is a perfectly accurate distinction in fact; but I am unable to see that it affected the judgment which was pronounced in *Patrick Thomson's* case (1)."

There are two cases, therefore, in the Scottish courts, one in 1916 and one in 1922, saying that in cases such as this the order does not apply, and although those decisions are in no way binding on this court, this court does try to decide in the same way, as LORD GODDARD, C.J., said quite recently in *Trickers (Confectioners), Ltd.* v. *Barnes* (3) ([1955] 1 All E.R. 803 at p. 807):

"In any case, if there is a decision of the High Court of Justiciary which deals with these matters on the other side of the Border, we in this court always try to decide in the same way."

What LORD GODDARD, C.J., there said applies with force in the present case. There were these decisions in 1916 and 1922, since when Parliament has considered the whole matter, and Parliament has enacted the present Act of 1950. Unless this court could come to a clear conclusion that the decisions in Scotland were wrong, they should, in those circumstances, be followed. On that ground, and on that short ground, I would allow this appeal.

DONOVAN, J.: Speaking solely for myself, I would have come to a conclusion in the appellants' favour even in the absence of the Scottish decisions, but in the circumstances there is no point in my giving detailed reasons. Broadly they are those put forward on behalf of the appellants, but the decision of this court in this case is presumably final and I do not want to run the risk of creating fresh difficulties on this dark subject by observations of my own; I content myself, therefore, by agreeing that this appeal should be allowed for the reasons, among others, stated by the Lord Chief Justice.

ASHWORTH, J.: I agree with the judgment of the Lord Chief Justice.

Appeal allowed.

Solicitors: *Royds, Rawstorne & Co.* (for the appellants); *Sharpe, Pritchard & Co.*, agents for *Town clerk*, Brighton (for the respondents).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

GUINNESS TRUST (LONDON FUND) FOUNDED 1890 REGISTERED 1902 *v.* WEST HAM CORPORATION.

[COURT OF APPEAL (Jenkins, Sellers and Pearce, L.JJ.), February 4, 1959.]

Rates—Limitation of rates chargeable—" Established or conducted for profit "—Whether charitable organisation, though not established for profit, was conducted for profit by reason of terms of trust—Rating and Valuation (Miscellaneous Provisions) Act, 1955 (4 & 5 *Eliz.* 2 *c.* 9), *s.* 8 (1) (*a*).

The words " not established or conducted for profit " in s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955*, mean not established or conducted for the purposes of making profit or with the object of making a profit (see p. 488, letter D, and p. 490, letter A, post); thus an organisation established for charitable purposes, which receives, by way of profit from its property, a fair income that provides a means of achieving the charitable purposes, is not constituted an organisation " conducted for profit " (within s. 8 (1) (a)) merely because it receives the income (see p. 490, letter H, p. 491, letter G, to p. 492, letter A, and p. 492, letter C, post).

A trust was founded by a deed which declared that the objects to which the trust fund was to be applicable were (by cl. 1 (A)) " the amelioration of the condition of the poorer classes of the working population of London and of their modes and manner of living, by the provision of improved dwellings " and by other means. Clause 1 (B) provided—" without restricting the interpretation in the widest sense of the objects as before defined, it is the intention of the founder that the original capital of the fund should, by expenditure on objects of a permanent character returning a fair low rate of interest . . . , be kept intact and go on increasing . . . ". The trustees invested the fund in dwellings which they let to poor working people at rents calculated, so far as the Rent Acts would allow, to realise, after allowing for all outgoings, a nett income of three per cent. on their capital. This income was applied in acquiring additional properties and expanding the work of the trust. It was common ground that the main objects of the trust were charitable.

Held: not only was the trust established for charitable purposes but also it was not " conducted for profit " within s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, because the profits realised by the trust from following the administrative policy indicated in cl. 1 (B) were applicable for, and incidental to, the carrying out of the main charitable objects established by cl. 1 (A); therefore, the trust was entitled to limitation of rates under s. 8 (1), (2).

National Deposit Friendly Society Trustees v. *Skegness U.D.C.* ([1957] 3 All E.R. 199, C.A., [1958] 2 All E.R. 601, H.L.) applied.

Decision of the QUEEN'S BENCH DIVISIONAL COURT ([1958] 2 All E.R. 237) reversed.

[For the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 8, see 35 HALSBURY'S STATUTES (2nd Edn.) 394.]

Cases referred to:

(1) *National Deposit Friendly Society Trustees* v. *Skegness U.D.C.*, [1957] 1 All E.R. 407; [1957] 1 Q.B. 531; *affd.* C.A., [1957] 3 All E.R. 199; [1957] 2 Q.B. 573; 121 J.P. 567; *affd.* H.L., [1958] 2 All E.R. 601; 3rd Digest Supp.

(2) *R.* v. *Whitmarsh*, (1850), 15 Q.B. 600; 19 L.J.Q.B. 469; 16 L.T.O.S. 108; 117 E.R. 586; 9 Digest (Repl.) 71, *277*.

* Section 8 (1) (a) is printed at p. 483, letter F, post.

(3) *New York Life Insurance Co.* v. *Styles*, (1889), 14 App. Cas. 381; 59 L.J.Q.B. 291; 61 L.T. 201; sub nom. *Styles* v. *New York Life Insurance Co.*, 2 Tax Cas. 460; 28 Digest 59, *300*.

Appeal.

The ratepayers appealed against the decision of the Queen's Bench Divisional Court, dated Apr. 22, 1958, and reported [1958] 2 All E.R. 237, on a Case Stated by the Recorder of West Ham, that they were not entitled to rating relief under s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The facts appear in the judgment of JENKINS, L.J.

John Pennycuick, *Q.C.*, and *J. P. Widgery*, *Q.C.*, for the ratepayers.
Harold Williams, *Q.C.*, and *A. G. F. Rippon* for the rating authority.

JENKINS, L.J.: In this case the ratepayers, a charitable body known as the Guinness Trust (London Fund) Founded 1890 Registered 1902 claimed with respect to premises occupied by them and known as the Working Persons Hostel and Premises in John Street, West Ham, the benefit of the provisions in regard to rating contained in s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955. The respondents, the county borough of West Ham, as rating authority, rejected that claim, and the ratepayers appealed to quarter sessions. The case was heard by the learned recorder, who by his order of June 3, 1957, allowed the appeal. At the instance of the respondent rating authority the learned recorder stated a case for the opinion of the Queen's Bench Division, and by a judgment dated Apr. 22, 1958, the Queen's Bench Divisional Court allowed the appeal, and held that the ratepayers were not entitled to the benefit of s. 8. From that judgment the ratepayers now appeal to this court.

In order to succeed, the ratepayers must bring themselves within the terms of s. 8, and I should next refer to sub-s. (1) of that section, which is the only part of it with which I need trouble. Section 8 (1) is in these terms:

> "This section applies to the following hereditaments, that is to say—(a) any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

The next two paragraphs of the sub-section are not directly material, but I should perhaps refer to them. They are:

> "(b) any hereditament held upon trust for use as an almshouse; (c) any hereditament consisting of a playing field (that is to say, land used mainly or exclusively for the purposes of open-air games or of open-air athletic sports) occupied for the purposes of a club, society or other organisation which is not established or conducted for profit and does not (except on special occasions) make any charge for the admission of spectators to the playing field."

Then there is a proviso with which I need not trouble. The directly relevant provisions are those contained in para. (a) of sub-s. (1) of the section.

The trust deed whereby the Guinness Trust was constituted is annexed to the case stated by the learned recorder. It is a deed dated Feb. 4, 1890, and it constituted the Guinness Trust as an ordinary unincorporated trust, but the Charity Commissioners incorporated the trustees as a charitable body by an order dated Feb. 28, 1902, and from that time they have been a corporate body with the title now appearing on the record, Guinness Trust (London Fund) Founded 1890 Registered 1902. The trust deed of Feb. 4, 1890, was made between Sir Edward Cecil Guinness, thereinafter sometimes called the founder, of the one part, and the trustees therein named, of the other part, and it contains these recitals:

" Whereas the said Sir Edward Cecil Guinness, having long felt the gravity of the evils which result from the insanitary and insufficient accommodation supplied to large numbers of the poorer of the working classes, in the dwellings now inhabited by them, on Nov. 18 last addressed a communication to the trustees requesting them to undertake the administration of a fund amounting to £200,000, which he proposed to establish with the object of endeavouring in those and other respects to ameliorate the condition of the labouring poor of London.

" And whereas, whilst defining the general lines on which the fund should be applied, it is the intention of the founder that very wide discretion should be left to the trustees as to the mode of application and management, in the expectation that by economical and wise administration the benefits of the fund may be brought within the reach of many who are unable to avail themselves of the advantages offered by existing organisations, and with the hope that, should his expectation in this respect be fulfilled, the success of the experiment may lead to other efforts in the like direction."

Then there is a recital as to the particulars of the investments transferred to the trustees; they had a total value at that date of £200,000. I can now go to the operative part. Clause 1 (A), to which there is a sidenote " Objects of the Trust ", is in these terms:

" 1 (A) The objects to which the fund shall be applicable are declared to be: The amelioration of the condition of the poorer classes of the working population of London and of their modes and manner of living, by the provision of improved dwellings; by giving them facilities, should the trustees think it desirable in any or all cases to do so, for obtaining means of subsistence and the necessaries and decencies of life; and by such other means as the trustees may in their uncontrolled discretion think fit."

Then sub-cl. (B), round which the main controversy in this case has centred, is in these terms:

" Without restricting the interpretation in the widest sense of the objects as before defined, it is the intention of the founder that the original capital of the fund should, by expenditure on objects of a permanent character returning a fair low rate of interest, as far as possible, be kept intact and go on increasing, so that, whilst payments of money in the nature of gifts or not returnable by the recipients are not precluded, the purpose to be kept in view may be assistance to individuals to improve their condition, without placing them in the position of being the recipients of a bounty."

I can omit sub-cl. (C) of cl. 1 and pass to cll. 2 and 3:

" 2. The administration of the fund will be vested in the trustees, and shall be carried out by them so as to give the fullest effect to the objects hereinbefore declared. The mode of application shall be from time to time determined by the trustees in their uncontrolled discretion. 3. The following modes of application are declared to be within the meaning of the trust, but they are mentioned by way of example and illustration only, and not so as to fetter or restrict the trustees' discretion, or render it incumbent on them to adopt them or any of them, unless they shall think fit so to do."

Then sub-cl. (A) of cl. 3:

" The acquisition of land, with or without buildings thereon, in London, and the provision, erection, adaptation, or improvement, of buildings for the purposes of:—(1) Dwellings to be let out in tenements to the poorer classes of the labouring population, in crowded neighbourhoods, or in places of easy access to the centres of labour, with power in the latter case, if deemed expedient, to make arrangements with railway and other companies or otherwise for cheap means of transit. It is the desire of the

A founder that the rents of such tenements may, if practicable, be fixed on such basis as to make them accessible to those of the poorer of the working classes, whom it is his desire to attract from the crowded and insanitary tenements which they now inhabit. Any part of such premises may be used for shops, or for any other purposes which the trustees may determine. (2) Common and other lodging houses. (3) All or any matters, things, B and conveniences for any and every purpose, tending, in the opinion of the trustees, to the convenience, health, comfort, moral welfare and improvement of their tenants and their families, and others whether tenants or not."

Then I think the only other provision to which I need refer is cl. 3 (D):

"The contribution towards, support of, or provision or subscription of C capital for any company, institution, or private or public undertaking or trust formed, or to be formed, either for purposes of profit, or without profit, having objects analogous to any of the objects of the present trust, with or without reserving any control over the application or administration of the funds contributed."

D I should mention, without reading them, that the provisions of cl. 4 give the trustees wide powers of administration and management.

Such being the objects of the Guinness Trust (London Fund), it is common ground that the ratepayers fall within the second requirement of s. 8 (1) (a) of the Act of 1955 in that the main objects of the trust are charitable. The matter in dispute is whether the trust also qualifies under the first requirement, E that the organisation concerned is not established or conducted for profit. The requirements are: "any hereditament occupied for the purposes of an organisation (whether corporate or unincorporate) which is not established or conducted for profit . . ."—that is the first requirement—"and whose main objects are charitable "—that is the second requirement. The second requirement is admittedly complied with, the contest being on the question whether the first requirement, that the organisation in question shall not be established or conducted F for profit, is also satisfied.

Passing to the Case Stated, in para. 2 the learned recorder says that having heard the appeal on Apr. 15, he gave judgment on June 3, 1957, and he found the following facts proved or admitted:

"(a) The ratepayers were an organisation whose main objects were G charitable. (b) The ratepayers were established in 1890 by a deed of trust and were incorporated by order of the Charity Commissioners in 1902. Their activities consisted in the main of providing houses for 'people who are not well-to-do'."

Then there is a reference to an action* to which the Guinness Trust was a party, H which I think has no bearing on the present dispute. The case continues:

"Out of the rents received substantially from these houses they enjoyed an annual gross income in the sum of £150,000. Their policy had been, after allowing for all outgoings, to realise a nett income of three per cent. on their capital which was applied in acquiring additional properties and expanding the work of the trust. This policy, however, the operation of I the Rent Acts had long prevented them from attaining and in 1949 and 1954 they actually sustained a loss of over £2,000 in each year. However, during the years 1946-55 their average profit was some £9,150 and they were now once again on a sound financial footing. (c) Their original capital fund amounted to £200,000 which had been increased by the end of 1955 to something of the order of £1,500,000. (d) A copy of the said deed of trust is attached hereto and forms part of this case. (e) The trustees had never

* *Guinness Trust* (*London Fund*) v. *Green*, [1955] 2 All E.R. 871.

made any contribution to another organisation pursuant to cl. 3 (D) of the said deed of trust." A

Then he gives the figure of the rateable value of the premises in (f) and continues:

" 3. The sole issue before me was whether or not the ratepayers were ' established or conducted for profit ' within the meaning of sub-s. (1) of s. 8 of the Act." B

Then he sets out the contentions of the ratepayers and the rating authority respectively and states his opinion thus in para. 7:

" I was of the opinion that (1) if it is shown that the ratepayers' organisation was not established for profit, the question whether or not it is conducted for profit does not arise. (2) ' Established for profit ' means established for the purpose of profit. (3) The crucial question which I therefore had to determine was What was the real purpose for which the ratepayers were established and was that purpose the making of profit or something else? (4) For the purpose of determining that question regard must be had to the objects for which the ratepayers were established as laid down in the said deed of trust. (5) Profit, while contemplated by the said deed, was entirely incidental to the objects of the trust. (6) The ratepayers' organisation is not established or conducted for profit . . ." C D

Accordingly, he held that the appeal must succeed.

Before passing to the judgment of the Divisional Court I may perhaps conveniently refer to the reports of *National Deposit Friendly Society Trustees* v. *Skegness U.D.C.* (1) in the Court of Appeal ([1957] 3 All E.R. 199) and in the House of Lords ([1958] 2 All E.R. 601). The Court of Appeal decision was delivered on July 30, 1957, and it was available to the Divisional Court. The case had not been heard in the House of Lords at the time of the Divisional Court hearing. The case concerned an organisation of a very different kind from the one with which we are here concerned, but expressions of view were given in the Court of Appeal and in the House of Lords which appear to me to afford substantial support to the contention of the ratepayers in this case. So far as the report in the Court of Appeal is concerned, I would refer to the observations of PARKER, L.J., in delivering the judgment of the court. The learned lord justice said ([1957] 3 All E.R. at p. 201): E F

" We will deal first with the question whether the ratepayers' organisation is established or conducted for profit. It conducts mutual insurance among its members and in carrying on that activity it has accumulated very considerable reserves in the form of investments in securities and in land. Indeed we think that if that activity is properly conducted, the accumulation of such reserves is not only inevitable, but a necessity. From time to time, when those investments are sold, profits are made and the income and rents obtained are also in the nature of profits. The organisation accordingly does earn profits from which the members benefit, but that as it seems to us is a very different thing from being established or conducted for profit. In our judgment the earning of profits is purely incidental, and it cannot be said that the organisation is established or conducted for profit. It carries on no ' business ' for the purpose of earning profits, cf. *R.* v. *Whitmarsh* (2) ((1850), 15 Q.B. 600). The appellants accordingly comply with the first condition." G H I

They were, however, held not to comply with the second condition, and, accordingly, could not qualify for the exemption. The decision of the Court of Appeal was upheld in the House of Lords and I should read some passages from the speeches. LORD KEITH of AVONHOLM said this ([1958] 2 All E.R. at p. 605):

" The society may, I think, quite properly be described as a mutual insurance organisation set up to provide benefits for its members in the various

A mischances of illness, disability and old age that may befall them during membership, and to afford them an opportunity of taking out whole life assurances, endowment assurances and old age annuities for themselves, and certain other defined types of insurance. A man might, in a sense, provide similar benefits for himself without joining any society by setting aside and investing a lump sum, or annual amounts, to accumulate with
B interest and to provide a nest egg against some emergency, or contemplated event, although such a scheme would be inadequate against unexpected early illness or death. The interest earned would necessarily be subject to tax but it could not, in my opinion, be said that he was engaged in earning a profit, or in setting up a profit-earning scheme. The accumulated sum is capital belonging to the person concerned. There are obvious advantages
C in joining with some 700,000 others to provide against such contingencies on a mutual basis and the mutual organisation does not take on the character of a profit-making organisation by the mere addition of numbers. This was, in my opinion, the ratio of the decision of this House in *New York Life Insurance Co.* v. *Styles* (3) ((1889), 14 App. Cas. 381), which is, I think, conclusive on this point."

D So far the learned Law Lord was, as I understand his observations, dealing with the question of mutuality and holding that the case was concluded from that point of view by *New York Life Insurance Co.* v. *Styles* (3). Then he continued with these further observations ([1958] 2 All E.R. at p. 606):

" The Court of Appeal thought that profits, or something in the nature
E of profits, were earned by the society for its members, but that this was purely incidental to the purpose for which the society was formed, and that it could not be said that it was established or conducted for profit. It may well be that, on change of its investments, the society on some occasions realised a capital appreciation just as on other occasions it may have suffered a capital loss. But it was not trading in its investments, and
F the position in the case of this mutual society does not seem to me to be different in any way from what it would be in the case of a single individual. The society holds very large investments which earn large sums of interest and rents. These are, no doubt, profits and gains for the purpose of the Income Tax Acts but, in my opinion, the existence of these investments does not make the society an organisation established or conducted for
G profit within s. 8 of the Act of 1955. If it were otherwise, many charitable organisations holding investments would be cut out of the benefit of the section."

Then LORD MACDERMOTT said this ([1958] 2 All E.R. at p. 608):

" Of these requirements, the first is clearly satisfied. The second has
H been a matter of controversy throughout the litigation, but quarter sessions found, and the Court of Appeal held, that the society was not established or conducted for profit. As at present advised, I am not disposed to differ from that view, but I do not need to express a final opinion on it and I shall, therefore, refrain from doing so and proceed on the assumption that this condition, too, is fulfilled."

I He then goes on to consider the other branch of the section. It will be seen that while not expressing any concluded opinion, he said that as then advised he was not disposed to differ from the view of the Court of Appeal on the question whether the society was established or conducted for profit. LORD SOMERVELL OF HARROW concurred in the opinion which had been delivered by LORD KEITH, and LORD DENNING said (ibid., at p. 611):

" I have no doubt that this society was not ' established ' for profit. Like other friendly societies it was, no doubt, established to encourage thrift among people of small means. Rule 2 (1) shows that its object was to

enable its members, by the pooling of their contributions, to establish a common fund or funds, out of which they would receive relief during sickness . . . Looking at the way in which the society has conducted its affairs, I am of opinion that it has made profits. It has not distributed those profits like a commercial company. Nor has it returned them to members. It has used them to build up large and accumulating reserve funds. But the fact that the society has made profits does not mean that it is 'conducted for profit', which I take to mean 'conducted for the purpose of making profit'. Many charitable bodies, such as colleges and religious foundations, have large funds which they invest at interest in stocks and shares, or purchase land which they let at a profit. Yet they are not established or conducted for profit. The reason is because their objects are to advance education or religion, as the case may be. The investing of funds is not one of their objects properly so called, but only a means of achieving those objects."

I think that those are all the passages to which I can usefully refer, and notwithstanding the difference between the two cases, they fortify me in the view that "established or conducted for profit" in s. 8 (1) of the Act means established for the purpose of making profit or conducted for the purpose of making profit, and does not extend to every organisation which in any circumstances or at any stage in its activities receives something which might be considered in itself to constitute a profit.

The Divisional Court took a different view and I should next read some part of their judgments. The leading judgment was delivered by LORD GODDARD, C.J., and he said ([1958] 2 All E.R. at p. 239):

"It is clear that what Sir Edward Guinness desired was that this sum of £200,000 should be administered by the trustees in erecting buildings and letting them to tenants at such a low rent as would enable the trust to maintain the buildings and to accumulate funds; the settlor hoped and desired that more buildings of this nature would be put up either by his trustees or other like-minded charitable people, so that the dwellings of the poor of London would be very largely increased. That was the object of the trust; and I have read the direction to the trustees. The trustees are therefore to invest their money in buildings charging rents which will yield a low rate of interest. That is a profit and the profit will be accumulated and used for the purpose of acquiring for the benefit of the trust other buildings or erecting other buildings, though not for the personal profit of any member of the trust, still less of the settlor . . . Let it be assumed, as I think it may properly be assumed, that the Guinness Trust is not established for profit in the sense that that is not the object of the trust. It is, however, to be conducted for profit and exists in order that there may become an accumulation of funds which will enable the trustees to invest in other buildings and thus increase the benevolent objects which the settlor had in mind. The rating authority is not, it seems to me, concerned with more than whether the conduct of the business is for profit, and here it is for profit. It is for other objects, no doubt, but it is conducted for profit. The clause which I have read distinguishes this case, if distinction is needed, from *National Deposit Friendly Society Trustees* v. *Skegness U.D.C.* (1) ([1957] 3 All E.R. 199), to which we have been referred, which shows that if a profit is being made the rating authority is not concerned with what is done with that profit. The rating authority does not have to consider whether the profit is used for charitable purposes or whether it is used for any other purpose . . . I will assume that the organisation is not established for profit, but in my opinion it is conducted for profit, because it is making profits and its object is making profits for the purposes that

A I have indicated; and, in my opinion, although its main objects are charitable it is not entitled to the benefit of the section. The appeals must be allowed."

Then HILBERY, J., said ([1958] 2 All E.R. at p. 239):

"The difficulty in the way of the Guinness Trust seems to me to be in B the terms of the deed which created the trust. It is conceded that under that deed the main object for which it was established is charitable, but the question arises whether it is also conducted for profit. I find it difficult to escape from the express terms of cl. 1 (B) which has been read by my Lord because there the founder of the trust expressed himself thus [then he read cl. 1 (B)* and continued:] In my view the fair interpretation of that is C a direction to the trustees so to conduct the affairs of the trust as to produce a profit, which will if possible increase the fund available for the charitable purposes. That is conducting for profit. That distinguishes the case from the decision of the Court of Appeal on which counsel for the respondent placed great reliance, *National Deposit Friendly Society Trustees* v. *Skegness U.D.C.* (1) ([1957] 3 All E.R. 199), because the words of PARKER, L.J., on D which particular stress was laid were these (ibid., at p. 201): 'The organisation accordingly does earn profits from which the members benefit, but that as it seems to us is a very different thing from being established or conducted for profit. In our judgment the earning of profits is purely incidental, and it cannot be said that the organisation is established or conducted for profit.' In my view, if the facts were that in this case the trustees had, E merely incidental to the discharge of the trust, so to invest money as to increase the amount available for charitable purposes the case would come immediately within the reasoning of that judgment, but that is not the case here. It is not that incidentally or fortuitously these profits have been made by the trustees. They have been made pursuant to the direction given to them about the affairs of the trust under the trust deed in cl. 1 (B) F which I have read."

DONOVAN, J., agreed and he said this ([1958] 2 All E.R. at p. 240):

"It seems to me that all that the learned recorder thought he had to decide here was whether the trust was established for profit, and if he decided it was not then he had automatically to decide that the trust was G not conducted for profit. I think that is clearly wrong. There are two separate conditions in the section both of which must be satisfied before there is a claim for relief. I merely venture to repeat what I said in argument to counsel for the respondent in connexion with the judgment of PARKER, L.J., about the concern being conducted for profit. Where a concern simply invests its reserves in order to get a return until the reserves are required H for the business, it is natural to say that in so investing its reserves the concern is not merely on that account conducting its affairs for profit. It is otherwise where the whole business is to make investments and so earn a profit, whether the investments be in stocks and shares or in dwelling-houses."

I find it impossible to accept the views expressed by the Divisional Court. I Returning to the deed of trust itself, it appears to me abundantly plain that the objects of the fund are set out in cl. 1 (A)† and that para. (B) of cl. 1 is an ancillary provision which does not restrict what has gone before or, to use the exact words, "without restricting the interpretation in the widest sense of the objects as before defined". It states the intention of the founder without narrowing the foregoing objects, nor, as I see it, obliging the trustees to adopt the

* Clause 1 (B) is printed at p. 484, letter F, ante.

† Clause 1 (A) is printed at p. 484, letter D, ante.

policy that the founder recommended. In my view, as I have said before, the words "not established or conducted for profit" mean not established or conducted for the purpose of making profit or with the object of making a profit. If that is right, then clearly it appears to me that the ratepayers are entitled to succeed in this case. If one does not introduce some word indicative of object or purpose into this requirement, it appears to me that, as LORD KEITH observed in *National Deposit Friendly Society Trustees* v. *Skegness U.D.C.* (1) ([1958] 2 All E.R. at p. 606), many charitable organisations holding investments would be cut out of the benefit of the section. In my view it is really quite plain, when one considers the trust deed under which the ratepayers were constituted and when one considers the history of their trust, that the ratepayers are not in any ordinary sense of that expression an organisation established for profit or an organisation conducted for profit. The trust was established for the amelioration of the condition of the poorer classes of the working population of London, and so forth by, inter alia, the provision of improved dwellings. These were the objects of the trust. It was at no time the object or the purpose of the trust to make profits, and I venture to think that the founder would have been much, and justifiably, surprised if, after he had executed this document, he had been told that this trust was a trust established for profit. I think that it is an abuse of language so to describe it. The objects, as I have said, are those enumerated in sub-cl. (A) of cl. 1*, and cl. 1 (B)† indicates the method which the founder recommends of carrying out the objects. It is perfectly true that in conducting their affairs on the lines indicated in para. (B) of cl. 1 the trustees did make a profit in the sense that they charged rents which, though moderate, were at such rates as to show some surplus over the outgoings incurred in respect of the various properties. It does not follow that the trust was established for the purpose of making or realising this surplus or, one may say, these profits; it was established for the purpose of ameliorating the condition of the poorer classes by, inter alia, the provision of improved dwellings. Lettings were adjusted so as to show a surplus with the sole object of supporting and furthering these charitable purposes. Not a penny of the so-called profits could ever find its way into the hands of anybody as a profit to which he was beneficially entitled. The only persons who could benefit by this surplus were the objects of the charity.

In the circumstances of this case I agree with the learned recorder that if it is shown that the ratepayers' organisation was not established for profit (i.e., for the purpose of profit) the question whether it is conducted for profit does not arise, by which I take him to mean that there can be no ground for holding that it is conducted for the purpose of profit. The point is not one which is capable of great elaboration, and all that I can add is that when one considers the whole matter it is reasonably plain that, according to all ordinary notions, the ratepayers were not established for profit or conducted for profit. They were a charitable organisation which carried out its charitable purposes in part by means of the surpluses which they could derive from the letting at moderate rents of accommodation to people of limited means. Such were the purposes of the organisation, and it does not appear to me that any question of profit enters into their case at all if one construes the language of s. 8 (1) in the way in which I have endeavoured to construe it.

There is one point on the construction of para. (a) of s. 8 (1) to which I should advert, and it is this. The sub-section says:

> "any hereditament occupied [and so on] which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

* See p. 484, letter D, ante.

† See p. 484, letter F, ante.

That language, it is said, suggests that the legislature had in contemplation the possibility that an object which could qualify as charitable might be established or conducted for profit within the meaning of the earlier words of the section. That argument at first sight is not without force, but in my view the language " not established or conducted for profit " is capable of being explained by the circumstance that it refers to an enumeration of particular objects, not all of which are charitable or wholly charitable. It is an enumeration which includes what one might describe as charities and near charities, and it might have been thought necessary ex abundanti cautela to apply this qualification to the entire range without discrimination between the different objects stated. As I have said, the matter does not admit of any great elaboration. Giving it the best consideration that I can, and with all respect to the views of the members of the Divisional Court, from whom I differ with diffidence, I am of opinion that this appeal should be allowed.

SELLERS, L.J.: For the greater part of the argument I was inclined to resist the persuasive submissions of *Mr. Pennycuick* (counsel for the ratepayers) and to think that the decision of the Divisional Court was right. One of the difficulties which I felt about accepting the argument on behalf of the ratepayers is the matter to which my Lord has just referred, the effect of it on the words in s. 8 (1) (a) of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, " not established or conducted for profit ". It seemed to me that the argument would go a long way to make those words unnecessary and of no effect. My Lord has indicated a manner in which they might be accepted. I still feel doubt whether there is any satisfactory way of explaining them. If you have an organisation whose main objects are charitable, it is a little difficult to see, on the argument which has been advanced, that it could be at the same time established or conducted for profit. Both requirements have to be present, that the organisation is not established or conducted for profit and that its main objects are charitable, in order to come within the section.

On the whole I have come to the conclusion that one should approach the matter in this way. The Divisional Court had before them the decision of this court in *National Deposit Friendly Society Trustees* v. *Skegness U.D.C.* (1) ([1957] 3 All E.R. 199), and, in particular, the passage in the judgment delivered by PARKER, L.J., relating to this matter, which my Lord has read more fully. The material passage is ([1957] 3 All E.R. at p. 201):

> " The organisation accordingly does earn profits from which the members benefit, but that as it seems to us is a very different thing from being established or conducted for profit. In our judgment the earning of profits is purely incidental, and it cannot be said that the organisation is established or conducted for profit."

In the House of Lords I do not understand that that view was enlarged. It was accepted. The reasoning in support of it was developed in the speech of LORD DENNING, on which great reliance has been placed before this court, and, in particular, on the passage where he says ([1958] 2 All E.R. at p. 612):

> " Many charitable bodies, such as colleges and religious foundations, have large funds which they invest at interest in stocks and shares, or purchase land which they let at a profit. Yet they are not established or conducted for profit. The reason is because their objects are to advance education or religion, as the case may be. The investing of funds is not one of their objects properly so called, but only a means of achieving those objects. So here, it seems to me, that, if the making of profit is not one of the main objects of an organisation, but is only a subsidiary object—that is to say, if it is only a means whereby its main objects can be furthered or achieved—then it is not established or conducted for profit . . ."

The recorder finds in the Case Stated: A

" Profit, while contemplated by the said deed, was entirely incidental to the objects of the trust."

I have come to the conclusion, on the grounds which my Lord has advanced more fully, that that is the right view to take and that it concludes this case. I have come to it with some hesitation and after considerable persuasion but I agree that this appeal should be allowed. B

PEARCE, L.J.: I agree with the reasons which have been given by JENKINS, L.J. The making of profit by the ratepayers, the trust, was part of the machinery by which it achieved charitable purposes. The making of that profit, which could never be distributed, was not the object or purpose of the trust. It was the means for the expansion of the sphere of the charity; it was not an end in itself. Though deliberate, it was incidental and subsidiary to the purpose of the trust. In my opinion the trust was not established or conducted for profit, and the appeal should be allowed. C

Appeal allowed: judgment of the Queen's Bench Division set aside and order made by quarter sessions restored. Leave to appeal to the House of Lords granted. D

Solicitors: *Travers Smith, Braithwaite & Co.* (for the ratepayers); *Town clerk*, West Ham (for the rating authority).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

E

NOTE

THE LIVERPOOL. STEAMSHIP ENTERPRISES OF PANAMA INC., OWNERS OF S.S. LIVERPOOL *v.* OWNERS OF S.S. OUSEL AND OTHERS. F

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), January 20, 1959.]

Shipping—Limitation of liability—Decree—Form of decree—Harbour board claiming in respect of removal of ship sunk in collision—Rules of the Supreme Court, Appendix Q, Form No. 2. G

[As to decrees for limitation of liability in shipping cases, see 1 HALSBURY'S LAWS (3rd Edn.) 106, para. 243; and as to the limitation of liability, see 30 HALSBURY'S LAWS (2nd Edn.) 940-942, paras. 1303, 1304; and for cases on the subject, see 41 DIGEST 914-920, *8058-8103.*

As to amendments to correct clerical or accidental mistakes in orders, see H 22 HALSBURY'S LAWS (3rd Edn.) 786, para. 1666.]

Case referred to:

(1) *MacCarthy* v. *Agard*, [1933] All E.R. Rep. 991; [1933] 2 K.B. 417; 102 L.J.K.B. 753; 149 L.T. 595; Digest Supp.

Application and Appeal. I

This was an application by the plaintiffs, the owners of the steamship Liverpool, to amend a decree dated May 28, 1958, made by the district registrar at Liverpool, in an action brought for limiting the liability of the plaintiffs. The proceedings arose out of a collision in the River Mersey on Jan. 8, 1957, in which the Ousel was sunk by the Liverpool, and damage was done to the cargo carried by the Ousel, and, as result of the sinking, the Mersey Docks and Harbour Board incurred expense in the removal of the Ousel. The plaintiffs admitted negligence and brought an action under s. 504 of the Merchant Shipping Act,

1894, to limit their liability. The defendants were (1) the owners of the Ousel, (2) owners of part of the cargo and (3) the Mersey Docks and Harbour Board. The district registrar made a decree following the form 2* set out in Appendix Q to the Rules of the Supreme Court, added by R.S.C. (Admiralty) 1953 (S.I. 1953 No. 986), r. 10. The plaintiffs applied to amend the decree by adding thereto the following words:

> "or any loss or damage caused to property or rights of any kind, whether on land or on water, or whether fixed or movable, by reason of the improper navigation or management of the Liverpool."

Alternatively the plaintiffs sought a further decree under the Merchant Shipping Acts, 1894 to 1954, limiting the liability of the plaintiffs to damages including any loss or damage caused to property or rights of any kind, whether on land or on water, or whether fixed or movable, by reason of the improper navigation or management of the Liverpool, in respect of the casualty which was the subject of the action (i.e., the proceedings for relief under s. 504), viz., the collision between the steamship Liverpool and the steamship Ousel. The district registrar referred the application to the judge. The plaintiffs, by a new summons, applied for leave to appeal from the order of the district registrar of May 28, 1958, out of time, and, after hearing argument the court (KARMINSKI, J.) gave leave to appeal so that all aspects of the matter might be before him.

The second defendants, the cargo-owners, filed objection that the third defendant, the Mersey Docks and Harbour Board, had no cause of action against the plaintiffs, or, if the board had, then it was not one in respect of which the plaintiffs were entitled to limit liability. These matters were, however, abandoned except that the cargo-owners maintained that the decree made by the district registrar did not cover any claim of the board and the board claimed that it was entitled to share in the fund in court.

J. R. Adams, Q.C., and *B. C. Sheen* for the plaintiffs, owners of the Liverpool.

R. F. Stone for the first defendants, owners of the Ousel.

H. V. Brandon for the second defendants, owners of part of the cargo of the Ousel.

J. V. Naisby, Q.C., and *G. N. W. Boyes* for the third defendant, the Mersey Docks and Harbour Board.

KARMINSKI, J., having stated the nature of the application and appeal and having summarised the facts, continued: A difficulty in this case has arisen, perhaps from the form set out in Appendix Q to the Rules of the Supreme Court, which is referred to in R.S.C., Ord. 55H. It is not necessary to refer to the provisions of that order in detail, but r. 12 of the order states:

> "The form set out in Appendix Q to these rules shall be used for the purposes of the proceedings to which this order applies, with such modifications as circumstances may require."

The history of the form, which is now form 2 in Appendix Q, is, to me, still a little obscure. In all probability it is derived from one of the early editions of ROSCOE'S ADMIRALTY PRACTICE and may have been in use for a very great many years under earlier Merchant Shipping Acts, but, although the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, widened the scope of limitation expressly, yet the existing form of limitation decree still seems to be in use although it was probably designed to meet earlier Acts. The rules expressly state that the form as set out in the appendix can be varied; but I gather that in practice it has been very constantly used. Though I am not concerned with revision of a prescribed form yet it has occurred to me that possibly the form might be re-examined with a view to being re-drafted.

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* See ANNUAL PRACTICE, 1959, p. 2561.

I have to deal with the matter as it stands, and it is sought on behalf of the plaintiffs to amend the decree of limitation made by the learned district registrar, although it is not for a moment suggested that he committed any kind of error. He was asked to make a decree in the form in which it was made, and the draft was examined and initialled by at any rate two of the firms of solicitors concerned, who have great experience in these matters. I have to consider whether I can, as counsel for the plaintiffs has invited me to do, correct or amend the decree of the learned district registrar. To make that possible I would have to act under the very limited provisions of what is usually called the slip rule, R.S.C., Ord. 28, r. 11*, which reads:

> " Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court or a judge on motion or summons without an appeal."

It will be noticed that the rule refers expressly to " clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission ". It cannot be said that there was in this case a clerical error of any kind, or " any accidental slip or omission ". The rule, as I understand it, has always been somewhat carefully construed and has been acted on only when the court has been satisfied that the mistake or omission came within its wording.

Counsel for the second defendants referred me to the decision of the Court of Appeal in *MacCarthy* v. *Agard* (1) ([1933] All E.R. Rep. 991), which was a case where a judgment was obtained against a married woman in the well-known *Scott* v. *Morley*† form; but in fact she was not a married woman, but a widow, having actively misrepresented to the court her status. When the facts were ascertained, the plaintiff applied to the master to alter the judgment and GODDARD, J., acceded to that application. The matter then went to the Court of Appeal where a majority (SCRUTTON, L.J., dissenting), decided that the court had no power, either under the slip rule or under the inherent jurisdiction of the court, to correct the judgment which had been intentionally given in that form, although procured by the active misrepresentation of the defendant. It cannot be doubted that the majority of the court (i.e., GREER and ROMER, L.JJ.), came to the clear conclusion, although with some obvious regrets, that the real remedy was by appeal or by a further action. GREER, L.J., described that as rather " like using a steam-hammer to crack a nut "‡. In the present case, however, the procedural difficulties have been smoothed out by my being able to grant leave to appeal.

The other suggestion, which was argued by counsel for the plaintiffs, was that even if I could not deal with the matter under the slip rule I could in terms amend the order by granting a further decree. I do not think that the court has power to deal with that without a fresh action being brought. In my view, either the matter comes under the slip rule or it does not. I have decided without any difficulty that it does not come under the slip rule and I do not see how the court, even under its inherent jurisdiction, can grant a further decree without further proceedings being brought.

In this case it has been very fairly conceded by counsel for the second defendants that the real way to deal with this matter, if I think it a proper course, is to give leave to appeal out of time against the decree of the learned district registrar. I am quite satisfied that that is the proper course to adopt here. I, therefore, give that leave, and allow the appeal by adding to the decree the words " or any loss or damage caused to property or rights of any kind, whether

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* ANNUAL PRACTICE, 1959, p. 633.

† See (1887), 20 Q.B.D. 120 at pp. 125 et seq.—the form referred to was one for judgment against a married woman under s. 1 (2) of Married Women's Property Act, 1882.

‡ [1933] All E.R. Rep. at p. 995.

on land or on water, or whether fixed or movable, by reason of the improper navigation or management of the Liverpool."

[The order of May 28, 1958, as amended by the order, dated Jan. 20, 1959, made pursuant to the present application, was, so far as is material, in the following terms, the words added by amendment being printed in italic type:—

". . . it is ordered as follows:—(1) the liability of the plaintiffs to damages in respect of the casualty which is the subject of this action that is to say the collision between their vessel the steamship Liverpool and the steamship Ousel shall not exceed the following limit as respects claims in respect of loss of, or damage to, vessels, goods, merchandise or other things, *or any loss or damage caused to property or rights of any kind, whether on land or on water, or whether fixed or movable, by reason of the improper navigation or management of the Liverpool,* namely £ . . . with interest thereon at four per cent. from Jan. 8, 1957, to the date of payment into court or payment."]

Appeal allowed.

Solicitors: *Batesons & Co.*, Liverpool (for the plaintiffs); *Weightman, Pedder & Co.*, Liverpool (for the first defendants); *Waltons & Co.* (for the second defendants); *R. H. Bransbury*, Liverpool (for the third defendant).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

NOTE

SWISZCZOWSKI *v.* SWISZCZOWSKI AND JEWASINSKI.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Karminski, J.), January 27, 28, 29, 1959.]

Divorce—Practice—Pleading—Answer—Amending answer by adding cross-petition alleging desertion—Date of original answer within three years of alleged desertion.

Divorce—Decree absolute—Restriction where welfare of children involved—Proceedings begun before Jan. 1, 1959, *but amendment by way of cross-petition made thereafter—Matrimonial Proceedings (Children) Act,* 1958 (6 *& 7 Eliz.* 2 *c.* 40), *s.* 2 (2) *inapplicable.*

[As to cross-petitions and cross-prayers, see 12 HALSBURY'S LAWS (3rd Edn.) 341, para. 713, 342, para. 717; and for cases on the subject, see 27 DIGEST (Repl.) 484 and 3rd DIGEST Supp.]

Cases referred to:

(1) *Robertson* v. *Robertson*, [1954] 3 All E.R. 413, n.; 3rd Digest Supp.

(2) *Pickett* v. *Pickett* (*otherwise Moss*), [1951] 1 All E.R. 614; [1951] P. 267; 27 Digest (Repl.) 484, *4233.*

Petition and cross-petition.

By his petition for divorce the husband alleged that the wife had been guilty of adultery and desertion and had treated him with cruelty. The wife, by her answer, denied the allegations and herself prayed for divorce on the ground of her husband's cruelty prior to the date of the alleged adultery and asked for the court's discretion. There was a child of the marriage and the parties had

lived apart for less than three years when the wife filed her answer; but she relied on the proviso to s. 4 of the Matrimonial Causes Act, 1950*, and further alleged that the husband had deserted her prior to the alleged adultery. The statutory three years were completed after the pleadings had closed, but before the case came on for hearing. A

B. L. A. O'Malley, for the husband, at the conclusion of the husband's evidence, stated that he proposed to call no further evidence on the allegations made in the petition. B

Karminski, J., referring to *Robertson* v. *Robertson* (1) ([1954] 3 All E.R. 413, n.), in which BARNARD, J., applied his decision in *Pickett* v. *Pickett* (*otherwise Moss*) (2) ([1951] 1 All E.R. 614), suggested that the wife be given leave to pray for a divorce by amending her answer by adding a cross-petition on the ground of desertion. C

John B. Gardner, for the wife, asked leave to amend the answer by adding the words " And by way of cross-petition [the wife] saith " followed by the allegation of desertion.

Karminski, J., gave leave to amend the answer accordingly, and, exercising his discretion, granted the wife a decree on the ground of desertion and also the custody of the child of the marriage. D

HIS LORDSHIP held that although the cross-petition had been filed since the date when the Matrimonial Proceedings (Children) Act, 1958, came into force (namely, Jan. 1, 1959), s. 2 (2)† of that Act did not apply to the child of the marriage as the cross-petition was part of the original proceedings. E

Petition dismissed. Decree nisi on cross-petition.

Solicitors: *Alban P. B. Gould* (for the husband); *Lionel Leighton & Co.* (for the wife).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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* See 29 HALSBURY'S STATUTES (2nd Edn.) 394.

† Section 2 (1) restricts the court's power to make a decree absolute, where the welfare of a child is involved, and sub-s. (2) confers a dispensing power in relation to that restriction.

NURSEY AND ANOTHER *v.* P. CURRIE (DARTFORD) LTD.

[COURT OF APPEAL (Hodson and Willmer, L.JJ., and Wynn-Parry, J.), February 11, 1959.]

Landlord and Tenant—New tenancy—Business premises—Opposition by landlord—Intention to occupy the "holding"—Demised property was buildings—Landlord's intention at time of hearing was to demolish those buildings and to convert and occupy the site—Whether an intention to occupy the holding—Landlord and Tenant Act, 1954 (2 & 3 *Eliz.* 2 *c.* 56), *s.* 23 (3), *s.* 30 (1) (*g*).

By a written tenancy agreement landlords let on a quarterly tenancy "the buildings forming part of premises known as No. 248, Broadway . . . and comprising the drivers' room, can store, pump and the spirit store, together with the right of ingress and egress thereto". The buildings were in a yard in which the landlords carried on a garage business. On Dec. 8, 1957, the landlords served notice to terminate the tenancy on June 24, 1958, and in their notice stated only one ground as that on which they would oppose the grant of a new tenancy, viz.—"on the termination of the current tenancy we intend to occupy the premises for the purposes, or partly for the purposes, of a business to be carried on by us therein". This ground of opposition was within that enacted in s. 30 (1) (g) of the Landlord and Tenant Act, 1954. In April, 1958, the tenants applied for a new tenancy. On June 9, 1958, the landlords were granted planning permission to develop their premises as a petrol-filling station with car-park behind it. Thenceforward the landlords intended to carry out this development, which would involve the demolition of the tenants' buildings, and to occupy the proposed petrol-filling station and carry on business there. At the hearing of the tenants' application for a new tenancy on July 17, 1958, the landlords contended that this intention was an intention "to occupy the holding for the purposes . . . of a business to be carried on by [them] therein" within s. 30 (1) (g), and that the tenants' application must therefore be refused. By s. 23 (3) of the Act "the holding" meant "the property comprised in the tenancy".

Held: (i) the landlords had not established their opposition under s. 30 (1) (g) because the ground of opposition must be considered in relation to the "holding", viz., the property comprised in the tenancy, and the landlords did not intend at the date of the hearing to occupy the buildings, which were the property demised; it was not permissible to take into account the wider scheme and treat the land comprised in the holding as land which would be occupied by the landlords for their wider undertaking.

Fisher v. *Taylors Furnishing Stores, Ltd.* ([1956] 2 All E.R. 78) distinguished.

(ii) since the sole ground of opposition stated by the landlords' notice was that provided by s. 30 (1) (g) and the Act of 1954 conferred no power of amendment, the landlords' opposition failed and a new tenancy would be granted, although at the hearing the landlords might have had a good ground of opposition under s. 30 (1) (f) by reason of their intention to demolish or reconstruct the premises.

Appeal allowed.

[**Editorial Note.** The decision of the House of Lords in *Betty's Cafés, Ltd.* v. *Phillips Furnishing Stores, Ltd.* ([1958] 1 All E.R. 607) established that the ground of opposition under s. 30 (1) (f) of the Landlord and Tenant Act, 1954, was a ground independent of that enacted in s. 30 (1) (g).

As to opposition to new lease on the ground of the landlords' intention to occupy, and as to the meaning of "the holding", see respectively, 23 HALSBURY'S LAWS (3rd Edn.) 894, para. 1718, and p. 885, para. 1707.

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For the Landlord and Tenant Act, 1954, s. 23 (3), s. 30 (1), see 34 HALSBURY'S STATUTES (2nd Edn.) 408, 414.] A

Case referred to:

(1) *Fisher* v. *Taylors Furnishing Stores, Ltd.*, [1956] 2 All E.R. 78; [1956] 2 Q.B. 78; 3rd Digest Supp.

Appeal. B

The tenants appealed against the order of His Honour JUDGE BARRINGTON, made on July 17, 1958, at Dartford County Court, dismissing their application made under Part 2 of the Landlord and Tenant Act, 1954, for the grant of a new tenancy of premises, No. 248, Broadway, Bexley Heath, occupied by them for the purposes of their business. The facts appear in the judgment of WYNN-PARRY, J. C

Harold Christie, Q.C., and *G. B. H. Dillon* for the tenants.

L. K. E. Boreham for the landlords.

HODSON, L.J.: I will ask WYNN-PARRY, J., to deliver judgment.

WYNN-PARRY, J.: This matter raises what in the end will be found to be a very short question of construction of two paragraphs of sub-s. (1) of s. 30 D of the Landlord and Tenant Act, 1954, s. 23 (3), and the tenancy agreement itself. By the tenancy agreement the landlords let the premises in question, which are described as

> " drivers' room, can store, pump and the spirit store together with the right of ingress and egress thereto between the hours of 8 a.m. and 6 p.m.", E

on a quarterly tenancy terminable by either party by not less than three months' notice in writing to the other expiring on any of the usual quarter days at a rent of £150; and there follow in the agreement a number of provisions in favour of the landlord and also in favour of the tenant, which are all, so far as I can see, more or less in the usual form. A plan has been put in evidence which shows that these various small buildings stand in a yard, of which the land- F lords are tenants, and the buildings are used by the tenants for the business of storing and vulcanising tyres. In that yard the landlords carried on a garage business. At some time in 1955 the landlords were minded to apply for planning permission to develop the yard with a view to the erection of a petrol-filling station, and in June of that year they made application for planning permission. That was refused later in the same summer. It was again renewed and again G refused, but finally permission was granted, we were told, probably because the landlords agreed to a modification of their plan involving the bringing into existence of a car-park at the rear of the petrol-filling station. Planning permission was finally granted on June 9, 1958. In the meantime, namely, on Dec. 8, 1957, the landlords served the necessary notice under s. 25 of the Act to terminate the tenancy, and the notice, had there been no opposition by the H tenants, would have expired on June 24, 1958. In their notice the landlords intimated that they would oppose the grant of a new tenancy, and they stated in their notice that the ground on which they were giving the notice was that they intended to occupy the premises for the purposes, or partly for the purposes, of a business to be carried on by them therein. It will be observed that in using those words they were in effect using the language in para. (g) of s. 30 (1). I Section 25, of course, required them by sub-s. (6) to state in their notice the ground mentioned in s. 30 on which they sought to terminate the tenancy. There was a counter-notice sent by the tenants in February, 1958, stating that they were unwilling to give up possession, and in April, 1958, the tenants made application for a new tenancy.

Nothing turns, as this case has developed in this court, on the question whether or not the landlords had at the material date a firm intention of using the property for the purposes mentioned in their notice. The trouble in their

A way is quite different. The trouble is that by the time when the hearing arrived the grant of planning permission had entirely changed the landlords' outlook, and they then intended, and they still intend if they get possession, to proceed to develop the property as a petrol-filling station in the manner which I have indicated.

The short question, therefore, which arises is whether they can bring themB selves within para. (g) of s. 30 (1), which they must do in view of the terms of their notice, or whether the fact that an essential part of what they intend to do involves demolishing the very buildings which were the subject of the tenancy, prevents them relying on that paragraph. Paragraph (f) deals solely with demolition or reconstruction, and it is perfectly clear that if the landlords had given a notice under para. (f) no difficulty would have arisen and this case C would never have had to be brought. It has been argued on behalf of the landlords, and it was the view taken by the county court judge, that demolition is really immaterial; what has to be shown is that the landlord intends to occupy the holding; and it is said that "the holding" means the land, subject to the tenancy to the tenants, whether with the present buildings on it or not, for the demise effected by the tenancy must have included the land on which the D buildings stood. It was also pointed out that there is a case which is the reverse of the present case, namely, *Fisher* v. *Taylors Furnishing Stores, Ltd.* (1) ([1956] 2 All E.R. 78). That was a case in which in September, 1955, the landlords bought two adjoining shops which were about two hundred and fifty years old and near the end of their life. The headnote says:

> "They intended to undertake the demolition of the premises for which E it was necessary to obtain possession, to rebuild on the site and to occupy the new buildings for the purpose of their business as furniture retailers."

They gave the necessary notice under the Act to each tenant, and when the tenant of the first shop applied for a new lease, they opposed the application on the ground that they intended to demolish and reconstruct the premises. F It was held that

> "a new lease ought not to be granted since the landlords had satisfied the requirements of s. 30 (1) (f) by showing a genuine intention to demolish the premises, notwithstanding their intention also to occupy the newly constructed premises for the purposes of their business."

In the course of his judgment, indeed in the penultimate paragraph, DENNING, G L.J., said this (ibid., at p. 80):

> "In many cases the landlord will have two purposes, both of which are genuine and important: the one is to get possession for his own business, and the other is to reconstruct the premises. He does not lose the benefit of s. 30 (1) (f) simply because he bought the premises less than five years before. Suppose a man buys up derelict premises and the only sensible H thing is to pull them down at once and re-build. If he intends to let them to a new tenant, he clearly can rely on s. 30 (1) (f). He should not be debarred from so doing simply because, instead of letting them, he intends to occupy them himself. The legal position is made clear by s. 31 (1), which says that, if the landlord establishes *any* of the grounds set out in s. 30 (1), a new lease must be refused. The fact that he cannot establish I one ground does not prevent him from relying on another."

We were also referred to a passage (ibid., at p. 84) from the judgment of PARKER, L.J., rather to the same effect and we were asked to draw the inference that but for the five-year bar, the conclusion of the court would have been that reliance could have been placed on para. (g). That is quite truly said to be the converse of this case, and so it is argued that the corollary should follow. To argue a corollary in law is, it has been said more than once, a dangerous thing, and I think that it is necessary, at any rate in the first instance, to consider

the relevant provisions of the Act, because it may be found that there is no room in this particular case for arguing the corollary.

In s. 30 (1) (g) there is a reference, as there is in the preceding para. (f), to " the holding ", and the phrase " the holding " is defined in s. 23 (3) as meaning

> " in relation to a tenancy to which this Part of this Act [namely, Part 2] applies . . . the property comprised in the tenancy."

In para. (g) the words " the holding " must be read as interpreted in the light of that definition, and " the holding " is one which the landlord intends to occupy " for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence." It seems to me that that language circumscribes the use of the phrase " the holding " in that paragraph and makes it necessary to concentrate the whole of one's attention on the particular piece of land, whether it has buildings on it or not, which is the subject-matter of the tenancy in question. So viewed, it appears to me that the contention for the landlords in this case is too wide, and that when one is looking at the material time at " the holding " under para. (g), it is not permissible to take into account the wider scheme which the landlords had in mind and merely to treat the land comprised in the holding as land which in one way or another will be used for the purpose of the wider undertaking.

In my view for those reasons this case could come, and could only come, within para. (f), but, unfortunately, there is no right of amendment and the matter had to go forward on the basis of the notice, and in the events which have happened it appears to me that the landlords do not bring themselves within para. (g); they fall within para. (f), and para. (f) not having been relied on in the notice which they gave, it appears to me that this appeal should be allowed.

WILLMER, L.J.: I agree, and I desire to add only a few words because the point which has arisen for decision is a very short one which does not admit of much elaboration. It is not now in dispute that the landlords here proved a case within para. (f) of s. 30 (1) of the Landlord and Tenant Act, 1954, in the sense that they proved an intention to demolish or reconstruct the premises in question. Unhappily for them, no reliance was placed on para. (f), and no mention of para. (f) was made, in the notice which they served under s. 25 of the Act. The only ground put forward in the notice which they served was the ground that:

> " On the termination of the current tenancy we intend to occupy the premises for the purposes, or partly for the purposes, of a business to be carried on by us therein."

The words there used follow approximately, although not exactly, the wording used in para. (g) of the same sub-section of the Act. It was contended on behalf of the landlords, and was held by the judge, that in addition to proving a case, as they admittedly had, under para. (f), they had in the circumstances also proved a case under para. (g), in the sense that they proved an intention, prevailing at the time of the hearing, to occupy the holding for the purpose of a business to be carried on by them therein. It seems to me, however, that so to hold does violence to the wording of the paragraph. I have said that the words used in the landlords' notice do not exactly correspond to the words used in para. (g) which are as follows:

> " . . . on the termination of the current tenancy, the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by him therein, or as his residence."

A The important word for the purposes of this case is the word " holding ", and that is defined by s. 23 (3) of the Act as meaning " the property comprised in the tenancy ".

It appears to me, therefore, that in applying s. 30 (1) (g), one must look at the particular holding comprised in the particular tenancy which is before the court B in the particular case. Here the building is described in the tenancy agreement as

> " the buildings forming part of premises known as No. 248, Broadway, Bexley Heath in the County of Kent, and comprising the drivers' room, can store, pump and the spirit store, together with the right of ingress and egress thereto . . ."

C In relation to this case, therefore, para. (g) must be construed as though, instead of the word " holding ", those words which I have read from the tenancy agreement were set out in the paragraph.

The question to be determined then is whether the landlords proved that on the termination of the current tenancy they intended to occupy

D

> " the buildings forming part of the premises known as No. 248, Broadway, Bexley Heath in the County of Kent and comprising the drivers' room, can store, pump and the spirit store "

for the purposes, or partly for the purposes, of a business to be carried on by them therein. To that there can be only one answer. The only intention proved E was an intention to demolish and reconstruct. It appears to me that, on what I conceive to be the true construction of para. (g), it is straining language to say that the landlords brought themselves within it.

In those circumstances it seems to me the learned judge was wrong in holding that the landlords had proved a case in accordance with what they had set out in their notice, and accordingly I agree that this appeal should be allowed.

F

HODSON, L.J.: I also agree and have nothing to add.

Appeal allowed. New tenancy granted for a period of three months commencing three months from the date of the Court of Appeal's judgment.*

Solicitors: *James & Charles Dodd* (for the tenants); *T. G. Baynes & Sons*, Dartford (for the landlords).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

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* See s. 64 (1) and s. 25 (1) of the Landlord and Tenant Act, 1954, and *Re No. 88, High Road, Kilburn*, p. 527, post.

LOUIS DREYFUS ET CIE. *v.* PARNASO CIA. NAVIERA S.A.

[QUEEN'S BENCH DIVISION (Diplock, J.), February 12, 13, 1959.]

Shipping—Charterparty—Construction—" Full and complete cargo "—Declaration of " approximative cargo " by master within limits set by charterparty—Gencon form of charterparty—Whether declaration good.

Shipping—Charterparty—Exceptions—Inability of vessel to load full cargo—Gencon form of charterparty—Whether owners exempted from liability for expense incurred by charterers in sending balance of cargo elsewhere.

By a charterparty in the standard Gencon form, the Dominator was to proceed to La Pallice, and (by cl. 1) was there to load " a full and complete cargo of not more than 10,450 tons of wheat and not less than 8,550 tons of wheat in bulk, quantity in owners' option to be declared by the master in writing on commencement of loading . . . which the charterers bind themselves to ship ". The charterparty contained the Gencon form of exceptions clause which was set out in three printed paragraphs, the last of which was deleted, typed words being substituted. The exceptions clause, as so amended by the parties, read: " [1] Owners are to be responsible for loss of or damage to the goods or for delay in the delivery of the goods only in case the loss, damage or delay, has been caused by the improper or negligent stowage of the goods . . . or by . . . want of due diligence . . . to make the vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied or by the personal act or default of the owners or their manager. [2] And the owners are responsible for no loss or damage or delay arising from any other cause whatsoever . . . [3] Owners to be responsible for the number of bags signed for in bills of lading ". The deleted paragraph provided that " Damage caused by contact with or leakage, smell or evaporation from other goods . . . not to be considered as caused by improper or negligent stowage . . ." The vessel duly arrived at La Pallice for loading, and the master, purporting to act under cl. 1 of the charterparty, made a declaration in writing, addressed to the charterers, notifying them that he would require an " approximative " total cargo of 10,400 long tons of wheat. Relying on the master's declaration, the charterers brought the declared quantity of cargo to La Pallice for loading but, as the vessel was then sailing to her winter marks, she was incapable of loading the full 10,400 tons and, in fact, she loaded 331 long tons less (3.14 per cent. less) than the full quantity declared. The charterers incurred expense in sending the 331 tons elsewhere and claimed damages.

Held: the charterers were entitled to recover damages for breach of the charterparty by the owners because—

(i) the master's declaration determined (within the limits stated in the charterparty) what constituted a " full and complete cargo ", and the word " approximative " should be construed as referring to such limits of tolerance as the de minimis rule imported into every such contract; therefore, the master's notice was a good notice and, the short weight being more than the de minimis rule allowed, the owners had not shipped a full and complete cargo in accordance with the charterparty, and

(ii) on the true construction of the exceptions clause (which was an ambiguous clause, so that the court was entitled to look at the deleted paragraph) the exception did not cover loss sustained by the charterers owing to the failure to load the contract quantity of goods, but was limited to liability for loss of or damage to the goods or delay in their delivery.

Dictum of MACKINNON, J., in *Chandris* v. *Louis Dreyfus & Co.* ((1934), 50 Lloyd's Rep. 141) considered.

A [As to the amount of cargo to be provided by the charterer and taken aboard by the shipowner, see 30 HALSBURY'S LAWS (2nd Edn.) 304-307, paras. 497, 498.]

Cases referred to:

(1) *Chandris* v. *Louis Dreyfus & Co.*, (1934), 50 Lloyd's Rep. 141.

B (2) *Carlton S.S. Co.* v. *Castle Mail Packets Co.*, (1896), 2 Com. Cas. 173; *revsd.* C.A., [1897] 2 Q.B. 485; *affd.* H.L., [1898] A.C. 486; 67 L.J.Q.B. 795; 78 L.T. 661; 3 Com. Cas. 207; 41 Digest 447, *2802.*

(3) *Jardine, Matheson & Co.* v. *Clyde Shipping Co.*, [1910] 1 K.B. 627; 79 L.J.K.B. 634; 102 L.T. 462; 41 Digest 645, *4764.*

Action.

C In this action Louis Dreyfus et Cie., the plaintiffs, charterers of the Panamanian steamship Dominator (hereinafter referred to as "the vessel"), sought declarations as to their rights in respect of alleged breaches of a charterparty made between them and Parnaso Cia. Naviera S.A., the defendants, the owners of the vessel. By a charterparty dated Nov. 4, 1957, in the Gencon form, the owners chartered the vessel to the charterers on the terms set out in the charter-

D party. The charterparty provided as follows:

"1. . . . the said vessel shall proceed to La Pallice . . . and there load a full and complete cargo of not more than 10,450 tons and not less than 8,550 tons wheat in bulk, quantity in owners' option to be declared by the master in writing on commencement of loading . . . which the charterers bind

E themselves to ship and being so loaded the vessel shall proceed to Karachi . . . and there deliver the cargo being paid freight . . . 16. Charterers to supply a sufficient quantity of cargo in bags for safe stowage as required by the master . . . such quantity to be declared by the master in writing on commencement of loading."

F The charterparty contained the Gencon form of exceptions clause (cl. 2) which was set out in three printed paragraphs, the last of which in this charterparty had been deleted and typed words substituted: the exceptions clause as so amended read as follows:

"Owners' responsibility clause. 2. Owners are to be responsible for loss of or damage to the goods or for delay in the delivery of the goods only in

G case the loss, damage or delay, has been caused by the improper or negligent stowage of the goods, stowage to be under the master's direction, or by personal want of due diligence on the part of the owners or their manager to make the vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied or by the personal act or default of the owners or their manager.

H "And the owners are responsible for no loss or damage or delay arising from any other cause whatsoever, even from the neglect or default of the captain or crew or some other person employed by the owners on board or ashore for whose acts they would, but for this clause, be responsible, or from unseaworthiness, of the vessel on loading or commencement of the voyage or at any time whatsoever.

I "Owners to be responsible for the number of bags signed for in bills of lading."

The deleted third paragraph of the exceptions clause (for which the words "Owners to be responsible . . . lading" were substituted) read:

"Damage caused by contact with or leakage, smell or evaporation from other goods or by the inflammable or explosive nature or insufficient package of other goods not to be considered as caused by improper or negligent stowage, even if in fact so caused."

Pursuant to the charterparty the vessel proceeded to La Pallice, and on Nov. 23, 1957, the master (who was a Greek) acting under cl. 1 of the charterparty made a declaration in writing, addressed to the charterers, which read:

> "To the shippers, La Pallice. I, the master . . . of the steamer Dominator, I have notify you that I shall require 300 tons wheat in bags for loading and approximative cargo to the holds will be as follows:—No. 1 hold 1,600 long tons, 2 hold 3,000 long tons, 3 hold 2,000 long tons, 4 hold 2,150 long tons, 5 hold 1,650 long tons; total:—10,400 tons."

Relying on the master's declaration, the charterers tendered for loading at La Pallice 10,400 long tons of wheat but, as at the time of loading the vessel was sailing to her winter marks, she was incapable of carrying the full amount of 10,400 tons and in fact she loaded 331 long tons short of the full amount. As a result of the vessel's inability to load the 331 tons, the charterers incurred expenses amounting to £155 8s. 2d. in sending the 331 tons elsewhere.

The charterers now sought the following declarations: (a) that by failing to load 336.750 kilos [viz., 331 long tons] the owners were in breach of the charterparty; (b) that the damages suffered by the charterers by reason of the breach amounted to £155 8s. 2d., and (c) that the charterers were entitled to set off such damages against the amount of freight claimed by the owners. The owners denied that they were in breach of the charterparty in failing to load the full amount of 10,400 tons of cargo, and relied on the exceptions clause as exempting them from any liability to the charterers; the owners counterclaimed for the sum of £155 8s. 2d., as freight due to them under the charterparty.

R. A. MacCrindle for the charterers, the plaintiffs.
M. R. E. Kerr for the owners, the defendants.

DIPLOCK, J.: This is an action brought by the French charterers of a Panamanian ship for declarations relating to their rights in respect of an alleged breach of the charter by the shipowners. The writ was issued on Oct. 27, 1958. Judgment is being delivered today, less than four months since the action was started. It is a matter for congratulation to the parties that the matter in dispute should come for its initial solution, at any rate, so very shortly after the proceedings started; and I may say, as I have said before, that it is to provide expeditious decisions on commercial matters of this kind that the Commercial List was set up.

The matter arises in this way. [His Lordship then read the relevant parts of cl. 1 of the charterparty and the terms of the declaration made by the master, and having referred to the facts regarding the loading of the vessel at La Pallice, continued:] The question which I have to determine is whether the charterers are entitled—whether by way of set-off or whether by way of claim for damages does not matter in the circumstances of this case—to recover from the owners for breach of contract the sum incurred by them in sending elsewhere the 331 tons which the vessel was unable to load. That depends on two questions of construction: (1) the true construction of cl. 1 of the charterparty and (2), if I am in favour of the charterers on the construction of that clause, there arises the question of the construction of the Gencon owners' responsibility clause.

At first sight, it would seem plain that once the owners had exercised their option, through their nominated agent, the master, of declaring the quantity to be carried, the quantity of cargo which they were bound to load and the charterers bound to ship is the quantity so declared. Is there some mystique about charterparties which prevents the words having this effect which I think is a perfectly plain one? I doubt if it would have been argued that the words meant anything other than the meaning which I have suggested were it not for a dictum of MacKinnon, J., in *Chandris* v. *Louis Dreyfus & Co.* (1) ((1934), 50 Lloyd's Rep. 141). Before I read that dictum, it is desirable to note that that action was an action for rectification of a charterparty in respect of which arbitration

proceedings were already current, and the main point in the case was whether a provision in the charterparty containing an undertaking by the owners as to the capacity of the vessel should be rectified. The undertaking in the charterparty as signed was as follows:

> " That the said steamer . . . shall proceed to one or two ports between Karachi and Calicut . . . and . . . load in customary manner from the charterers . . . a full and complete cargo of linseed and/or groundnut kernels in bags . . . which owners undertake will be not more than 2,300 tons and not less than 2,000 tons English weight linseed and/or groundnut kernels in bags."

Since the vessel was capable of carrying a great deal more linseed than groundnut kernels, groundnut kernels being a bulkier cargo, the main issue between the parties was whether or not the warranty as to capacity related to linseed alone or whether it did, as expressed, warrant a capacity for groundnut kernels. Having considered the evidence, MACKINNON, J., came to the conclusion that the former was the real agreement between the parties and that the contract should be rectified accordingly. The actual form of the rectification he left to the parties. There was, however, a provision in the charterparty: " The master to declare quantity of cargo required on readiness to load ". The master had in fact declared 1,850 tons as the quantity required of groundnut kernels. The capacity of the vessel for groundnut kernels, it would appear from the report, was 1,730 tons. Again it would appear from the report, though not very clearly, that there was some alternative claim being prosecuted before the arbitrator based on an obligation to carry the amount declared by the master—an amount, be it observed, which was greater than the carrying capacity for groundnut kernels which the owners had warranted. In relation to that, application was also made to MACKINNON, J., to rectify the charter further by deleting the words " The master to declare quantity of cargo required on readiness to load ". MACKINNON, J., on the evidence, thought that the charter should not be rectified in this way, and he went on to say this (50 Lloyd's Rep. at p. 145):

> " Mr. Catsell [the broker acting on behalf of the shipowners] very candidly has said: ' I think this clause, " The master to declare quantity of cargo required on readiness to load " is part of the usual Bombay charter adapted '. That being so, it must stand as part of this charter. I was going to say that I express no opinion as to the effect of that. I may perhaps state that it does not seem to me that it has really any contractual effect at all; it is merely a sort of intimation for the convenience of the parties; but I cannot think that, if the master says a certain figure, he would be varying the terms of the charter or creating a new contractual liability for his owners. However, that is only my present impression; I have not had it exhaustively argued, and it is not necessary for that to happen."

I do not think that that dictum of MACKINNON, J., in somewhat obscure circumstances relating to a charter in different terms from that with which I have to deal, really assists me in deciding what the meaning of these words is. No doubt, if cl. 1 of the present charter had read " there load a full and complete cargo of not more than 10,450 tons and not less than 8,550 tons wheat in bulk " and had stopped there, the obligations of the parties would have been that the owners warranted a minimum capacity of 8,550 tons and the charterers were under an obligation to provide a full and complete cargo up to 10,450 tons if the vessel were capable of holding so much, but under no obligation to provide more. That well-known construction of clauses of this nature is confirmed by MATHEW, J.'s judgment in *Carlton S.S. Co.* v. *Castle Mail Packets Co.* (2) ((1896), 2 Com. Cas. 173), and in *Jardine, Matheson & Co.* v. *Clyde Shipping Co.* (3) ([1910] 1 K.B. 627). Those being the obligations if the clause stopped there, there is no question of any option. The parties' rights are defined finally by the

words of the clause. In the present case, however, those words are followed by the phrase " quantity in owners' option, to be declared by the master in writing on commencement of loading ". These words seem to me to make all the difference. Whatever quantity the master declares within those limits is to be deemed to be a full and complete cargo for the purposes of the charter. I therefore reject the argument of counsel for the owners, based on MACKINNON, J.'s dictum, that the words " quantity in owners' option, to be declared by the master in writing on commencement of loading " have no contractual effect at all —a somewhat surprising submission.

Now, the declaration required is of an exact quantity, but exact subject to the de minimis rule which applies particularly to commercial contracts. The declaration by the master contains the word " approximative ": " the approximative cargo to the holds will be as follows ", then setting out tonnage for the individual holds and setting out " total, 10,400 tons ". Counsel for the owners submits that this declaration must be construed as if it contained words such as " about " or " thereabouts ". He says that is what " approximative " means; and he relies on the well-known cases* where such words have been used in contracts for the carriage of goods or the sale of goods and which show that where such words have been used in a contract a tolerance greater than the de minimis tolerance is an allowable tolerance. He relies on the cases to which attention is so often directed where three per cent. or as much as five per cent. has been treated as being a compliance with the words " about " or " thereabouts ", and he points out that here the goods shipped were only 3.14 per cent. less than the quantity declared. It may be, he concedes, that in giving a declaration in this form, containing the word " approximative ", the master as agent for the owners committed a breach of contract, but he says the shippers accepted the notice in this form; they are not suing for that particular breach of contract, and the quantity in fact loaded does comply with the notice when full effect is given to the word " approximative ". I do not think that the cases on the construction of contracts assist here. What I have here is a document purporting to be given under cl. 1 of the charter, a document therefore which purports to be a declaration of an exact quantity within those narrow limits of tolerance which the de minimis rule incorporates in every contract. In construing the declaration as I have to construe it, it is right for me to construe it as one complying with the terms of the contract, if such a construction is open to me. " Approximative " is a word which has no defined limits of tolerance; and I construe it accordingly as referring to those limits of tolerance which the de minimis rule imports into contracts of this kind. I therefore hold that the notice was a good notice.

I am somewhat sorry to come to that conclusion, despite its according in my view with common justice, because that compels me now to construe the Gencon exceptions clause, which, although it apparently came into force as long ago as Sept. 15, 1922, has so far escaped construction by the courts. It is my misfortune, apparently, to have to try to make sense of it. The exceptions clause, owners' responsibility clause, is cl. 2 of the charter. It consists of three printed paragraphs, the third of which in this charterparty has been deleted and typed words have been substituted. The first question which I have to consider is whether, to assist myself in construing the paragraphs that remain, I can look at the one which has been deleted. There is a pleasant diversity of authority on this subject which the curious can find conveniently listed in a note on p. 33 of SCRUTTON ON CHARTERPARTIES (16th Edn.). In construing a contract, however, what the court is engaged in doing is seeking to ascertain the intention of the parties as expressed in the words that they have used. Where there is a standard form of words familiar to commercial men and contained in a printed form in general use, such as the Gencon charter, it seems to me unreal to suppose that

* See, e.g., *Morris* v. *Levison* (1876), 1 C.P.D. 155; *The Resolven* (1892), 9 T.L.R. 75.

when the contracting parties strike out a provision dealing with a specific matter, but retain other provisions, they intend to effect any alteration other than the exclusion of the provision struck out. I cannot, prima facie at any rate, ascribe to them any intention of altering the meaning of the words in the provisions which they have chosen to retain. I say " prima facie " because there may be added or substituted words which drive one to the conclusion that they did intend to ascribe to the words retained a meaning modified by the added or substituted provisions; but, while I think I must look first at the clause in its actual form without the deleted words, if I find the clause ambiguous, I think I am entitled to look at the deleted words to see if any assistance can be derived from them in solving the ambiguity, bearing in mind the prima facie rule which I have indicated.

[HIS LORDSHIP then read the exceptions clause without the deleted words (which is set out at p. 530, letters G and H, ante), and continued:] The first paragraph of this clause is plainly limited, and expressly limited, to loss of or damage to the goods or for delay in delivery of the goods, and the phrase " the loss, damage or delay " is also equally plainly so limited. The paragraph is clumsy in form because it appears to be placing a positive liability for loss, damage or delay arising from certain causes, a liability which would exist at common law quite apart from the clause. It negatives or excludes liability which would exist at common law for damage, loss or delay from other causes only in so far as such exclusion is implicit in the word " only "—" Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods only " in the cases set out. One would not expect the draftsman of a clause designed to exclude liabilities which would otherwise exist at common law to rest content with an exclusion which was merely implicit, and, having started with his first paragraph in the positive form, one would expect him to go on to state in express words the exclusion of liability which up to that stage has only been implicit by the use of the word " only ". It seems to me that this is what he has done, for he goes on: " And "—a conjunctive word consistent with a reference to the same subject-matter as had gone before—" the owners are responsible for no loss or damage or delay ", the same phrase as used in the first paragraph where it was clearly limited to loss of or damage to the goods or delay in delivery of the goods, " arising from any other cause whatsoever, even from the neglect or default of the captain or crew ". It is not " no loss or damage or delay whatsoever ", or any other word used to enlarge its meaning, although the word " whatsoever " is used in relation to cause. The second paragraph might well have stopped with the words " And the owners are responsible for no loss or damage or delay arising from any other cause whatsoever ", but per majorem cautelam the draftsman goes on to say:

> " even from the neglect or default of the captain or crew or some other person employed by the owners on board or ashore for whose acts they would, but for this clause, be responsible, or from unseaworthiness, of the vessel on loading or commencement of the voyage or at any time whatsoever ",

all of which would have been excluded, one would have thought, by the words " any other cause whatsoever ". One finds here, therefore, a draftsman (cautious, no doubt, because of the contra proferentem rule) who is taking the opportunity of saying, in all ways that he can think of, that the owner is not to be responsible for damage other than the kinds which he has ascribed to the subject-matter of the exceptions clause.

There is, I think, ambiguity here. The words " no loss or damage or delay " in the second paragraph are capable of a wide meaning, an extended meaning, or are capable of the narrower meaning with which the same phrase was used

in the first paragraph of the clause; that is to say, they are capable of being read as relating to the same subject-matter as the first paragraph, loss of or damage to the goods or delay in delivery of the goods; and, when I look at the third paragraph as it appears in this charterparty, " Owners to be responsible for the number of bags signed for in bills of lading ", I find that the third paragraph, like the first, is relating to loss of, or damage to, goods. As there is an ambiguity, I am going to look at the deleted paragraph to see if it throws any light on that ambiguity. The deleted paragraph was in these terms:

> " Damage caused by contact with or leakage, smell or evaporation from other goods or by the inflammable or explosive nature or insufficient package of other goods not to be considered as caused by improper or negligent stowage, even if in fact so caused."

That, as I say, is deleted; but that deals plainly, and deals only, with damage to the goods. It is an exception to the first paragraph of the clause. I see, therefore, that in its printed form, and indeed (though perhaps less cogently) in its substituted form, the second paragraph is sandwiched between two paragraphs plainly dealing only with loss of, damage to, or delay in delivery of the goods. I find also that I am dealing with a clause which is purporting to limit a common law liability.

Fortified by the two Latin tags, contra proferentes and noscitur a sociis, I am prepared to resolve the ambiguity by holding that the clause is limited to liability for loss of or damage to the goods or delay in delivery of the goods and it does not cover loss sustained by the charterers owing to the failure of the owners to load the contract quantity of goods. That contract quantity I have held to be the quantity declared by the master in the notice given under cl. 1 of the charterparty. Accordingly, the charterers in this case succeed.

[His Lordship said that it was unnecessary for him in the present case to express any view as to the charterers' right to set off the damages suffered by them against the amount of freight claimed by the owners. His Lordship proposed to grant only declarations (a) and (b) asked by the statement of claim*, and to make no order on the counterclaim.]

Declarations granted (a) that by reason of the failure to load 336.750 kilos the owners were in breach of the charterparty, and (b) that the damages suffered by the charterers by reason of the breach amount to £155 8s. 2d.

Solicitors: *Richards, Butler & Co.* (for the charterers, the plaintiffs); *Holman, Fenwick & Willan* (for the owners, the defendants).

[*Reported by* Wendy Shockett, *Barrister-at-Law.*]

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* The terms of these declarations appear at p. 504, letter C, ante.

SOCIETY OF MEDICAL OFFICERS OF HEALTH *v.* HOPE (VALUATION OFFICER).

[COURT OF APPEAL (Morris and Sellers, L.JJ. and Wynn-Parry, J.), January 15, 16, February 9, 1959.]

Rates—Local valuation court—Appeal—Res judicata—Scientific society's claim for exemption—Claim upheld on appeal for previous valuation list—Decision not appealed—Circumstances admitted to be unchanged—Whether valuation officer estopped from opposing claim.

In 1951 a hereditament occupied by a society was held by a local valuation court on appeal to be exempt from rating under the Scientific Societies Act, 1843, and there was no appeal by the valuation officer against that decision. In the new quinquennial valuation list which came into force in 1956 the hereditament was assessed as a rateable hereditament. On an appeal to the local valuation court arising out of the society's proposal for the alteration of the list by showing the hereditament as exempt, the valuation officer declined to contend that the society's activities had changed since 1951, and on that and further appeal the society contended that the issue of exemption was res judicata as between the parties by virtue of the decision of 1951.

Held (SELLERS, L.J., dissenting): although the appeal in 1951 was a lis inter partes, the decision on it (which would have involved the conclusion that the society was instituted for the purposes of science, etc., exclusively) related only to the valuation list existing at that time, for the court had then jurisdiction over that list only, not over future lists; therefore, there was no res judicata which could give rise to an estoppel in relation to the new valuation list of 1956, and the valuation officer was not estopped from contesting the appeal as to the rateability of the hereditament in relation to that list.

Leith Harbour & Docks Comrs. v. *Inspector of the Poor* ((1866), L.R. 1 Sc. & Div. 17) applied.

Hoystead v. *Taxation Comr.* ([1926] A.C. 155) distinguished.

Appeal dismissed.

[As to the essentials of res judicata, see 15 HALSBURY'S LAWS (3rd Edn.) 185, para. 358; and for cases on the subject, see 21 DIGEST 159-163, *213-221.*

As to the extension of the doctrine of estoppel by record to tribunals, see 15 HALSBURY'S LAWS (3rd Edn.) 212, para. 398.

For the procedure on a proposal for altering a valuation list and appeal, see Local Government Act, 1948, s. 40, s. 41, s. 44 and s. 48, 20 HALSBURY'S STATUTES (2nd Edn.) 234, 237, 243, 249; and for the amending provisions of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 2, s. 15, see 35 HALSBURY'S STATUTES (2nd Edn.) 381, 406, 425.]

Cases referred to:

(1) *Re Koenigsberg, Public Trustee* v. *Koenigsberg*, [1949] 1 All E.R. 804; [1949] Ch. 348; [1949] L.J.R. 1098; 2nd Digest Supp.

(2) *Inland Revenue Comrs.* v. *Sneath*, [1932] All E.R. Rep. 739; [1932] 2 K.B. 362; 101 L.J.K.B. 330; 146 L.T. 434; Digest Supp.

(3) *R.* v. *Hutchings*, (1880), 5 Q.B.D. 353; *revsd.* C.A., (1881), 6 Q.B.D. 300; 50 L.J.M.C. 35; 44 L.T. 364; 45 J.P. 504; 21 Digest 232, *631.*

(4) *Kingston's (Duchess) Case*, (1776), 1 East, P.C. 468; 1 Leach, 146; 20 State Tr. 355; 2 Smith, L.C. 12th Edn. 754; 21 Digest 159, *213.*

(5) *Barrs* v. *Jackson*, (1842), 1 Y. & C. Ch. Cas. 585; 62 E.R. 1028; *on appeal*, (1845), 1 Ph. 582; 21 Digest 165, *232.*

(6) *Patuck* v. *Lloyd*, (1944), 171 L.T. 340; 26 Tax Cas. 284; 2nd Digest Supp.

(7) *Leith Harbour & Docks Comrs.* v. *Inspector of the Poor*, (1866), L.R. 1 Sc. & Div. 17; 38 Digest 480, *390.*

(8) *Leith Harbour Comrs.* v. *Inspector of the Poor*, (1855), 2 Macq. 28.
(9) *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council*, [1926] A.C. 94; 95 L.J.P.C. 33; 134 L.T. 335; Digest Supp.
(10) *Wakefield Corpn.* v. *Cooke*, [1904] A.C. 31; 73 L.J.K.B. 88; 89 L.T. 707; 68 J.P. 225; 21 Digest 154, *163.*
(11) *Hoystead* v. *Taxation Comr.*, [1926] A.C. 155; 94 L.J.P.C. 79; 134 L.T. 354; Digest Supp.
(12) *New Brunswick Ry. Co.* v. *British & French Trust Corpn., Ltd.*, [1938] 4 All E.R. 747; [1939] A.C. 1; 108 L.J.K.B. 115; 160 L.T. 137; Digest Supp.
(13) *Re Waring, Westminster Bank, Ltd.* v. *Burton-Butler*, [1948] 1 All E.R. 257; [1948] Ch. 221; [1948] L.J.R. 705; 2nd Digest Supp.

Appeal.

The ratepayer society appealed against a decision of the Lands Tribunal (ERSKINE SIMES, ESQ., Q.C.) given on Apr. 14, 1958, dismissing the contention of the society by way of a preliminary point that the respondent valuation officer could not be heard to say that the society was not entitled to exemption from rating in respect of a hereditament which it occupied under s. 1 of the Scientific Societies Act, 1843. The hereditament comprised offices, third floor rooms, 483-486, Tavistock House, South Wing Extension, Tavistock Square, in St. Pancras Metropolitan Borough. The society contended that the tribunal misdirected itself in holding that, notwithstanding the decision of the local valuation court given on Oct. 24, 1951, that the hereditament was exempt from rating under s. 1, it was open to the valuation officer to say that it was not so exempt, and that on the facts proved or admitted the tribunal ought to have found that the valuation officer could not be heard to say that the society was not so entitled.

D. Tolstoy for the society.

H. J. Phillimore, Q.C., and *P. R. E. Browne* for the valuation officer.

Cur. adv. vult.

Feb. 9. The following judgments were read.

MORRIS, L.J.: In the year 1951 the Society of Medical Officers of Health was in occupation of a hereditament at Tavistock House, Tavistock Square, in London. That hereditament was placed on the then existing valuation list. The society claimed to be exempt from the payment of rates. Exemption was claimed on the basis of the provisions of s. 1 of the Scientific Societies Act, 1843. The relevant parts of that section are as follows:

> ". . . No person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay, to any county, borough, parochial, or other local rates or cesses, in respect of any land, houses, or buildings, or parts of houses, or buildings, belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either as tenant or as owner, and occupied by it for the transaction of its business, and for carrying into effect its purposes, provided that such society shall be supported wholly or in part by annual voluntary contributions and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members . . ."

and then there follows a provision as to a certificate. The society would therefore be exempt from being rated if (a) it was a society instituted for purposes of science, literature or the fine arts exclusively; (b) it occupied the hereditament for the transaction of its business and for carrying into effect its purposes; (c) it was supported wholly or in part by annual voluntary contributions; (d) it did not and could not make any dividend, gift, division or bonus in money to members and provided that a certain certificate was obtained.

The society proceeded to take the step which was open to it under the procedure laid down by the Local Government Act, 1948. Section 40 of the Act* provides as follows:

"(1) Any person who is aggrieved—(a) by the inclusion of any hereditament in the list; or (b) by any value ascribed in the list to a hereditament or by any other statement made or omitted to be made in the list with respect to a hereditament; or (c) in the case of a building or portion of a building occupied in parts, by the valuation in the list of that building or portion of a building as a single hereditament, may at any time make a proposal for the alteration of the list so far as it relates to that hereditament.

"(2) The valuation officer may at any time make a proposal for any alteration of a valuation list.

"(3) Any such proposal as is mentioned in the previous provisions of this section is in this Part of this Act referred to as 'a proposal'".

Section 41 deals with the proceedings on proposals. Sub-section (1) is as follows:

"Every proposal must—(a) be made in writing and, except where it is made by the valuation officer, be served on the valuation officer; (b) specify the grounds on which the proposed alteration is supported; (c) comply with any requirements of any regulations made by the Minister with respect to the form of proposals and otherwise with respect to the making thereof."

Sub-section (4) provided:

"Where the proposal is made otherwise than by the valuation officer, the valuation officer may, within twenty-one days from the date on which the proposal is served on him, serve on the maker of the proposal notice in writing of objection to the proposal."

Then sub-s. (6) provided:

"Where notice of objection is made and is not unconditionally withdrawn —(a) the person making the proposal may, by notice of appeal served within the time and on the persons hereinafter mentioned, appeal against the objection to a local valuation court; and (b) no alteration shall be made in the list in pursuance of the proposal except where notice of appeal is given as aforesaid and then only either—(i) in pursuance of the directions of a court or arbitrator given under the subsequent provisions of this Part of this Act; or (ii) by agreement between all the persons entitled to be heard on the appeal."

By later legislation, the Rating and Valuation (Miscellaneous Provisions) Act, 1955, certain new sub-sections were substituted for the original ones and the present provisions of paras. (b) and (c) of sub-s. (6) are as follows:

"(b) if the proposal was made otherwise than by the valuation officer, he may, at any time within the period of five months beginning with the relevant date, give notice in writing to the person who made the proposal that he objects to the proposal, and that the said person, if he does not withdraw the proposal within fourteen days, will be treated as intending to appeal against the valuation officer's objection to the proposal; (c) not less than fourteen nor more than twenty-eight days after the valuation officer has given a notice under the last preceding paragraph, he shall, unless the proposal has then been withdrawn, transmit a copy of the proposal to the clerk to the appropriate local valuation panel, together with a copy of the notice under the last preceding paragraph, and of any notice of objection to the proposal which has been served under sub-s. (3) of this section and has not been unconditionally withdrawn."

* But see the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 2 (2).

The appeal referred to is to a local valuation court. Section 44 (1) in its present form* provides as follows: A

"Local valuation courts constituted as hereinafter provided shall be convened as often as may be necessary for the purpose of hearing and determining appeals under the preceding provisions of this Part of this Act against objections to proposals for the alteration of valuation lists." B

Section 48 deals with the sittings, procedure and powers of local valuation courts. Sub-sections (2), (3) and (4) are, in their present form*, as follows:

"(2) The procedure of local valuation courts shall, subject to such regulations, if any, as may be made in that behalf by the Minister, be such as the court in question may determine, and every such court—(a) shall, unless the court otherwise order, on the application of any party to the appeal and upon being satisfied that the interests of either party would be prejudicially affected, sit in public; (b) may take evidence on oath and shall have power for that purpose to administer oaths. C

"(3) On the hearing of an appeal to a local valuation court—(a) the appellant; and (b) the valuation officer, when he is not the appellant; and (c) the owner or occupier of the hereditament to which the appeal relates, when he is not the appellant; and (d) the rating authority for the area in which the hereditament in question is situated, when that authority is not the appellant; and (e) the objector, where he is not one of the persons aforesaid, shall be entitled to appear and be heard as parties to the appeal and to examine any witness before the court and to call witnesses. D

"(4) After hearing the persons mentioned in the last preceding sub-section, or such of them as desire to be heard, the local valuation court shall give such directions with respect to the manner in which the hereditament in question is to be treated in the valuation list as appear to them to be necessary to give effect to the contention of the appellant if and so far as that contention appears to the court to be well founded . . ." E

and the valuation officer must cause the list to be altered accordingly. F

The society availed itself of the right to make a proposal. The proposal was "to delete the hereditament from the valuation list" on the ground that it was "exempt from payment of rates under the Scientific Societies Act, 1843". The valuation officer objected to the proposal. The resultant appeal, which was the appeal of the society against the objection of the valuation officer, came before the local valuation court for North-East London on Oct. 24, 1951. Its decision was that the hereditament was "exempted from rating under the Scientific Societies Act, 1843". It gave directions that the valuation list should be amended to accord with its decision. The valuation officer could have appealed against that decision to the Lands Tribunal (see the Lands Tribunal Act, 1949) but no appeal was lodged. G H

It was provided by s. 34 (1) and (2) of the Local Government Act, 1948, as follows:

"(1) Subject to the provisions of sub-s. (3) of this section, a new valuation list shall be made for every rating area, so as to come into force . . . (b) inside London, on Apr. 6, 1952, and the periods for which the valuation lists in force at the date of the passing of this Act are to remain in force shall be extended accordingly." I

Then follows a proviso which I do not read. Then sub-s. (2):

"Thereafter new valuation lists shall, subject to the provisions of sub-s. (3) of this section, be made for all rating areas, whether within or outside London,

* I.e., as amended by the Rating and Valuation (Miscellaneous Provisions) Act, 1955, s. 15, Sch. 8, Part 1.

A so as to come into force on Apr. 1 in the following years, that is to say, the year 1957 . . ."

and each fifth successive year. By virtue of a later Act (the New Valuation Lists (Postponement) Act, 1952), and of orders made under that Act, the dates laid down by the Act of 1948 were altered. But a new valuation list had to be made B which was to come into force on Apr. 1, 1956. A new list was made, and in it was entered the hereditament of the society together with figures of £300 gross value, and £247 rateable value.

The society claimed that it could still qualify for the exemption given by the Scientific Societies Act, 1843. It is to be observed that a society might qualify for exemption in circumstances existing at one date and might not qualify in C circumstances existing at a different date. Accordingly the society made a proposal on Sept. 25 1956. That was a proposal for the alteration of the list " by the exclusion of the hereditament from the valuation list " on the grounds of " exemption from payment of rates under the Scientific Societies Act, 1843 ". Strictly speaking the society could not claim the " exclusion of the hereditament " from the list but could only claim to have it marked as exempt (see r. 22 of the D Valuation Lists Rules, 1955). The valuation officer made objection to the proposal of the society, and as a result the matter came before the local valuation court on June 13, 1957. It was the appeal of the society against the valuation officer's objection to its proposal. It is important to see what was the question which was before the court. It was in effect whether the society was entitled in respect of the new valuation list to have an entry made that it was exempt from E rates. That raised the question whether in reference to the proposal made by the society in 1956 the facts and circumstances were such that the provisions of s. 1 of the Act of 1843 would give exemption.

The society as appellant had the right to begin, but apparently no evidence was given; and the course that was followed was that the court wished the valuation officer to state whether he alleged that the society's constitution or F activities were different from what they were in 1951. The court, after hearing the parties, adjourned the hearing deciding that

> " the court is satisfied that the question of exemption of the society on the basis of its memorandum of association and facts existing in 1951 has already been decided between these parties and, accordingly, we are not prepared to G hear the valuation officer's objection unless he can bring evidence to show some variation in the society's constitution or activities since 1951."

The solicitor for the valuation officer made his attitude quite clear in a letter written on June 14. It was that the valuation officer did not wish to give evidence to show changes or differences in the society's constitution or activities since 1951. His contention was that in view of the then existing constitution and H activities of the society it was not entitled to exemption. But, in view of the statement of the chairman of the court that, unless the valuation officer brought evidence of a variation since 1951, the court was " not prepared to hear the valuation officer's objection ", there seemed no purpose in the further attendance of the valuation officer. The relevant parts of the letter are important and read as follows:

I

> " The valuation officer's case is that the Society of Medical Officers of Health is not entitled to exemption under the provisions of the Scientific Societies Act, 1843, in view of the constitution and its activities. The valuation officer does not contend that any alteration has been made in the constitution of the society since the earlier decision of the local valuation court which was given on Oct. 24, 1951, and he does not suggest that the society now carries on activities which it did not then carry on. The valuation officer relies on the present constitution of the society and its present

activities, and he is not in a position to say whether the present activities are in any way different from those to which the court was referred in 1951; whether or not they are different is, it is submitted, entirely irrelevant. The hearing was adjourned to enable the valuation officer to give evidence of any changes or differences in the society's activities, but the valuation officer does not wish to take advantage of this. Accordingly, in view of the statement made by the chairman at the close of the proceedings on June 13, all that will remain for the court to do will be, it seems, to issue a direction that the hereditament occupied by the society should be treated as 'exempt'. In these circumstances the court may not consider it necessary to arrange a further formal hearing for the purposes of issuing its formal direction and might prefer to dispense with any further hearing. You will no doubt let me know the court's wishes in this respect in due course. It will, of course, be appreciated that the valuation officer is in no way withdrawing his notices of objection to the society's proposals and that it is his present intention to take the case to the Lands Tribunal."

It does not appear that at that stage the society could make any plea of res judicata. The society had gone to the local valuation court to appeal against the objection of the valuation officer to its proposal to have an entry made in the newly made valuation list to the effect that it was exempt from rates. The society was doubtless in a position to give evidence on the relevant matters, and its case was that it qualified for the exemption given by the Act of 1843. The matter was in a sense taken out of its hands by the court.

In the result the local valuation court gave its decision on June 24, 1957. It was in the following terms:

"Following the views of the court expressed at the hearing on June 13, 1957, and as a result of a letter received from the solicitor's office of the Inland Revenue dated June 14, 1957, the court hereby decide and direct that the offices, 3rd floor rooms, 483-486, Tavistock House, South Wing Extension, Tavistock Square, be exempted from rating under the provisions of s. 1 of the Scientific Societies Act, 1843."

That decision must have been given on the assumption (though not on the proof) that the occupation of the society at the time of its proposal in 1956 was similar to the occupation in 1951, and that other existing facts were similar to those which existed in 1951, and on the basis that the constitution (whether the same as before or not) showed that the society was instituted for purposes of science, literature or the fine arts exclusively.

The valuation officer gave notice of appeal on July 11, 1957. Appeal lay to the Lands Tribunal. It does not seem to me that the right of the valuation officer to appeal can be questioned. Pursuant to the Lands Tribunal Rules, 1956, the valuation officer as appellant lodged his case, and the society lodged its reply. In the reply it was stated that the society would rely on a point of law which it formulated as follows:

"The appellant [valuation officer] cannot now be heard to say that the respondent society is not entitled in respect of the said hereditament to exemption from rating under the provisions of s. 1 of the Scientific Societies Act, 1843, by reason of the following matters:—(a) On July 27, 1951, the respondent society made a proposal for the exclusion of the said hereditament from payment of rates under the said Act of 1843, to which proposal the appellant [valuation officer] gave notice of objection. (b) On Oct. 24, 1951, the local valuation court decided and directed that the said hereditament should be exempted from rating under the said Act of 1843."

In effect the society was seeking to preclude the valuation officer from appealing against the decision which the society secured in its favour.

When the case reached the Lands Tribunal it was agreed by both parties that the tribunal should deal with this contention of the society as a preliminary point. The Lands Tribunal in a careful decision gave its reasons for declining to dismiss the appeal on the plea of res judicata. The Lands Tribunal stated a Case for the decision of the Court of Appeal, the question stated being whether on the findings of fact recorded in the decision, the Lands Tribunal came to a correct decision in law in rejecting the contention of the society as recorded above.

When the society was before the local valuation court in 1957 it was an appellant who was asking for an order in its favour: it had taken the proper initiative, following the procedure laid down in the statutory code, to obtain an entry on a new valuation list in a form to which it submitted that it was entitled. It would not have availed it merely to produce the decision of 1951. The local valuation court in 1951 could not decide, and did not purport to decide, what entry should be made on some future valuation list not then in existence. The court in 1957 had to be satisfied as to the facts existing at the time of the new valuation list and to consider the position at the date of the society's proposal. The circumstance that the court had decided what the facts were in 1951 did not establish what they would be in 1956. It is, of course, clear that in 1957 the facts could be very speedily and easily ascertained if someone was prepared to say that they were the same as or similar to those which existed in 1951 when the court had a previous appeal before it. But, by whatever method the facts are ascertained in 1957, the court, in 1957, after having ascertained the facts, was giving its decision on the question as to what entry should be made in the new valuation list. What was decided in 1951 was as to what entry should or should not be made in the valuation list then existing. A decision then made on that question cannot preclude the court from giving whatever it considers to be the correct decision on a later question which later arises, i.e., what entry should be made in a later list on the basis of the facts and circumstances later existing. If by the date of the later hearing the superior courts have given guidance on points of law, it would be wrong not to follow such guidance.

The underlying principle supporting a plea of res judicata is that it is desirable that litigation should end and that it is undesirable that a person should be vexatiously pursued in litigation in regard to a matter that has already been decided. It has, however, always been clear that the plea will only avail if it appears that there is an attempt to re-open the very matter that has been decided (compare *Re Koenigsberg, Public Trustee* v. *Koenigsberg* (1), [1949] 1 All E.R. 804).

In *Inland Revenue Comrs.* v. *Sneath* (2) ([1932] All E.R. Rep. 739), LORD HANWORTH, M.R., said (ibid., at p. 745):

> "There must be a lis inter partes in which the point relied on for establishing the estoppel was not merely incidentally, or collaterally, discussed and litigated, but was fundamental to the conclusion reached by the court. The court must be one of competent jurisdiction that has seisin of the case for the purpose of reaching a final decision inter partes, though it may be a private tribunal such as an arbitrator whose forum is a domestic one constituted by the parties themselves."

LORD HANWORTH, M.R., referred to the judgment of LORD SELBORNE, L.C., in *R.* v. *Hutchings* (3) ((1881), 6 Q.B.D. 300). LORD SELBORNE said this (ibid., at p. 304):

> "The principles of the law of estoppel by a judgment, inter partes, to which alone I think it necessary to refer, may be taken from DE GREY, C.J.'s opinion in the *Duchess of Kingston's Case* (4) ((1776), 2 Smith, L.C. 12th Edn. 761) and from that of KNIGHT BRUCE, V.-C., in *Barrs* v. *Jackson* (5) ((1842), 1 Y. & C. Ch. Cas. 585). The decision in the latter case was reversed, but on a ground not at all touching the statement of principles contained in it.

'The judgment' (said DE GREY, C.J.) 'of a court of concurrent' (or of exclusive) 'jurisdiction, *directly upon the point*, is conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence' (that is, as I understand the meaning of the Chief Justice, conclusive evidence) 'of any matter which came collaterally in question, though within their jurisdiction; *nor of any matter incidentally cognisable*, nor of any matter to be inferred by argument from the judgment'. KNIGHT BRUCE, V.-C., said: 'It is, I think, to be collected that the rule, against re-agitating matter adjudicated, is subject generally to this restriction—that however essential the establishment of particular facts may be to the soundness of judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may be as to its immediate and direct object, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question; provided *the immediate subject of the decision* be not attempted to be withdrawn from its operation, *so as to defeat its direct object*'."

On behalf of the society it was not contended that a decision of a local valuation court or of the Lands Tribunal on a question as to the value of a hereditament could be regarded as binding for the future. But it was submitted that in the present case there had been a decision on a question of status and that the local valuation court had in 1951 decided that the society had a status which gave it exemption from rates, and that that decision was binding for the future unless in the future the facts were not comparable with those previously existing. I cannot accept this submission. The local valuation court in 1951 did not and could not decide any other question than that which was before it. That question was whether an entry should be made in the valuation list in the manner set out in the proposal of the society. The local valuation court never purported to give a decision which could operate in relation to the year 1956.

It is urged, however, that the decision given in 1951 must have involved the conclusion, as a matter of law, that the society was " instituted for purposes of science, literature or the fine arts exclusively ". Though there is no judgment of the local valuation court in 1951 which can be read so as to see how this aspect of the matter was dealt with, it is true to say that the court in 1951 ought not to have decided as it did unless it did conclude that the society was instituted for purposes of science, literature, or the fine arts exclusively. But, in my judgment, no estoppel can arise even in a limited form for the reason that in 1951 the local valuation court had no jurisdiction save to deal with the then existing valuation list. Its decision on any incidental issue of fact or law, even though necessary in order to decide as to the valuation list which was before it, could not, in my judgment, be conclusive in reference to any future entries to be made on any future valuation list. A new list came into existence because there was a statutory obligation to make it. The force and effect of any decision relating to the list that existed in 1951 became spent and exhausted when that list was replaced by the new valuation list.

Both parties agree that it is a general principle that, where a question has been decided by a court of competent jurisdiction in a lis inter partes, those parties are estopped from re-opening this decision in any subsequent litigation between the same parties as to the same question. In their careful addresses to the court learned counsel cited numerous authorities. I do not propose to refer to all of these for the reason that many of them merely showed the application of the principle to different sets of circumstances and different topics.

We were referred to various decisions in tax cases, including *Patuck* v. *Lloyd* (6) ((1944), 171 L.T. 340), where LORD GREENE, M.R., said (ibid., at p. 341):

A "There is no such thing as res judicata in respect of the decisions of Inland Revenue Commissioners. They may or may not follow their previous decision; but they are not bound to because the subject-matter is a different year's tax and a different year's assessment and is not the same as the subject-matter of the previous ruling."

B It was submitted on behalf of the valuation officer that a proceeding before a local valuation court is not a lis inter partes but is more in the nature of necessary administrative machinery for determining what entries should be made in a valuation list. But, in agreement with the view of the Lands Tribunal, I am not prepared to accept this submission. The provisions of s. 48 of the Local Government Act, 1948, to which I have referred, show that a local valuation C court is not an assessing authority. The court, after hearing such parties as are entitled to appear and be heard and after hearing evidence, must give such directions with respect to the manner in which the hereditament in question is to be treated in the valuation list as are necessary in order to give effect to such contention of an appellant as it decides to be well founded. But, though the proceedings in 1957 can be regarded as being subsequent litigation between parties who previously litigated in 1951, the question in issue in 1957 was not, D in my judgment, and for the reasons which I have given, the same question as that which was in issue in 1951.

In *Leith Harbour & Docks Comrs.* v. *Inspector of the Poor* (7) ((1866), L.R. 1 Sc. & Div. 17) an action was brought in 1861 by the inspector of the poor and three owners or occupiers of property in North Leith against the Leith Harbour and Docks Commissioners to have it declared that they were liable to be assessed E for the relief of the poor in respect of the lands, harbours, docks and property held by them, and that in estimating the yearly value all harbour dues and miscellaneous dues collected by them should be included and taken into account. One defence of the commissioners was that of res judicata; they said that the very question raised in the case had been already decided in a previous suit between the same parties. Further they said that the property sought to be F charged was held by them solely for the benefit of the public, and that the revenues were appropriated to the maintenance of the harbour and the payment of the cost of construction of works. It appeared that some years previously a question had been raised as to the liability of the commissioners to contribute to the rate for the year from Whit-Sunday, 1846, to Whit-Sunday, 1847. The commissioners in then denying liability had then pleaded the same ground of G immunity as they later pleaded in the 1861 case as above referred to (7). The matter was litigated up to the House of Lords, and the House of Lords in 1855 (*Leith Harbour Comrs.* v. *Inspector of the Poor* (8) ((1855), 2 Macq. 28) reversed a decision of the Court of Session adverse to the commissioners. But when the decision of the House of Lords of 1855 was examined in considering the latter case in 1866 it was manifest that the decision in the earlier case had turned on a totally H different point from that of the immunity as claimed by the commissioners. In the later case, which also went to the House of Lords, the plea of res judicata was on this ground held to be invalid by LORD CRANWORTH, L.C. LORD CHELMSFORD, with whom LORD KINGSDOWN agreed, while holding that the decision of the House of Lords in 1855 had left open the question of immunity from assessment, gave an additional reason for the failure of the plea of res judicata. He said I (L.R. 1 Sc. & Div. at p. 22):

"It appears to me that the argument for the appellants has not sufficiently attended to the nature of a plea of res judicata. The maxim of the civil law, 'res judicata pro veritate accipitur', applied only when the identical question, which had been once judicially decided, was again raised between the same parties—the rule laid down in the Digest, lib. xliv. t. 2, s. 3, being 'exceptionem rei judicatae obstare, quoties eadem questio inter easdem personas revocatur'. This plea, therefore, is exactly analogous to a plea in the

English courts of 'judgment recovered': in which it is necessary, in order to make the judgment operate as an estoppel, that it should be between the same parties and upon the same subject-matter coming directly in question, either in the same court, or in another court of co-ordinate jurisdiction. Without considering whether the pursuers are different or substantially the same in the present and in the former action, or whether the circumstances under which the question is now raised have been changed from what they were before by the Act of the 23 & 24 Vict. c. 48, it is sufficient to say that the proceeding in the present case being for a different rate from that upon which the former judgment proceeded, the cause of action is different, and the plea of res judicata is consequently inapplicable."

In my judgment, the reasoning that a proceeding for one rate involves a different cause of action from that in a proceeding for a different rate applies to the situations where different valuation lists are in question.

A corresponding view was taken by the Privy Council in *Broken Hill Proprietary Co. v. Broken Hill Municipal Council* ([1926] A.C. 94). A New South Wales statute laid down a formula for ascertaining the unimproved capital value of a mine for rating purposes. In reference to the assessment of a mine in one year, a question arose as to the correct construction of the statute. That question was decided by the High Court of Australia on appeal from the Supreme Court of New South Wales, to which court there had been an appeal from a judge of the district court. In reference to the assessment of the mine for a later year, the Supreme Court of New South Wales considered that it was bound by the previous decision of the High Court of Australia as to the construction of the statute. On appeal to the Privy Council, it was held that the question as to the correct method of ascertaining the unimproved value was not res judicata, and in the judgment of the Board the matter was thus expressed (ibid., at p. 100):

"It was also contended before this Board on behalf of the respondents that having regard to the said decision of the High Court of Australia the question raised by this appeal is res judicata as between the appellants and the respondents, and the appellants are estopped from contending that such decision of the High Court of Australia is wrong. It has been pointed out that no such question was raised or pleaded either before the district court or the Supreme Court in New South Wales, nor has there been any adjudication or finding upon it. There is, however, no substance in this contention. The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question—namely, the valuation for a different year and the liability for that year. It is not eadem questio, and therefore the principle of res judicata cannot apply."

These authorities lend support to the view which I have expressed, and, for the reasons I have given, I consider that the Lands Tribunal was correct in rejecting the plea of res judicata.

SELLERS, L.J.: On Oct. 24, 1951, the local valuation court for the area, on the appropriate proceedings having been taken, held that the appellant ratepayer, the Society of Medical Officers of Health, fulfilled all the necessary requirements of the Scientific Societies Act, 1843, and was exempted from liability to rates in respect of premises occupied by it as offices being the third floor rooms, 483-486, Tavistock House, Tavistock Square, W.C.1. The application for exemption had been contested by the valuation officer (the present respondent) but the decision in favour of the society was not appealed from and the premises became and remained unrated.

Under s. 34 of the Local Government Act, 1948, as amended by the New Valuation Lists (Postponement) Act, 1952, and orders made thereunder, a new

A valuation list was made to come into force on Apr. 1, 1956. The society's premises were entered in the new list with an assessment of £300 gross value, £247 rateable value.

By the appropriate procedure the society again claimed exemption on the same ground as in 1951, namely, that it was exempted from being assessed or rated or being liable to be assessed or rated, or being liable to pay any rates B by reason of the Friendly Societies Act, 1955. Notwithstanding the adjudication in October, 1951, the valuation officer objected to such exemption, and the matter came before the same court as before, the local valuation court for North-East London on June 13, 1957. The society relied on the decision of 1951 that it was a friendly society entitled to exemption under the Act of 1955, and the court, no doubt itself cognizant of the previous decision, held that the issue had already been decided by it and, unless there was some variation in the society's constitution or activities since 1951, the court was not prepared to hear the C valuation officer's objection.

Some question was raised before us as to the form rather than the substance. I speak of what happened at the local valuation court. The position was that the society was simply relying on the decision which had been reached after a dispute between the parties in 1951, and was saying that, whether it was a friendly society or not was res judicata and more accurately created an estoppel per rem judicatam. It was open to the valuation officer to say that that decision was not binding between the parties because in the intervening years the facts had changed and were so different that, whether or not the society came under the Act of 1955 had to be judged afresh in the light of the different circumstances. E The local valuation court adjourned the hearing to enable the valuation officer to challenge the correctness of the decision of 1951 and to contend that the decision as sought applied to the altered circumstances, but he intimated his attitude in the matter of June 14, 1957, ruled in full by the Lands Tribunal, and as a consequence on June 26, 1957, the local valuation court made an order exempting the society's premises from rating on the ground that the question of exemption of the society on the basis of its memorandum of association and facts existing in 1951 had already been decided between the parties. In the letter it was stated:

> "The valuation officer does not contend that any alteration has been made in the constitution of the society since the earlier decision of the local valuation court was given on Oct. 26, 1951, and he does not suggest that the society does not continue to administer as it did then, carry on."

G It happened the words underlined in the letter may have intended to convey or achieve, it appears to me that, even if the then activities of the society were the same as in 1951, it was entirely irrelevant. If the valuation officer had wished, he could no doubt have required the society to prove that the circumstances were the same as before, a little pedantic to require, as was submitted, that it should be H furnished as to what was in dealing with a society's constitution and activities and the case of previously before it would be said and held that the manner in which it was not pursued. That was not the course taken by the valuation officer. He was prepared to accept that the circumstances had not changed, and that change or no change was irrelevant, and to argue that in rating matters in respect of matters as a new valuation list, or at least in respect of the entry of those premises, no issue decided on a previous occasion could be binding.

I The valuation officer's position in this litigation is emphasised by the course which the dispute subsequently took. The parties agreed to the trial of a preliminary point of law by the Lands Tribunal on the ground that the valuation officer could not be bound by any finding that the society was not entitled to exemption from rating under the provisions of s. 1 of the Industrial Assurance Act, 1923, because the local valuation court had in 1951 decided and decreed that the society should be exempted thereunder. This appeal,

in my view, must be heard, and can only be heard, as a preliminary point on the basis that the facts and circumstances do not differ from those existing in 1951 in so far as the issue of the society's right to exemption from rateability under the Act of 1843 is concerned. A

The question for our consideration is not whether the valuation officer or the local valuation court, if invoked, can consider afresh whether the society's premises should be included in the new valuation list as premises to be rated— of course it must—but whether or not in considering that question there can be litigated again the society's right to exemption under the Act of 1843, if all the relevant circumstances of its constitution and its user of the premises are unchanged. There is, as I see it, no question of the local valuation court having jurisdiction, or even purporting to exercise jurisdiction, to decide in 1951 what should or should not be included in a 1956 or any other valuation list except the then current list. It clearly could do no such thing. Entries in a new valuation list, and in this case the entries in the 1956 valuation list, have to be considered if challenged by the procedure provided. The submission of the society is that in its case an estoppel per rem judicatam arises because its claim for exemption can in no way be differentiated from the claim it has already established. B C

The basis of an estoppel per rem judicatam is that it is in the public interest that there should be an end to litigation, and I do not favour the submission that a good general ruling to this effect should be held inapplicable because the decision relied on could in effect be re-opened by someone who was not a party to the original proceedings. It is for the society in this case, desirous as it is of setting up res judicata as a bar to the claim against it, that its premises are rateable, to bring itself within all the requirements to establish the plea, except in so far as they are admitted by the valuation officer. It has been accepted that the parties are the same in the litigation now raised as in the decision of 1951. There seem to be five other elements to be established: (i) that there was a judicial decision; (ii) that the judicial decision was in fact pronounced; (iii) that the tribunal pronouncing the decision had competent jurisdiction to do so; (iv) that the decision was final, and (v) that the judicial decision was or involved a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised. I have adopted this convenient summary from SPENCER BOWER'S book RES JUDICATA. D E F

The decision of the Lands Tribunal deals with the contentions on behalf of the valuation officer before him and those contentions were repeated with perhaps varying emphasis before us. The submissions were that there was and is no estoppel by record by reason of the judgment in personam of the local valuation court, because the proceedings there did not create a lis inter partes; the court was not a court of competent jurisdiction; the proceedings in 1951 were in respect of the then valuation list and could not apply to proceedings in respect of the new and different valuation list which came into force on Apr. 1, 1956; and that the court in 1951 had no jurisdiction to determine any question raised in 1956. G H

The society made its proposal in 1951 that it should be exempted from rateability under the Act of 1843 in accordance with the procedure for deciding such an issue if the valuation officer challenged the claim. The procedure is laid down in the Local Government Act, 1948, and in particular in s. 40, s. 41, s. 44 and s. 48. Section 44 (1), as amended, provides for a local valuation court to be convened I

> " . . . for the purpose of hearing and determining appeals under the preceding provisions of this Part of this Act against objections to proposals for the alteration of valuation lists."

Then s. 48 (2) and (4) make certain provisions which I do not read as my Lord has already read them. Section 49 gives a right of appeal, now to the Lands

A Tribunal, to any person who appeared before a local valuation court on the hearing of an appeal and is aggrieved by the decision of the court.

I agree with the Lands Tribunal that the local valuation court was a competent court, constituted by the Local Government Act, 1948, to deal with matters in dispute such as arose here and that there was a lis inter partes. The only ground on which the society claimed exemption was that it was a scientific B society within the terms of the Act of 1843. It was a question which required a careful judicial inquiry. It received it and a decision thereon from the appropriate court, whose decision was final subject to any appeal which in this case was not made.

The argument to the contrary was based on several authorities dealing with decisions of the Income Tax Commissioners. As the Lands Tribunal pointed C out, the local valuation court is not an assessing authority, and he, in my view, rightly rejected these submissions of the valuation officer. But he has held that the principle of res judicata could not be applied to proceedings in respect of a different valuation list than that in respect of which a decision had been given. Under present legislation, the ratepayers are confronted with the prospect of a new valuation list every five years. If the view appealed against is right, D it would seem that, if it takes the greater part of five years (as well it might) for a ratepayer (or indeed for a valuation officer) to have the benefit of a decision in the House of Lords, then no sooner would this have been achieved than the whole question could be litigated again on the same material, steadily exhausting one quinquennial period after another.

I would reject the view that there can be no finality on any issue in rating E unless authority restrains me. Instability and uncertainty seem to be as undesirable in rating as in any other factor affecting future planning and financing of the affairs of a trade, an organisation or an individual. A new valuation list provides the occasion for reviewing the entries of premises not only as to their values but as to exemptions and categories, such as industrial or freight-transport hereditaments. On the face of it, a value fixed in one year has to be regarded F in a different setting both actually and relatively five years later, or even one year later, and in fact there would seem little scope for a plea of res judicata in respect thereof. Authorities were quoted, which learned counsel for the society did not challenge, to the effect that values or estimates could not be relied on by a plea of res judicata. In the days when a person aggrieved had to challenge a rate in order to air his grievance, an objection sustained or rejected one year G could not be said to be res judicata in respect of a newly assessed rate for a subsequent year. The rate had to be estimated afresh each year and was clearly attackable as a new estimate. But the present issue seems to me not to be affected by a question of value or estimate. The society found itself placed on the new valuation list coming into force on Apr. 1, 1956. Its only claim for exemption was that it was a scientific society within the Act of 1843. The only issue which H arose was whether the society was or was not so exempt. In an issue already tried between the same parties, in the court provided to hear such a dispute, it had been held that the society was within the Act in its purposes and activities, and in the occupation and user of the premises and was entitled thereby to exemption from rates. The matter is therefore, as I see it, res judicata between the parties involved in that dispute unless circumstances have changed. This I preliminary point arises on the basis that circumstances have not changed and, in my opinion, the question cannot be litigated further, even if the decision, if reviewed, might be held to be wrong.

Counsel for the valuation officer relied mainly on the following three cases: *Leith Harbour & Docks Comrs.* v. *Inspector of the Poor* (7) ((1866), L.R. 1 Sc. & Div. 17), *R.* v. *Hutchings* (3) ((1881), 6 Q.B.D. 300), and a case in the Privy Council, *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council* (9) ([1926] A.C. 94). In the *Leith Harbour* case (7), the relevant part of the headnote is as follows:

" Res Judicata:—That the court has decided against a poor rate for one year, is no reason why it should not decide in favour of a poor rate for another and a different year, in respect of the same property, and in a suit between the same individuals. The doctrine of res judicata does not apply to such a case ",

and the valuation officer relied in particular on the speech of LORD CHELMSFORD. But the speech of LORD CRANWORTH, L.C., on the point was as follows (L.R. 1 Sc. & Div. at p. 20):

" There remains the single point of res judicata, which, I think, will appear to your Lordships to be more plausible than substantial. Some ten or eleven years ago the question was raised as to the liability of the commissioners of this very harbour to contribute to the rate for the year from Whit-Sunday, 1846, to Whit-Sunday, 1847. They denied liability; and pleaded, amongst other things, that 'The subjects were held by them solely and exclusively for the benefit of the public; and further, that the rates and revenues leviable being by law limited and appropriated to the maintenance and repair of the harbour, and the liquidation of the debt incurred in the construction of the works, they were not liable for the assessment'. That case, however, turned, as appears by Mr. Macqueen's report of it, on a totally different point. And the affirmance of a part of the decision below, so far as it was affirmed, had reference not to the general question of rateability, but solely to the payment to be made for a particular year. Care, however, was taken by the House to guard itself from expressing any opinion as to the general question of the rateability of harbours and docks."

The earlier case on which reliance had been placed is inserted in the report at p. 21 and it reveals that both LORD CRANWORTH, L.C., and LORD BROUGHAM made it clear that the judgment of the House should be so drawn up as not to prejudice the parties with respect to any rate that might be imposed thereafter. I do not think this case is helpful and certainly not conclusive in the present dispute, both because the earlier decision could not in its terms be relied on and on the general ground that the appeal had been against the rate for a given year.

In *R.* v. *Hutchings* (3) this court held that the adjudication of justices that a street was a highway repairable by the inhabitants at large on the first application was beyond the jurisdiction of such justices, which was only to make or refuse the order for the expenses claimed, and that therefore such adjudication on the first application did not estop the local board from claiming the expenses that they claimed on the second application. That statement from the headnote seems accurately to state the decision of LORD SELBORNE, L.C., who presided and gave the only judgment of the court.

In the present case no question of the court's jurisdiction to try the issue in 1951 or whether its judgment was directly on the point or not has arisen, or could arise, and I fail to see that *R.* v. *Hutchings* (3), strongly relied on by counsel for the valuation officer, has any application. In the prior court LUSH, J. (5 Q.B.D. 353), on the basis that the decision was within the justices' jurisdiction, had held that the defendant was entitled to the benefit of the estoppel claimed by him. The effect of *R.* v. *Hutchings* (3) was dealt with in *Wakefield Corpn.* v. *Cooke* (10) ([1904] A.C. 31), and treated as a case where the justices clearly had no jurisdiction. The *Wakefield* case (10) itself turned on the conclusiveness of a judgment in rem. In *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council* (9), a question which had arisen as to the method of ascertaining the average annual value of a mine was held not res judicata by a decision of the High Court of Australia between the parties to the valuation for a previous year. LORD CARSON, who delivered the judgment of the Judicial Committee, in dealing with the estoppel point said ([1926] A.C. at p. 100):

A "It was also contended before this Board on behalf of the respondents that having regard to the said decision of the High Court of Australia the question raised by this appeal is res judicata as between the appellants and the respondents, and the appellants are estopped from contending that such decision of the High Court of Australia is wrong. It has been pointed out that no such question was raised or pleaded either before the district B court or the Supreme Court in New South Wales, nor has there been any adjudication or finding upon it. There is, however, no substance in this contention. The decision of the High Court related to a valuation and a liability to a tax in a previous year, and no doubt as regards that year the decision could not be disputed. The present case relates to a new question—namely, the valuation for a different year and the liability for that year. C It is not eadem questio, and therefore the principle of res judicata cannot apply."

In the same volume of reports, another Australian case, *Hoystead* v. *Taxation Comr.* (11) ([1926] A.C. 155) is reported. There, in a judgment delivered by LORD SHAW, the Judicial Committee held that the commissioner was estopped D since, although in previous litigation no express decision had been given whether the beneficiaries were joint owners, it being assumed and admitted that they were, the matter so admitted was fundamental to the decision then given. LORD WRIGHT cited those two Privy Council cases in *New Brunswick Ry. Co.* v. *British & French Trust Corpn., Ltd.* (12) ([1938] 4 All E.R. 747), and said it was not necessary to decide between the judgments if they conflicted or to reconcile E them if they merely seemed to conflict. I think the facts here are different from and clearer than those in either of the Australian cases cited (*Broken Hill* case (9) and *Hoystead's* case (11)). The issue in the present case was not only fundamental, it was the only issue in the appeal to the local valuation court in 1951, and was in no way dependent on any admissions.

Hoystead's case (11) was concerned with taxation and not rating, but I would F apply its reasoning to the present case and would regard it as the most relevant of all the authorities cited to us, especially as taxation is a matter of annual assessment and therefore periodic as is rating. The full court in Australia had held in respect of the financial year 1918-19 that the trustees of the will were entitled to make this deduction of £5,000 from the assessment of liability to taxation as the six beneficiaries were joint owners within certain sub-sections of G the Land Tax Assessment Act. LORD SHAW continued ([1926] A.C. at p. 163):

"Matters were allowed to rest upon this footing for another year. And then, in the subsequent year, the whole matter was reopened by the action of the Commissioner of Taxation who, in respect of the same estate and the same parties, reverted to the position that the taxable value should not be H six sums of £5,000 as decided in the former case, but one sum of £5,000. To this it was answered, to put the matter briefly, that the former decision was right upon its merits, but that whether so or not, the respondent was estopped by the judgment already pronounced. If this argument be sound there is an end of the case; and it will be unnecessary to enter upon the merits of the difference between the parties upon the construction of the I statute. In the opinion of their Lordships the contention of the appellants is sound, and the respondent is estopped by judgment."

Then LORD SHAW says (ibid., at p. 165):

"As to the amount of deduction to be made under the Act, being either six sums of £5,000 or one sum of £5,000, the former litigation settled six; the judgment under appeal settled one. There is accordingly between the same parties in regard to the same property a definite prescription of deduction from assessable values. The Board is of opinion that that prescription

was as conclusively settled in the former litigation as language could settle it, it having been 'How many deductions of £5,000 the respondent should make?' and the judicial answer being 'six'. Apart from the other arguments and the authorities to be presently alluded to, the case appears thus to be concluded in favour of the appellants. Very numerous authorities were referred to. In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle—namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs."

Then the noble Lord referred to some of the cases of outstanding authority, and went on (ibid., at p. 170):

"It is seen from this citation of authority that if in any court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding."

Inland Revenue Comrs. v. *Sneath* (2) ([1932] All E.R. Rep. 739), to which reference was made in the argument, does not seem to be relevant, except for an interlocutory observation by GREER, L.J., who said ([1932] 2 K.B. at p. 372):

"I should feel difficulty if the Special Commissioners was a court of competent jurisdiction in saying that there was not here an estoppel."

The decision was that the commissioners' determination was not lis inter partes of a competent court so as to create an estoppel per rem judicatam.

The valuation list giving rise to consideration of the issue was new and the time for applying the decision was different. It seems to me that such sort of considerations would normally arise when the plea of estoppel per rem judicatam is raised. The question is whether the matter in issue is the same. I would hold it to be precisely the same, namely, whether or not the society is qualified as a scientific society to exemption from rating under the Act of 1843. That is the res, the only issue on which the society can justify its exemption. If on the same facts the local valuation court were to find contrary to its 1951 decision, there would be two conflicting decisions of the same court in litigation between the same parties on the same subject-matter, the only difference being an interval of a few years.

It is not even suggested that any decision of the courts had intervened which, if the question can be reviewed, would or might invalidate the first decision. But, even if there were such an authority, it would not defeat the plea of estoppel. In *Re Waring, Westminster Bank, Ltd.* v. *Burton-Butler* (13) ([1948] 1 All E.R. 257), JENKINS, J., held that the decision (i.e., the decision relied on as res judicata) was a decision that those annuities must be provided for as annuities of twenty twenty-ninths of the full amount thereof so long as tax

continued at 10s. in the pound. It has been overruled, or, in other words, has been held to be wrong in law and not to be followed in other cases, but it is nevertheless a subsisting order which is binding on the parties to the proceedings in which it was made.

With deference to my Lords and to Mr. ERSKINE SIMES, Q.C., whose view they approve, I do not think that the distinction which they find between *Hoystead's* case (11) and the present holds. The question in *Hoystead's* case (11) was the assessment for tax in a given year. The tax commissioners were held estopped from adopting a different method for that year in a certain matter of allowances in arriving at their assessment than that which had been decided between the parties in the course of litigation two years earlier. In the present case the valuation officer has to prepare a list of those premises which are liable to rating for the given period. In so doing he is estopped from saying that the society is not a scientific society within the meaning of the Act of 1843 and entitled to the benefits the Act gives them, because that precise issue has been decided. The society claims no greater or other estoppel.

I would allow the appeal and would hold, in answer to the question asked, that the Lands Tribunal did not come to a correct decision in law in rejecting the contention of the society set out in para. 3 of the Case.

WYNN-PARRY, J. (read by MORRIS, L.J.): I am of opinion that, for the purposes of considering whether the doctrine of res judicata applies in this case, first, the local valuation court is a court of competent jurisdiction, and, secondly, the contention between the parties whether or not the society is entitled to exemption from liability to be rated in respect of the hereditament in question under s. 1 of the Scientific Societies Act, 1843, is a lis inter partes, as regards the society and the respondent valuation officer.

Counsel for the society contended that the decision of the local valuation court in 1951 on the construction of the memorandum of association of the society is, as he put it, a constant factor, and that, therefore, by reason of this decision of the local valuation court in 1951, the society, so far as concerns the construction of its memorandum of association, must, when the new valuation list came to be considered in 1956, be held to be still within s. 1 of the Scientific Societies Act, 1843.

I agree with MORRIS, L.J., that this is not a sound contention, but, even if it were, it could not conclude the matter: there are other conditions set out in s. 1 which must be fulfilled before the benefit of the section can be claimed. It must be shown inter alia that the premises are occupied by the society for the transaction of its business and for carrying into effect its purposes. The society may fulfil that condition at one given point of time but fail to do so at another. The question whether or not it does so at any given point of time is wholly a question of fact.

The effect of s. 34 of the Local Government Act, 1948, as amended, is that a new valuation list must be prepared every five years by the valuation officer. It is clearly an essential part of his duty to consider the position as regards all premises within his area as they exist at the time of making his list. In 1951, having considered the circumstances as they then existed, he entered the society in the 1951 valuation list on the basis that it was liable to be rated. The local valuation court took the view that in the existing circumstances the society fulfilled all the conditions set out in s. 1 of the Scientific Societies Act, 1843, and was, therefore, exempt, and the valuation list was accordingly amended. In 1956 a new list had to be prepared, and for that purpose the circumstances then obtaining had to be ascertained, because, as I have pointed out, the society might have ceased to fulfil one or more of the conditions set out in s. 1.

It matters not to my mind what is the result of the investigation into the circumstances obtaining in 1956: it may be found that the society fulfils all the conditions in s. 1, or it may be found that the society has ceased to fulfil

one or more of the conditions in that section. The vital point is that the investigation has to be made. To my mind the inevitable result of the necessity to make the investigation is that the res which was brought into existence in 1951 becomes exhausted. If, as a result of the valuation officer inserting the society in the new list as liable to be rated, the society makes a proposal for exemption, a new issue arises between the parties which has to be resolved. It matters not whether it is resolved by the local valuation court after evidence has been adduced by the valuation officer or whether it is resolved without any evidence being adduced by him. The important and, to my mind, the decisive point is that the new issue has to be resolved.

Now, if this reasoning be right, it must follow that a decision of any court on a particular list can only bind the parties at most during the currency of that list. The local valuation court proceeded on the basis that there was not shown to be any change of circumstances between 1951 and 1956. It therefore decided that the hereditament should be marked " exempt ". In doing so, it must be taken not to have applied the doctrine of res judicata, but merely to have followed its own previous decision.

As regard the authorities, the only one which at first sight appears to support the society is *Hoystead* v. *Taxation Comr.* (11) ([1926] A.C. 155), a decision of the Judical Committee of the Privy Council. In my view that case is to be distinguished from the present case; and in order to point the difference, I do not think that I can do better than quote from the decision of Mr. ERSKINE SIMES, Q.C., in the Lands Tribunal:

> " The distinction between that case and the one now under consideration seems to me to lie in the fact that the statute then in question was one which prescribed the method in which an assessment was to be made and it was the method which was called in question again in the subsequent case, whereas in the present case the question is whether the respondent society should be entered in the list which came into force in 1956 with gross and rateable values or as exempt and no decision as to how it should be so entered in the list has ever been decided."

I also agree with what follows:

> " The point at issue in the present case is not dissimilar to that raised in *Leith Harbour & Docks Comrs.* v. *Inspector of the Poor* (7) ((1866), L.R. 1 Sc. & Div. 17) and the dictum of LORD CHELMSFORD (ibid., at p. 23)' . . . it is sufficient to say that the proceeding in the present case being for a different rate from that upon which the former judgment proceeded, the cause of action is different, and the plea of res judicata is consequently inapplicable' seems to me to apply to a case where there is a different valuation list."

I therefore conclude that the doctrine of res judicata is inapplicable in this case, and that the decision of the Lands Tribunal was correct.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Hillearys* (for the society); *Solicitor of Inland Revenue* (for the valuation officer).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Re No. 88, HIGH ROAD, KILBURN. MEAKERS, LTD. *v.* D.A.W. CONSOLIDATED PROPERTIES, LTD.

[CHANCERY DIVISION (Wynn-Parry, J.), February 2, 3, 4, 6, 1959.]

Landlord and Tenant—New tenancy—Business premises—Terms of new tenancy—Date of commencement of new tenancy—Landlord and Tenant Act, 1954 (2 & 3 *Eliz.* 2 *c.* 56), *s.* 25 (1), *s.* 33, *s.* 64 (1).

Tenants of business premises held them under a lease dated Dec. 5, 1921, for 36¾ years from Sept. 29, 1921, expiring on June 24, 1958, at a rent rising to £250 per annum. The landlords served on the tenants notice of termination under s. 25 of the Landlord and Tenant Act, 1954, specifying June 24, 1958, as the date of termination of the tenancy, and the tenants applied under Part 2 of the Act for a new tenancy. The landlords accepted that a new lease should be granted and the court decided that it should be for the equivalent of a fourteen-year term at a rental of £3,000 per annum (exclusive of rates) with a provision enabling rent to be increased on a review at the end of the first half of the term if the rental value of the premises had then increased. On the question of the date from which the new lease should run,

Held: (i) by virtue of s. 25 (1) and s. 64 (1) of the Landlord and Tenant Act, 1954, the tenancy under the lease of 1921 did not determine until the expiration of three months beginning with the date on which the application for the new tenancy was finally disposed of, and, therefore, the new lease could not begin to run, having regard to s. 33, until the end of those three months, which at earliest would be May 6, 1959 (three months from the date of judgment), or at latest would be three months from the determination of the ultimate appeal, if any.

(ii) in the circumstances the length of the term demised by the new lease, irrespective of the date from which it might run, would be limited to end on June 24, 1972, viz., fourteen years after the date of expiration of the term originally demised by the lease of 1921.

[As to the terms included on the grant of a new tenancy of business premises by order of the court, see 23 HALSBURY'S LAWS (3rd Edn.) 899, para. 1726.

For the Landlord and Tenant Act, 1954, s. 25, s. 33, s. 64, see 34 HALSBURY'S STATUTES (2nd Edn.) 410, 417, 441.]

Cases referred to:

(1) *Re Sunlight House, Quay Street, Manchester*, (Feb. 3, 1959), "The Times", Feb. 4, 1959; 173 Estates Gazette 311.

(2) *Berkovits & Co., Ltd.* v. *Monks*, (1956), 167 Estates Gazette 573.

Adjourned summons.

The applicants, Meakers, Ltd., who were the tenants of business premises in No. 88, High Road, Kilburn, in the county of London, applied by originating summons under the Landlord and Tenant Act, 1954, s. 24, for an order for the grant of a new tenancy. By a lease dated Dec. 5, 1921, the premises were demised for 36¾ years from Sept. 29, 1921, and the tenants were assignees of the lease by virtue of an assignment of July 1, 1949. The respondents, D.A.W. Consolidated Properties, Ltd., who were the landlords, served on the tenants a notice under s. 25 of the Landlord and Tenant Act, 1954, dated June 25, 1957, specifying June 24, 1958, as the date at which the tenancy was to end and stating that they would not oppose application to the court for a new tenancy. The tenants by counter-notice dated June 26, 1957, notified the landlords that they would not be willing at the date of termination to give up possession of the premises. It was accepted by the landlords that a new tenancy in some form should be granted to the tenants, but there were three matters in dispute between the parties: (i) the length of the term to be granted by the new lease; (ii) the rent to be reserved by the lease; (iii) the date from which the new lease was to begin.

The premises were about eighty years old and comprised a shop on the ground floor where the applicants carried on the business of gentlemen's outfitters and hosiers, a basement and three upper floors, of which the second and third floors were sub-let for residential purposes. The premises were situated on the east side of the road which, from the point of view of value of a shop, was a better position than the west side of the road, and, being virtually in the centre of the east side of the road, represented the best shopping area. The premises were held by the tenants by virtue of a lease, dated Dec. 5, 1921, for a term of 36¾ years from Sept. 29, 1921, expiring on June 24, 1958, at a rent which was £230 per annum for the first seven years of the term and £250 per annum thereafter, exclusive of rates. The premises had a rateable value of upwards of £530. Access to the ground floor shop premises was by an arcade entrance and access to the upper part was through No. 86, High Road, Kilburn, the adjoining premises, the freehold of which the applicants purchased in 1950 and on the ground floor of which they carried on a similar business of outfitters.

H. Heathcote-Williams, Q.C., and *T. G. Field-Fisher* for the applicants, the tenants.

Sir Lynn Ungoed-Thomas, Q.C., and *G. Avgherinos* for the respondents, the landlords.

Cur. adv. vult.

Feb. 6. **WYNN-PARRY, J.**, after referring to the summons and reviewing the circumstances relevant to the premises and previously existing lease, continued: I shall consider first the question for what term this new lease should be granted, disregarding for the moment the question of law, which I shall have to decide later, from what date the lease is to begin. That question of law has not yet formed the subject of any judicial decision in the High Court, though there is a decision of a judge of county courts. The tenants ask by their summons that the new lease should be for a term of fourteen years, for naturally they want security of tenure. The landlords, on the other hand, would like the shorter term of seven years, not because there is any likelihood of their wanting to use the premises themselves, as they are a private family company which buys properties for investment and they do not propose to embark on any retail trade themselves, but because they want a guard against inflation. The landlords, therefore, say that if the tenants are to have security of tenure in the shape of the longer term, a provision should be included in the lease that, at the end of the first half, the landlords should have a right to have the rent reviewed, provided that any review shall not have the effect of reducing the rent, but only of increasing it, if whoever has to review it considers that, in the circumstances then obtaining, the rental value of the property has increased.

My inclination is to grant the tenants the longer term of years, provided that I do not prejudice the landlords. Counsel for the tenants asked that a further term should be put in, giving the tenants the right to break the lease at seven years if the result of the review of the rent, in their opinion, resulted in too high a figure. On the whole, having considered that, I think that they are asking for the best of both worlds, and I propose to grant to the tenants the equivalent of a fourteen-year term, but to direct that there shall be included in the lease a provision as regards the review of the rent at the end of the first half of the term.

[His Lordship considered the evidence of the valuer for the tenants and of the valuers for the landlords, and, accepting the valuation for the landlords, decided that the rent should be £3,000 per annum, exclusive of rates. His Lordship continued:] The last point is from what date the new lease is to be taken to begin. It is provided by the Landlord and Tenant Act, 1954, s. 33, that, where the court makes an order for the grant of a new tenancy, the tenancy, as regards term, shall be "... for a term not exceeding fourteen years, and shall begin on the coming to an end of the current tenancy". In order to find out what is meant by the phrase "current tenancy" it is necessary to refer back to s. 26 (1), where it is said:

A "A tenant's request for a new tenancy may be made where the tenancy under which he holds for the time being (hereinafter referred to as 'the current tenancy') . . ."

That has the result in this case of making the current tenancy the lease dated Dec. 5, 1921. Again in order to ascertain how the current tenancy, the lease of 1921, can be terminated, it is necessary to look at the previous section, s. 25. By s. 25 (1) it is provided:

B "The landlord may terminate a tenancy to which this Part of this Act applies by a notice given to the tenant in the prescribed form specifying the date at which the tenancy is to come to an end (hereinafter referred to as 'the date of termination') . . ."

C If sub-s. (1) stopped there, there would be no difficulty at all in coming to the conclusion that the lease in question here came to an end on June 24, 1958, but there is added to sub-s. (1) this proviso:

"Provided that this sub-section has effect subject to the provisions of Part 4 of this Act as to the interim continuation of tenancies pending the
D disposal of applications to the court."

I therefore have to turn to Part 4, where the relevant section is s. 64. The sidenote to that section is: "Interim continuation of tenancies pending determination by court", and sub-s. (1) provides:

"In any case where—(a) a notice to terminate a tenancy has been given
E under Part 1 or Part 2 of this Act or a request for a new tenancy has been made under Part 2 thereof, and (b) an application to the court has been made under the said Part 1 or the said Part 2, as the case may be, and (c) apart from this section the effect of the notice or request would be to terminate the tenancy before the expiration of the period of three months beginning with the date on which the application is finally disposed of,
F the effect of the notice or request shall be to terminate the tenancy at the expiration of the said period of three months and not at any other time."

The effect of the proviso to s. 25 (1) appears to me to be the same as if s. 64 (1) had been written in at the end of the first paragraph of s. 25 (1) instead of the proviso. I am quite unable, in view of the force of the language, to come to any other conclusion than that, once the conditions stated in paras. (a), (b) and (c)
G of s. 64 (1) are fulfilled, then the notice given by the landlord under s. 25 (1) ceases to be of any effect so far as terminating the tenancy at the date specified in his notice, and that the tenancy will be continued and will only be terminated under the provisions of s. 64 (1).

Counsel for the landlords, in a very attractive argument, contended that s. 64 of the Landlord and Tenant Act, 1954, should have a more limited appli-
H cation. He pointed out—and, I think, everyone who has had cause to consider these sections either in a judicial capacity or at the Bar is unanimous in this view—that the Act in this respect produces, or is liable to produce, injustice to landlords, because the rent reserved by the tenancy which the landlord seeks to determine will continue to be payable until the expiration of the period mentioned in s. 64. That period may be extended by delays on the part of
I the tenant taking the matter to appeal and perhaps to the House of Lords. I make no sort of suggestion against the tenants in the present case, but I use these figures as an example of how this interpretation of the section which I have felt compelled to put on it may work out. The rent fixed in 1921, which obtained until June 24, 1958, under the contractual document, was at the highest £250 per annum. In view of the changed circumstances and the expert evidence, I have had to decide that the proper present-day rate is £3,000. I can imagine a tenant using every possible means of delay to prolong the enjoyment of a rent so low as the present rent in this case in order to avoid the liability

of an increased rent which is the price of his being granted a new lease under the Act of 1954. However, the result of the construction which I have felt constrained to put on these sections is one which cannot be avoided as the Act of 1954 stands. It is not for me to speculate whether the legislature intended as a matter of policy what I hold to have been brought about by these sections, or whether there has been some mistake; whether, for instance, all that was intended (which was the result at which counsel for the landlords invited me to arrive) was that the tenant's position as tenant should not be prejudiced where, being faced with a notice by his landlord under s. 25, he wished to apply to the court to have a new tenancy. But, whether it be a matter of policy or a matter of mistake, I can find no way of giving any other construction to these sections than that which I have given, which must result in the lease of 1921 continuing until the expiration of the period provided in s. 64.

I observe that in *Re Sunlight House, Quay Street, Manchester* (1) ((Feb. 3, 1959), " The Times ", Feb. 4, 1959), a case before DANCKWERTS, J., into the details of which I need not go, the court proceeded on the basis, without there being any argument, that the view which I have felt compelled to take of the relevant sections was the correct one. Counsel for the landlords referred me to *Berkovits & Co., Ltd.* v. *Monks* (2), at Lambeth County Court before His Honour JUDGE CLOTHIER, in which the learned judge had felt able to come to an opposite construction of s. 64, which enabled him to direct that the new lease which he proposed to grant should commence to run from the expiration of the existing tenancy, i.e., from the date on which the landlord terminated it effectively by notice. With all respect to the learned judge, I cannot agree with his conclusion. The strength of the language of the proviso to s. 25, and the language of s. 64, appear to me to preclude any such construction.

The result, therefore, is that the new tenancy must begin at the earliest three months from today, but its commencement will, of course, be further delayed if the tenants (as they have every right to do) decide to test this matter before the Court of Appeal. I consider that the result at which I am compelled to arrive is one which is unjust to the landlords, but I cannot mitigate that injustice as regards rent. The new rent can only operate at the end of the period determined by s. 64. I can, however, intervene so far as the term of years is concerned, and what I propose to do is not to grant a term of fourteen years, but to direct that, when the lease comes to be executed, i.e., when the matter is finally disposed of, the terms of the lease to be executed shall be for a term ending on June 24, 1972*. I shall also direct that there be included in the lease a right in the landlords at such point of time as shall represent half of the term as it eventually emerges to apply to have the rent reviewed†.

Order accordingly.

[An application was made by the tenants on Feb. 19, 1959, under s. 36 (2) of the Landlord and Tenant Act, 1954, for the revocation of the order for the new tenancy and WYNN-PARRY, J., made an order revoking the new tenancy, but under s. 36 (3) ordered the tenants to pay the whole of the landlords' costs, including those of the application.]

Solicitors: *Warmingtons & Trevor Jones* (for the applicants); *Sydney Hackman & Co.* (for the respondents).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

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* I.e., fourteen years after the date of expiry of the term demised by the lease of Dec. 5, 1921.

† It was agreed that, to avoid application to the court, the review of rent, if desired, should be referred to an agreed surveyor or to surveyors to be nominated by the parties.

SCOTT *v.* SCOTT (OTHERWISE FONE).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), November 4, 5, 6, 10, 11, 24, 1958.]

Nullity—Approbation of unconsummated marriage—Pre-marital understanding between spouses—Acquiescence by petitioner for over four years—Wilful refusal to consummate marriage—Matrimonial Causes Act, 1950 (14 *Geo.* 6 *c.* 25), *s.* 8 (1) (*a*).

Where a petition for a decree of nullity has been presented on the ground of the respondent's incapacity or wilful refusal to consummate the marriage, the remedy sought is a personal one between the spouses, and, if the respondent seeks to show that there has been such conduct on the part of the petitioner as to preclude the petitioner from being granted a decree even if either of the issues relied on by the petitioner has been proved, it is to the conduct as between the spouses that the court should look, namely, the overt words and acts of the petitioner, and these should be judged by their own nature and declared intention, without regard to concealed thoughts. Moreover, the mere fact that a long time has elapsed between the date of the marriage and the date on which proceedings were commenced does not of itself constitute a bar to the petitioner's claim; nor does the mere fact that each party continues to share, under the matrimonial roof, the normal domestic services derivable from a joint establishment; nor does the mere receipt of financial benefits (see p. 535, letters D and E, post).

The husband and wife were married in April, 1950. At the time of the marriage the husband was a widower, forty-three years of age, and the wife was a spinster forty years of age. Before the marriage the wife was in a safe career which would have entitled her to a pension of £400 a year at the age of fifty-five. Before accepting the husband's proposal of marriage, the wife told him frankly that she had a distaste for the idea of sexual intercourse, and the husband gave her to understand that, although he hoped to be able in time to persuade her to change her attitude, he would not seek sexual intercourse with her against her wishes, and that, even if she did not change her attitude, it would not matter and the marriage would continue. During the first eighteen months or so of the marriage, the husband continued to hope to persuade the wife to accept sexual intercourse, and made a few attempts to have intercourse but desisted on the wife showing that she did not want it. From the beginning of 1952 until the end of 1955, the husband accepted the marriage without sexual intercourse, and the parties were happy together. In 1956 the husband met and became attached to another woman and contemplated the possibility of marrying her. In the beginning of 1957 the wife first learned from the husband that he regarded the question of sexual intercourse as fundamental and that its absence put the marriage in peril. The husband was presumed to have been at all times aware that nullity proceedings were available if a marriage was not consummated. On a petition by the husband for a decree of nullity on the ground either of the wife's incapacity or, under s. 8 (1) (a) of the Matrimonial Causes Act, 1950, that the marriage had not been consummated "owing to" her wilful refusal,

Held: a decree of nullity would be refused for the following reasons—

(i) as the husband had fully accepted the marriage despite the absence of sexual intercourse, there was a bar arising from his own conduct against his obtaining a decree of nullity, even if he were able to prove either of the issues on which he relied; and in the circumstances of the case the bar, which was a discretionary bar, should be applied.

Dicta of the EARL OF SELBORNE, L.C., and of LORD WATSON in *G.* v. *M.* ((1885), 10 App. Cas. at pp. 186, 197) and dicta of SIR ROBERT PHILLIMORE in *W.* (*falsely called R.*) v. *R.* ((1876), 1 P.D. at p. 410) applied.

(ii) the husband was not entitled to relief under s. 8 (1) (a) of the Matrimonial Causes Act, 1950, although the wife had wilfully refused to consummate the marriage, because non-consummation was attributable to the husband's keeping to the pre-marriage understanding between the parties and was not " owing to " the wife's refusal. A

SEMBLE: though the wife's change from her pensionable career before marriage should not be taken into account in deciding whether the husband was barred by conduct, yet it could be considered on the question of discretion (see p. 537, letter H, post). B

[**Editorial Note.** The decision in this case was considered and applied in *Morgan* v. *Morgan* (*orse. Ransom*), p. 539, post.

As to lack of sincerity, collateral motives and delay in presenting a petition for a decree of nullity, see 12 HALSBURY'S LAWS (3rd Edn.) 231, paras. 432, 433; C and for cases on the subject, see 27 DIGEST (Repl.) 416-418, *3460-3482*.

For the Matrimonial Causes Act, 1950, s. 8 (1) (a), see 29 HALSBURY'S STATUTES (2nd Edn.) 397.]

Cases referred to:

(1) *Brodie* v. *Brodie*, [1917] P. 271; 86 L.J.P. 140; 117 L.T. 542; 27 Digest (Repl.) 217, *1726*. D

(2) *G.* v. *M.*, (1885), 10 App. Cas. 171; 53 L.T. 398; 27 Digest (Repl.) 416, *3461*.

(3) *Clifford* v. *Clifford*, [1948] 1 All E.R. 394; [1948] P. 187; [1948] L.J.R. 969; 27 Digest (Repl.) 417, *3462*.

(4) *W.* v. *W.*, [1952] 1 All E.R. 858; [1952] P. 152; 3rd Digest Supp.

(5) *Tindall* v. *Tindall*, [1953] 1 All E.R. 139; [1953] P. 63; 3rd Digest Supp. E

(6) *Slater* v. *Slater*, [1953] 1 All E.R. 246; [1953] P. 235; 3rd Digest Supp.

(7) *Clarke* (*otherwise Talbott*) v. *Clarke*, [1943] 2 All E.R. 540; 112 L.J.P. 41; 168 L.T. 62; 27 Digest (Repl.) 273, *2190*.

(8) *W.* (*falsely called R.*) v. *R.*, (1876), 1 P.D. 405; sub nom. *Reynolds* (*otherwise Wilkins*) v. *Reynolds*, 45 L.J.P. 89; 27 Digest (Repl.) 418, *3474*. F

(9) *B—n* v. *B—n*, (1854) 1 Ecc. & Ad. 248; 23 L.T.O.S. 99; 164 E.R. 144; 27 Digest (Repl.) 270, *2161*.

(10) *R.* v. *R.*, (Feb. 25, 1935), unreported.

(11) *Baxter* v. *Baxter*, [1947] 1 All E.R. 387; *affd., on other grounds*, H.L., [1947] 2 All E.R. 886; [1948] A.C. 274; [1948] L.J.R. 479; 27 Digest (Repl.) 280, *2253*.

(12) *S.* v. *S.* (*orse. C.*), [1954] 3 All E.R. 736; [1956] P. 1; 3rd Digest Supp. G

Petition.

This was a petition by the husband for a decree of nullity on the ground of the wife's incapacity or her wilful refusal to consummate the marriage. The suit was defended by the wife, although it was agreed that the marriage had not been consummated. In cross-proceedings the wife sought a decree of divorce H on the ground of the husband's adultery.

The parties were married on Apr. 15, 1950. At the time of the marriage the husband, who was a widower, was forty-three years old, and the wife, who was a spinster, was forty years old. The wife had been employed in an insurance office for over twenty years and would have received a pension of £400 a year at the age of fifty-five if she had continued in her employment. The husband I proposed to the wife in September, 1949, but at first she refused the proposal because she was doubtful about changing her mode of life at her age and about giving up her independence and prospects, and also because of her distaste for the idea of sexual intercourse. This matter was frankly discussed between the husband and wife before they became engaged on Sept. 30, 1949, and again between the date of their engagement and their marriage. It was agreed between them that, while the husband hoped to persuade the wife to change her attitude, he would not seek to have sexual intercourse against her wishes; and

that, if he failed to achieve that change in her attitude, " it would not matter ", in the sense, so far as he was concerned, that the marriage would continue as one of sharing life but without sexual intercourse.

The husband and wife both helped to equip the matrimonial home and pooled their financial resources to a normal extent. From Apr. 15, 1950 (the date of the marriage) until about the end of 1951 (referred to as the " first period " of the marriage), the husband continued to hope to be able to persuade the wife to accept sexual intercourse. During this period he made two or three attempts to have intercourse and also raised the matter in conversation with the wife, but on each occasion the wife made it clear that her wishes were unaltered. The wife realised that the husband was disappointed at her attitude but the husband still conveyed to her that it did not matter and that he was content with the marriage as it was. By about the end of 1951 the husband ceased to make any further attempts to have intercourse or to raise the matter in conversation.

From the beginning of 1952 until about the middle of 1956 (the second period of the marriage), the husband not merely acquiesced in there being no sexual intercourse between him and the wife, but genuinely accepted the marriage, in the fullest sense of the phrase, without it. That acceptance was made plain to the wife, and during this period the parties continued to find great happiness in each other's company.

In about June, 1956 (the commencement of the third period of the marriage), the husband started a clandestine association with another woman, Mrs. Harding, and by November, 1956, he had become so attached to her that he contemplated the possibility of marrying her and consulted solicitors. He did not, however, say anything to the wife until Jan. 1, 1957, when he told her that he would be leaving her but did not mention his association with Mrs. Harding. On learning that the husband now regarded the question of sexual intercourse as fundamental and that its absence put the marriage in peril, the wife, in a letter to the husband, offered to allow it. Although the husband had no intention of becoming reconciled to the wife, he remained in the matrimonial home until the beginning of June, 1957. Throughout this period he continued his association with Mrs. Harding. His petition for nullity of the marriage was served on the wife on May 21, 1957.

D. Tolstoy for the husband.
J. Sarch for the wife.

Cur. adv. vult.

Nov. 24. **SACHS, J.**, read a judgment in which, after stating the facts, he said: It being common ground that the marriage has never been consummated, I now turn to the main issues between the parties, namely, whether the husband, on his side, has proved either incapacity on the part of the wife or that the marriage has not been consummated " owing to the wilful refusal of the [wife] to consummate the marriage "; and whether the wife, on her side, has proved that there has been such conduct on the part of the husband as to preclude him from being granted a decree, even if he succeeds on one of the two issues which he has set out to establish. First, however, it is convenient to refer to one other matter which was much canvassed in the course of the trial—that is the effect of the mutual understanding that " it would not matter " if there was no sexual intercourse. In evidence the wife, with characteristic fairness, never referred to this understanding as an agreement, but rather as a matter of mutual explanations as to what was the attitude of each party to the prospective engagement. Even, however, if it could be said to be an " agreement " (and it probably bears all the outward characteristics of a collateral agreement other than an intention to create legal relations), it is to be noted that at the time the husband was known to be capable of sexual intercourse and it certainly was not known that the wife was incapable. In those circumstances any such agreement would

be one striking fundamentally at the basis of marriage itself and would undoubtedly be void as between the parties: compare *Brodie* v. *Brodie* (1) ([1917] P. 271). Equally clearly, it could impose no fetter on the court granting a decree of nullity if the facts so warranted. On the other hand, the very fact that such an understanding or agreement is reached may be of considerable importance when it becomes necessary to draw inferences in relation to matters vital to the determination of other issues in the case.

Normally it would be apposite next to deal with the issues of incapacity and wilful refusal. These, however, present certain difficulties, not least as to what are the inferences which ought to be drawn from the primary facts as proved in evidence. Moreover, even if the husband were to succeed on either of those issues, he must still meet the defence that his conduct has precluded him from being granted relief. The facts relating to that defence being clear, it thus seems best to deal with it first and examine whether it is decisive.

The present case is one in which it is perfectly plain that there has been a considerable period when the husband was, despite the absence of sexual intercourse, truly content with a devoted marriage and made it clear to his wife that, despite that absence, he fully accepted the marriage. On those facts arises the clear-cut question whether such an acceptance over a period of the order of four years constitutes a bar to the husband's claim. Now that 101 years have passed since the date of the first Matrimonial Causes Act, it could be expected that the books would provide a firm basis for the answer to that question —but one's confidence in that behalf is not unduly enhanced on finding that in every reported case on this topic that has gone to the Court of Appeal in the last decade the trial judge has been reversed.

The locus classicus for expositions of the relevant law (a branch of that sometimes described by the much criticised word "insincerity") is *G.* v. *M.* (2) ((1885), 10 App. Cas. 171). There LORD WATSON stated (ibid., at p. 197):

> ". . . in a suit for nullity of marriage there may be facts and circumstances proved which so plainly imply, on the part of the complaining spouse, a recognition of the existence and validity of the marriage, as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect."

That passage has been described by SINGLETON, L.J.,* as the most clear and by JENKINS, L.J.,† as the most succinct statement of the law. The EARL OF SELBORNE, L.C., in an almost equally frequently quoted passage, said (10 App. Cas. at p. 186):

> ". . . there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it . . ."

After giving examples of such conduct, including, first, approbation of the marriage with knowledge of the facts and law, and, secondly, the taking advantages from the matrimonial relation which would make it inequitable or unfair to treat that relation as if it never existed, LORD SELBORNE, L.C., went on to say as regards this bar (ibid.):

> "The circumstances which may justify it are various, and in cases of this kind many sorts of conduct might exist, taking pecuniary benefits for example, living for a long time together in the same house or family with the status and character of husband and wife, after knowledge of everything which it is material to know . . . there must be a foundation of substantial justice, depending upon the acts and conduct of the party sought to be barred."

It is, of course, obvious from the phrases used by these eminent and learned Lords of Appeal, that neither of them was suggesting that the spouse who seeks

* In *Tindall* v. *Tindall*, [1953] 1 All E.R. at p. 141.

† In *W.* v. *W.*, [1952] 1 All E.R. at p. 864.

to set up the bar must necessarily prove all those ingredients which are required to establish an estoppel in pais: nor have the recent authorities so laid down; though it would naturally be difficult to imagine a case where those ingredients were all proved and there was no bar. The word " estop " is used in the broad sense of " bar ".

In relation to any narrow technical use, in connexion with this bar, of the word " estop ", with its concomitant concept of a specific change in the position of a respondent spouse, it is also to be noted that such an alteration in the position of a devoted but non capax wife on account of her husband's conduct approbating the marriage would normally be hard to establish, for the only effect of the approbation would be to make her want not to change the position. It is, accordingly, on the footing that to establish a bar it is not necessary to prove the equivalent of an estoppel in pais that I now turn to the recent authorities which have been so carefully cited to me by counsel, to see what other points directly relevant to the present facts and binding on a court of first instance can be gathered from them. In particular, I refer to four of the cases which reached the Court of Appeal, namely, *Clifford* v. *Clifford* (3) ([1948] 1 All E.R. 394), *W.* v. *W.* (4) ([1952] 1 All E.R. 858), *Tindall* v. *Tindall* (5) ([1953] 1 All E.R. 139) and *Slater* v. *Slater* (6) ([1953] 1 All E.R. 246). From these it appears that (i) the remedy sought is a personal one as between husband and wife, and it is to the conduct as between these two that the court should look; (ii) it is the overt words and acts of the husband that should be looked at and these should be judged by their own nature and declared intention, without regard to concealed thoughts; (iii) the mere fact that a long time has elapsed between the date of the marriage and the date on which proceedings were commenced does not of itself constitute a bar; (iv) the mere fact that each party continues to share, while under the same matrimonial roof, the normal mutual domestic services derivable from a joint establishment does not of itself constitute a bar; (v) the mere receipt of financial benefits does not of itself constitute a bar; (vi) if the present facts do constitute a bar, it is a discretionary and not an absolute bar.

It is, however, to be noted as regards both the third and fourth points that, in each case cited to me where it was held that the petitioner was not barred, there either was evidence of continuing complaints or separation, or, alternatively, there was no apparent argument that the absence of sexual intercourse had been the subject of affirmative acceptance or contented acquiescence on the part of the petitioner. Into the former category fall *G.* v. *M.* (2): see LORD FITZGERALD'S speech (10 App. Cas. at p. 206); and *Clifford* v. *Clifford* (3): see the judgment of TUCKER, L.J. ([1948] 1 All E.R. at pp. 397, 398). Into the latter falls *Clarke* (*otherwise Talbott*) v. *Clarke* (7) ([1943] 2 All E.R. 540), as determined by PILCHER, J.

Accordingly, it seems to me that the law in cases where the petitioning spouse has contentedly acquiesced in or expressly accepted a married life without sexual intercourse has not been held to be inconsistent with that applied in the well-known judgment of SIR ROBERT PHILLIMORE in *W.* (*falsely called R.*) v. *R.* (8) ((1876), 1 P.D. 405), when dismissing a petition for nullity some nine years before the decision in *G.* v. *M.* (2). After a very full review of the authorities, including the opinion of the Privy Council in *B—n* v. *B—n* (9) ((1854), 1 Ecc. & Ad. 248), as delivered by DR. LUSHINGTON (ibid., at pp. 257 et seq.), SIR ROBERT PHILLIMORE stated (1 P.D. at p. 410):

> ". . . the petitioner is bound to have evinced impatience under a sense of wrong and a reasonable activity in complaint and redress. The court cannot recognise these features in the conduct of the petitioner. On the contrary, she appears to have lived contentedly enough with her husband, until, as she says, he ill-treated her . . ."

That passage was quoted with approval by TUCKER, L.J., in *Clifford* v. *Clifford*

(3) ([1948] 1 All E.R. at p. 397), and he went on to say of the facts before him (ibid., at p. 398): A

> "It is not a case in which he was acquiescing in the disability and contentedly leading a married life until some incident arose, as in the case referred to by SIR ROBERT PHILLIMORE which I quoted just now. This seems to me to be a case where throughout his married life the husband was complaining and showing himself dissatisfied with the state of affairs which existed." B

R. v. *R.* (10) ((Feb. 25, 1935), unreported, a decision of the Court of Appeal, referred to in LATEY ON DIVORCE (14th Edn.) (1952) at p. 202, seems also to support the reasoning adopted in the passages cited above.

At this stage it is necessary to deal with the point taken by counsel for the husband that the husband was not at the material times aware of his right to seek the remedy for which he now prays. In all the cases dealing with the type of bar under consideration, stress has been laid on the fact that there can be no bar if the petitioner was not sufficiently aware that the remedy of a decree of nullity was available. When referring, in *W.* (*falsely called R.*) v. *R.* (8), to the requisite that the petitioner must have evinced impatience under a sense of wrong and a reasonable activity in complaint and redress, SIR ROBERT PHILLIMORE, however, prefaced his statement with the words (1 P.D. at p. 410): C D

> "The general circumstances of each case and the facilities . . . for obtaining legal advice and assistance will vary indefinitely . . ." E

In the present case, the husband had for many years been employed in a responsible position in the head office of a well-known insurance company and was, as he admitted, very well placed for getting any desirable legal advice. Moreover, he never suggested that he was not aware that nullity proceedings were available where a marriage was not consummated, but alleged that by the time he gave up hope of sexual intercourse three years had passed since the marriage and he thought that by virtue of something equivalent to a statute of limitations the remedy was then no longer open to him. That plea I reject for more than one reason. First, I have come to the conclusion that he gave up hope well before three years had passed after the marriage: next, his testimony on this point was so unconvincingly given that I am not prepared to accept it as rebutting the presumption of knowledge of the law to which JENKINS, L.J., referred in *W.* v. *W.* (4) ([1952] 1 All E.R. at p. 864); and, further, in any event his complete failure to make any inquiry for so long a period is the converse to that impatience and reasonable activity to which SIR ROBERT PHILLIMORE referred (1 P.D. at p. 410). F G

In the result, accordingly, although no specific change in the wife's position has been shown to result from the husband's contented acceptance as from 1952 of the marriage without sexual intercourse, there seems to be authority for holding that his conduct constitutes a bar within the rule as laid down by LORD WATSON in *G.* v. *M.* (2) (10 App. Cas. at p. 197). In so concluding I am not overlooking the fact that there are, in the authorities cited to me, a number of statements which could be construed as requiring some specific detriment to the wife since 1952 to be proved before the bar could come into existence. Those passages, however, occur in judgments concerned with facts different from those of the present case and were not intended to narrow down the breadth of the rule as stated by LORD WATSON: and any narrowing down of that type would, indeed, be inconsistent with that range of the varieties of circumstances capable of constituting the bar which have been referred to by the EARL OF SELBORNE, L.C., in *G.* v. *M.* (2) (10 App. Cas. at p. 186) and by BIRKETT, L.J., in *Tindall* v. *Tindall* (5) ([1953] 1 All E.R. at p. 147). H I

In relation to this question of specific change, I have already adverted to the

position of a wife such as the respondent in this case*. Looking, however, at the position of husbands and wives from a more general point of view, it is relevant to note that, at any rate, as regards those of reasonably mature age, the gradual passage of time inevitably effects each year some degree of change in the physical and material existence of each individual and his or her prospects, and that such changes are liable to be more pronounced for women than for men. Each year that passes is thus liable to affect the position of a woman as regards what will be her future if she ceases to have as husband the man to whom she thinks she is married. Moreover, the case can also arise of a wife whose incapacity derives only from frigiditas quoad hunc—she being otherwise apta virgo, who would be in a position herself to seek a decree of nullity on that ground, and who, being less devoted than the wife in the present case, might, at any rate, have considered initiating such a petition if her husband had not made clear his acceptance of the marriage without sexual intercourse; but who could not years later, on becoming a respondent, point to any specific detriment except the passage of time. Taking, accordingly, that broad view of substantial justice which is inherent in the phrases of the EARL OF SELBORNE, L.C., and LORD WATSON previously cited†, it would, to my mind, be surprising if the law permitted a man who had accepted the marriage for a considerable time nevertheless to turn round at any moment at his whim and then as of absolute right claim a decree that the marriage never existed: and, if support is needed for that view, it can be found, I think, in what DR. LUSHINGTON said in *B—n* v. *B—n* (9) (1 Ecc. & Ad. at pp. 260, 261). Such a state of affairs would lead to situations in which the granting of a decree would have that element of inhumanity to which SIR ROBERT PHILLIMORE referred in *W.* v. *R.* (8) (1 P.D. at p. 408). Thus the existence of a bar in cases such as the present accords with the general sense of LORD WATSON'S words as well as with the authorities, such as *W.* v. *R.* (8); any hard cases resulting from its existence can be dealt with by the court's exercise of discretion.

Whether the facts which constitute the bar in this case can be said to fall within some term such as recognition of, approbation of or election to be bound by the marriage, improper delay, or some other compendious expression, is a matter on which I prefer not to embark. The authorities make it clear that no single word or short expression can embrace or was ever intended to embrace all the circumstances which cause the bar to arise. The next question, accordingly, is whether this is a case in which the bar should be applied. On this I assume that the whole history of the marriage and the ages and other circumstances of the parties can be taken into account. On the facts of the present case the court's discretion should not, in my view, be exercised in favour of a man of the husband's age, who, incidentally, has stated that he does not desire to found a family. Here reference must be made once more to the fact that the wife, to the husband's knowledge, gave up the prospect of a pension of £400 per annum to marry him. While I am against the submission that this pre-marriage change of position by the wife could be taken into account when deciding whether there was a bar, yet I think that it could properly be put in the scales on the question of discretion, although I did not find it necessary so to use it. It follows that in the present case the husband is barred from obtaining the decree which he seeks.

[On the question whether the husband had established incapacity on the part of the wife, HIS LORDSHIP said that he would be inclined, on the available evidence, to infer that at all material times consummation was probably impracticable, but to doubt whether that impracticability had been proved with the clarity required in a nullity suit, the rule being that delay by the petitioner in seeking a remedy added to the burden of proof which lay on him. HIS LORDSHIP continued:] As regards the husband's claim to relief by virtue of

* See ante, at p. 535, letter B.

† See p. 534, letters F and G, ante.

s. 8 (1) (a) of the Matrimonial Causes Act, 1950, I am satisfied that until 1957 there was a persistent refusal by the wife to consummate the marriage and that this refusal was wilful in the sense that it was a considered refusal. On the other hand, I do not consider that in law the non-consummation can be said to be " owing to " that refusal. Assuming for the purpose of a decision on this point that the wife was during the first period* capable of consummating the marriage, then the true cause of the non-consummation was the husband's adherence to the pre-marriage understanding coupled with his failure to put to a decisive test whether the wife would have continued her refusal if once he had made it plain that this understanding must be abrogated and that the marriage could not otherwise last. I am fortified in this conclusion by finding that, when *Baxter* v. *Baxter* (11) ([1947] 1 All E.R. 387) was before the Court of Appeal, it was there stated by LORD GREENE, M.R. (ibid., at p. 388) that HODSON, J., had, in substance, found that

> ". . . the husband had not proved that this non-consummation was due to the wilful refusal of the wife and that it was due rather to the husband's own action in acceding to his wife's 'request' . . ."

This line of reasoning was adopted by LORD GREENE, M.R., delivering the judgment of the court, as being plainly right. When that cause reached the House of Lords, LORD JOWITT, L.C., in his speech ([1947] 2 All E.R. at p. 887), made clear the unanimous view of the House that the evidence did not justify the above conclusion of fact reached by the learned judge and the Court of Appeal. There was, however, no dissent in that speech from the view of the law taken by the Court of Appeal, and in those circumstances it seems that, although pronounced obiter by the decision of the House of Lords, it yet provides substantial support for the conclusion which I have previously expressed.

On this aspect of the case there remains, however, the problem as to what is the effect of the undoubtedly genuine offer of the wife in January, 1957, to have sexual relations. If consummation of the marriage was at that date practicable, then the offer would prima facie result in the defeat of any claim by the husband under s. 8 (1) (a): see *S.* v. *S.* (*orse. C.*) (12) ([1954] 3 All E.R. 736) where KARMINSKI, J., held that wilful refusal must have persisted up to the date of the presentation of the petition. In the present instance, however, there is the difficulty that, whatever inference may be drawn as to the incapacity of the parties during the two or three years immediately after the marriage, it seems to me that by January, 1957, the passage of years would almost certainly have brought about a state of affairs when consummation would no longer be practicable. The effect in law of such a change brought about by both parties adhering to a pre-marriage agreement is one on which, in the circumstances, I do not feel called on to pass an opinion.

The result is that I reject the prayer of the husband in his petition and it is now open to the wife to proceed to obtain a decree of divorce. It seems right, however, in view of the ground on which I have decided to reject his prayer that he should have fourteen days in which to consider the position. If no appeal has been entered in that period, I will proceed with the rest of this cause and will be able by abridging the time for decree absolute, to put the wife in no worse position than if the matter had been concluded today.

Petition dismissed.

Solicitors: *W. G. Street & Co.* (for the husband); *W. G. R. Saunders, Son & de Wolfe* (for the wife).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

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* From Apr. 15, 1950 (the date of the marriage) until about the end of 1951: see p. 533, letter B, ante.

MORGAN *v.* MORGAN (OTHERWISE RANSOM).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Mr. Commissioner Latey, Q.C.), November 4, 1958, January 19, 20, February 6, 1959.]

Nullity—Impotence—Petition by impotent spouse—Pre-marital agreement that marriage should be for companionship only—Mental reservation by petitioner regarding consummation later—Parties both of advanced years at time of marriage.

The husband and wife first met in 1953, he being then a bachelor about sixty-seven years of age, and she a spinster about fifty-four years of age. They became friends and saw each other frequently, but showed no physical affection for each other except for an occasional kiss. In 1957, at the wife's suggestion, they agreed to marry on the basis of companionship only. It was also agreed that the wife should continue at her work: the husband was an old-age pensioner. The marriage took place on Jan. 25, 1958, but the wife spent the night after the ceremony alone at a hotel and went away on the following day. The parties never lived together and the marriage was never consummated. At the time of the marriage the husband was incurably impotent, but did not know it until later. At the hearing of a petition by the husband for a decree of nullity on the ground of his impotence, the husband said in evidence that, notwithstanding the "companionship" agreement, he had hoped that later on the wife would agree to marital intercourse.

Held: the husband was not entitled to a decree of nullity on the ground of his impotence for the following reasons—

(i) having regard to the companionship agreement and the age of the parties when marriage took place, it would be contrary to justice and public policy to allow the husband to plead his own impotence (see p. 546, letter G, and p. 545, letters H and I, post), and

(ii) mental reservations could not in English law invalidate a marriage that was duly celebrated, and accordingly the marriage was valid notwithstanding the companionship agreement (see p. 546, letter E, post).

Scott v. *Scott* (*orse. Fone*) (ante, p. 531), applied.

[As to impotence as a ground for nullity, see 12 HALSBURY'S LAWS (3rd Edn.) 225, 228, paras. 421, 426; and as to the petitioner's own incapacity, see ibid., 230, para. 431; and for cases on the subject, see 27 DIGEST (Repl.) 271, 272, *2172-2182.*]

Cases referred to:

(1) *Hodgkins* v. *Hodgkins*, [1950] 1 All E.R. 619; [1950] P. 183; 27 Digest (Repl.) 279, *2241.*

(2) *Harthan* v. *Harthan*, [1948] 2 All E.R. 639; [1949] P. 115; [1949] L.J.R. 115; 27 Digest (Repl.) 272, *2178.*

(3) *Briggs* v. *Morgan*, (1820), 3 Phillim. 325 (161 E.R. 1339); 2 Hag. Con. 324 (161 E.R. 758); 27 Digest (Repl.) 280, *2249.*

(4) *Guest* v. *Shipley* (*falsely calling herself Guest*), (1820), 2 Hag. Con. 321; 161 E.R. 757; 27 Digest (Repl.) 376, *3099.*

(5) *Brown* v. *Brown*, (1828), 1 Hag. Ecc. 523; 162 E.R. 665; 27 Digest (Repl.) 270, *2164.*

(6) *B—n* v. *M—e* (*falsely calling herself B—n*), (1853), 2 Rob. Eccl. 580; 163 E.R. 1420; *subsequent proceedings*, sub nom. *B—n* v. *B—n*, (1854), 1 Ecc. & Ad. 248; 23 L.T.O.S. 99; 164 E.R. 144; 27 Digest (Repl.) 270, *2161.*

(7) *G.* v. *M.*, (1885), 10 App. Cas. 171; 53 L.T. 398; 27 Digest (Repl.) 416, *3461.*

(8) *Clifford* v. *Clifford*, [1948] 1 All E.R. 394; [1948] P. 187; [1948] L.J.R. 969; 27 Digest (Repl.) 417, *3462.*

(9) *Nash* v. *Nash*, [1940] 1 All E.R. 206; [1940] P. 60; 109 L.J.P. 60; 164 L.T. 48; 27 Digest (Repl.) 271, *2171.*

(10) *Scott* v. *Scott* (*orse. Fone*), ante, p. 531.

(11) *G.* v. *G.* (*falsely called K.*), (1908), 25 T.L.R. 328; 27 Digest (Repl.) 274, *2200.*

(12) *Brodie* v. *Brodie*, [1917] P. 271; 86 L.J.P. 140; 117 L.T. 542; 27 Digest (Repl.) 217, *1726.*

(13) *W.* v. *W.*, [1952] 1 All E.R. 858; [1952] P. 152; 3rd Digest Supp.

(14) *Tindall* v. *Tindall*, [1953] 1 All E.R. 139; [1953] P. 63; 3rd Digest Supp.

(15) *Slater* v. *Slater*, [1953] 1 All E.R. 246; [1953] P. 235; 3rd Digest Supp.

Petition.

This was a petition by the husband for a decree of nullity on the ground of his own impotence. The suit was undefended and came before Mr. Commissioner LATEY, Q.C., on Nov. 4, 1958, when it was adjourned for argument by the Queen's Proctor. The facts are set out in the judgment.

R. G. Dow for the husband.

J. P. Comyn for the Queen's Proctor.

Cur. adv. vult.

Feb. 6. MR. COMMISSIONER LATEY, Q.C., read the following judgment: This is an undefended petition for nullity of marriage brought by the husband on the ground of his own impotence at the time of the ceremony of marriage. When the marriage took place on Jan. 25, 1958, at Ramsgate Register Office, the husband was a bachelor seventy-two years of age, and the wife was a spinster fifty-nine years of age. They had first met in 1953, at Richmond. He was on holiday there and he saw her every evening until he returned to his abode at Margate. When he left she kissed him goodbye at the station. She often visited him at Margate. On these occasions he booked a room for her at a hotel, spent the days with her, and saw her to her hotel, where she spent the night, he returning home. Apart from greeting and goodbye kisses, there was no manifestation of affection between them. The husband gave me to understand that this form of friendship continued for several years. He said that he loved her to some extent, and that they liked each other's company. On various occasions she suggested that they should buy an annuity and that they should live more or less together, from the point of view of company, as she put it. She intended to go to Australia after they married, and she told him to find a flat where they could live on her return. They were to marry on the basis of companionship. Towards the end of 1957 they agreed to marry and that he should buy an annuity in her name, and that she was to continue at her work. He had a small income from an annuity and the old age pension.

His evidence went on as follows:

"Q.—You have made the remark that she wanted a companionship marriage with you. At that stage when you were discussing this matter and indeed right up to the date of this ceremony, were you agreeing to that situation or not? A.—Yes. Q.—Yes. I want you to listen very carefully to my next question and consider your answer carefully. Tell my Lord this: did you ever hope that any change might take place in that situation as far as the relationship between you was concerned? A.—Well, naturally as time goes on and we live together, I might possibly have thought possibly connexion might be had, but otherwise— Q.—You had that in mind? A.—I had that in mind, certainly, like any man would do. Q.—You had it in mind like any man would, after you had lived with her for some time? A.—Lived with her for some time. Q.—As husband and wife? A.—Quite."

The husband, who had never had sexual intercourse with any woman, said that, at the time of the marriage in January, 1958, he did not know that he was incapable of sexual intercourse. After the ceremony they went to the wife's hotel, where she had a room for two nights. He took his meals at his own address and then went to see her at the hotel, and he saw her off to London on the day after the ceremony. On the night after the ceremony she had slept at the hotel, and he at his home. After the ceremony he gave her a cheque for £2,000 for the annuity. Soon after, she said: "I am worried. If I leave you, you shall have your money back". He tried to calm her down, but wanted the marriage to go on as arranged. His evidence continued as follows:

> "Q.—You told us that she wanted a marriage on what you called 'companionship terms'—something like that? A.—Yes, exactly. Q.—What did you understand her to mean by that? A.—Well, to put it bluntly to you she made it quite obvious to me—I said to her 'Can I take you a cup of tea up in the morning?' She said 'No, I will lock the door first'. That was obviously the attitude she was in. Q.—Let us do it completely. Did you understand or not that she did not want to have sexual relations when you were married? A.—Exactly, yes."

In reply to the question whether the wife had told him if she had ever had sexual experience, the husband said that she once told him, about a year or two before the marriage, that she had been seduced and in that case she was a prostitute. She had a terrible temper and she went more or less mental at times with it.

On the day after the marriage, a Sunday, she said nothing more about living with him. Before she left by train she said: "Don't tell anybody about the wedding". He did not see her again until the Sunday previous to the hearing of his petition. She had written to him after the parting but he had not kept her letters. In her first letter she said that she was very ill and could not work; that she did not feel like a married woman, and was unhappy. Then she wrote and called him a cad, and said that she did not think that she would live long. She had admitted one day before the marriage that she had a mental touch. She was very highly strung and she went for him one day as much as to say: "I will murder you". He said that he "liked the girl" and, therefore, he put up with it all. She told him in a letter after the marriage to remain at Margate as his "digs" were cheap and she would let him know directly she went to Australia. Later she wrote asking him to see her solicitor. In July, 1958, he went to see the solicitor, a member of a firm of great experience in matrimonial causes, who told him that the wife regretted directly after the ceremony having married him and that the husband would probably get some of the money back. In fact the cheque had passed through the bank early in February, 1958, and the husband has not received any of the money back. The husband, having obtained legal advice, presented his petition on Aug. 13, 1958, and it was duly served on the wife, who took no action. Three days before the hearing took place on Nov. 4, 1958, the wife paid him an unexpected visit at Margate. She told him that he would not lose all his money. He tried to persuade her to start all over again but she refused. There was no discussion, he said, about the pending petition.

The husband proceeded to deal with his own state of health. Since 1919 he had suffered from a form of colitis; he had felt giddy at times; and he had a double hernia, for which he wore a truss. He had been advised that it would be dangerous to operate. A doctor examined him on July 29, 1958. In the witness-box the doctor went into the details of the husband's physical condition. He found no malformation of the genital organs, but, taking into account his age and a combination of physical weaknesses, he gave the definite opinion that the petitioner was impotent at the time of the marriage. It is well known that a man may be both perfectly virile and fertile in his seventies, but the doctor did not submit the husband to certain tests which are familiar to doctors expert in

this branch of medicine. I do not propose to refer to the medical evidence in detail. I regret the failure to bring in medical inspectors, who by their experience are of invaluable help to the court in nullity cases. After some hesitation, however, and bearing in mind the decision of the Court of Appeal in *Hodgkins* v. *Hodgkins* (1) ([1950] 1 All E.R. 619) as to the standard of proof in such cases, I accept the evidence of the husband and the doctor that the husband was incurably impotent at the time of the ceremony.

It would follow in the ordinary case from this finding that, on the authority of the Court of Appeal in *Harthan* v. *Harthan* (2) ([1948] 2 All E.R. 639), the husband would be entitled to a declaration of nullity of marriage on the ground of his own impotence. There were, however, extraordinary circumstances in connexion with this contract of marriage raising difficulties affecting the public interest which caused me to seek the assistance of the Queen's Proctor. The question which arose was whether the husband was debarred from the relief which he claimed by reason of his having entered into this marriage on the basis of mere companionship and without any intention of marital intercourse, and whether this court, which must always treat nullity cases as of national importance irrespective of the wishes of the parties, can accept the husband's mental reservations as to the bare possibility of marital intercourse in the future. On the facts as to the pre-marital arrangement and what followed, I accept the husband as a truthful witness. I also assume that he was not aware of the law as to nullity of marriage until at any rate some months after the marriage. But for his assertion of his own impotence, and possibly the companionship understanding, it is clear that he might have obtained a decree of nullity on the ground of the wife's wilful refusal to consummate the marriage. That remedy was barred, however, the moment his legal advisers became aware of his assertion of impotence.

On Jan. 19 and 20, 1959, I heard the arguments of counsel. In *Harthan* v. *Harthan* (2), which was not defended by the respondent wife, LORD MERRIMAN, P., in his comprehensive review of this aspect of the law of nullity, held that under the pre-Reformation canon law an impotent spouse could plead his or her impotence, provided that (a) he did not know of such impotence when the ceremony took place and had not deceived the other spouse, and (b) the other spouse did not know at that time of such impotence; and that neither the statute law nor common law had interfered in this respect with the pre-Reformation canon law, which, under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 21 and s. 56 (3), perpetuating the principles of the old ecclesiastical court, is still operative. In *Harthan* v. *Harthan* (2) the husband petitioner, who was granted a declaration of nullity, had made futile attempts at intercourse within the first five years of his marriage. In arguendo in that case, counsel incidentally drew attention to a phrase which has been employed from time to time in nullity cases, namely, of a man marrying a woman "tamquam sororem" —as if a sister. Counsel for the Queen's Proctor has illustrated its use in various cases: for example, *Briggs* v. *Morgan* (3) ((1820), 3 Phillim. 325), *Guest* v. *Shipley* (*falsely calling herself Guest*) (4) ((1820), 2 Hag. Con. 321), and *Brown* v. *Brown* (5) ((1828), 1 Hag. Ecc. 523), in which SIR JOHN NICHOLL said in the Court of Arches (ibid., at p. 524):

> ". . . a man of sixty who marries a woman of fifty-two should be contented to take her 'tanquam soror'."

Counsel for the Queen's Proctor submitted that it was no more than an obiter dictum. The expression is to be found in the works of the old canonists. SANCHEZ, the seventeenth century canonist, in laying down certain principles as to nullity, wrote inter alia that an incapable man could suffer no hardship if required to maintain his wife tamquam sororem: SANCHEZ DISPUTATIO CXIV, LIB VII (1626 Edn., p. 404). In my view, this phrase became a convenient verbal

A vehicle in the context of some cases of nullity in the ecclesiastical courts, but does not embody any legal principle.

Counsel for the Queen's Proctor, accepting as a fact that at the time of this marriage the husband was impotent, deprecated the order dispensing with the examination by medical inspectors. I have already said that I agree with this view. In this class of case, where a petitioner is asking for relief owing to his or B her own impotence, the ordinary practice of calling at least one of the medical inspectors into the witness-box to deal with the results of his examination is at least as essential as in the ordinary case. Counsel submitted that, on the facts as we know them, the husband ought to have been very doubtful of his sexual capacity and of the likelihood of having marital intercourse, and, as a reasonable man, should have been put on inquiry as to his own condition. He pointed out C that, if the marriage were valid, it was a clear case of desertion by the wife immediately after the ceremony, for which desertion the husband could obtain a divorce after the expiry of the three years laid down by statute.

Counsel maintained that the husband must show that the non-consummation was due to his own misfortune, but his incapacity was purely incidental to the married status. Suppose that a man married a woman knowing that she was D incurably stricken with poliomyelitis or was so crippled that sexual intercourse was impossible: he could not claim nullity on the ground of his own impotence. Having regard to the circumstances in which this marriage was contracted, the husband could not make a grievance now of what did not appear to him a grievance then. On this point counsel for the Queen's Proctor drew attention to the practice of pleading in the ecclesiastical courts, as illustrated in para. 5 of E the libel in *B—n* v. *M—e* (*falsely calling herself B—n*) (6) ((1853), 2 Rob. Eccl. 580 at p. 581), emphasising the sexual desire of the male spouse as an important factor, however frustrated, in entering into marriage. Counsel pointed out that in *Harthan* v. *Harthan* (2) it was laid down that both parties would have to be ignorant of the supposed incapacity of one of them, but, that in the present case there was no evidence whether the wife was ignorant of it or not. LORD F MERRIMAN, P., said ([1948] 2 All E.R. at p. 651):

> ". . . the reaction of the respondent to the situation created by the impotence of the petitioner should be taken into account in considering whether the circumstances of the case as a whole, including the respondent's attitude, are such as to debar the impotent spouse from suing."

G Pausing at this stage of the argument put forward on behalf of the Queen's Proctor, I should be disposed to regard this statement of principle as irrelevant in the circumstances of this case, insomuch as the wife never put the husband's potency to the test and has abstained from any defence, so that I must assume that her reaction to the petition was favourable.

H Counsel for the Queen's Proctor urged that the petition failed for lack of sincerity and bona fides, and that it would be inequitable and contrary to public policy to grant the husband the relief which he sought. He pointed out that, when the cohabitatio triennalis of olden days—the period during which spouses in a certain type of case were expected to try and try again—was discarded by our courts along ago, there was left a discretion in the court to decide whether it I was just or right to annul a marriage, and that that discretion still survives. He invoked well-known passages in the classic case of *G.* v. *M.* (7) ((1885), 10 App. Cas. 171), extracted from the speeches of the EARL OF SELBORNE, L.C., and LORD WATSON, to show that in this case there was conduct on the part of the husband which ought to debar him from the remedy which he sought. Counsel submitted that from the standpoint of public interest it was a vitally important case. Having entered into the marriage on the basis of companionship, the husband should not in equity or justice be allowed to claim relief from the marriage on the ground of his own impotence.

Counsel for the husband submitted that in this case all the requirements laid down in *Harthan* v. *Harthan* (2) had been satisfied. At the time of the ceremony neither the husband nor the wife was aware of the husband's impotence, and the reaction of the wife to the position was evidenced by her not defending the suit. Unless there was an overriding discretion in the court to refuse the relief sought, the husband was entitled to a decree. The point at issue turned on the principles of approbation and reprobation. In *Clifford* v. *Clifford* (8) ([1948] 1 All E.R. 394), the expression " sincerity ", so often used in the past in nullity cases based on the impotence of a respondent, was considered by the Court of Appeal, and counsel quoted passages from the judgments of TUCKER, L.J. (ibid., at pp. 396, 397) and of BUCKNILL, L.J. (ibid., at p. 399) to show that in the present case the husband was not lacking in sincerity in seeking this relief. He also invoked part of the judgment of LANGTON, J., in *Nash* v. *Nash* (9) ([1940] 1 All E.R. 206, and particularly at pp. 213, 214), to the same effect, namely, that the husband was not lacking in sincerity. The question of the money transferred to the wife formed no part of the husband's motive here, said counsel. He referred to LORD WATSON'S statement of principle in *G.* v. *M.* (7) (10 App. Cas. at p. 197) as to the existence of a rule in the law of England, namely:

> ". . . that in a suit for nullity of marriage there may be facts and circumstances proved which so plainly imply, on the part of the complaining spouse, a recognition of the existence and validity of the marriage, as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect."

In the present case, however, the husband had done nothing to recognise the validity of the marriage.

Counsel for the husband distinguished the recent decision of SACHS, J., in *Scott* v. *Scott* (*orse. Fone*) (10) (ante at p. 531), a case of approbation to which I must refer later. He referred to the observation of COZENS-HARDY, M.R., in *G.* v. *G.* (*falsely called K.*) (11) ((1908), 25 T.L.R. 328 at p. 329), where a decree was granted to each spouse on the ground of the other's impotence. The observation to which counsel referred was that the court should exercise its discretion very carefully in granting relief in a nullity suit by a petitioner on the ground of his own impotence; but counsel submitted that, in the present case, that ground having been taken and the husband having proved his incapacity, a decree should follow. In support of his case counsel referred to certain passages in the argument of counsel for the King's Proctor in *Harthan* v. *Harthan* (2). Before the marriage in the present case, although the basis of companionship was agreed on, the husband had a secret thought that he might persuade the wife to have marital intercourse, and it was not an irrevocable agreement. As he was given no opportunity to consummate the marriage, it would be just and equitable to grant the relief sought.

Lastly, counsel for the husband referred to the statement of the principle by LORD SELBORNE, L.C., in *G.* v. *M.* (7), in dealing with the somewhat ambiguous word " sincerity ". LORD SELBORNE said (10 App. Cas. at p. 186):

> ". . . there may be conduct on the part of the person seeking this remedy which ought to estop that person from having it; as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no such relation had ever existed . . . The circumstances which may justify it are various, and in cases of this kind many sorts of conduct might exist, taking pecuniary benefits for example, living for a long time together in the same house or family with the status and character of

husband and wife, after knowledge of everything which it is material to know. I do not at all mean to say that there may not be other circumstances which would produce the same effect; but it appears to me that, in order to justify any such doctrine as that which has been insisted upon at the bar, there must be a foundation of substantial justice, depending upon the acts and conduct of the party sought to be barred."

In the present case, said counsel in conclusion, there was no conduct by the husband after the ceremony to bar relief. The facts were unique, and no dangerous precedent would be created in pronouncing a decree. In reply, counsel for the Queen's Proctor argued that the pre-marital companionship agreement must be taken into account, and that that constituted an act which barred the husband's decree in accordance with the last sentence of the passage in Lord Selborne's statement of principle. That being the conclusion of the arguments, I reserved judgment.

I have endeavoured in my judgment to state the substance of the arguments by both counsel, to both of whom I am indebted for their able addresses. First, I ought to point out that nearly all the cases cited, with the exception of *Harthan* v. *Harthan* (2) concerned petitions for nullity by one spouse on the ground of the other's impotence, and although the principles laid down by Lord Selborne, L.C., and Lord Watson in *G.* v. *M.* (7) are still generally applicable, they might have been somewhat differently phrased if the House of Lords had been dealing with a case in which a petitioner pleaded his own impotence.

At a time when the canon law was well-known to the canonists, Dr. Ayliffe in his famous work, Parergon Juris Canonici Anglicani, published in 1726 and referred to in *Harthan* v. *Harthan* (2) wrote, at p. 230:

> "The husband may pray a separation of matrimony on the account of a matrimonial impediment, though such impediment proceeds and arises from himself; as from his own impotency and frigidity; but if he knowingly marries a woman that cannot render him his due, he is (notwithstanding) bound to maintain her, and shall not be divorced from her; for he ought to impute it to himself."

In the language of those days "divorce" was often used when "nullity" was meant, there being no divorce a vinculo except in very exceptional and limited circumstances under the canon law.

The whole pith of the present case is the pre-marital companionship agreement. In the ordinary case of a younger couple, the agreement itself would be void as against public policy, as was held in *Brodie* v. *Brodie* (12) ([1917] P. 271), and it would not avoid the marriage. The agreement to live apart and the marriage in that case were contracted in view of the fact that the wife was about to have a child by the husband; but the marriage subsisted notwithstanding. Many elderly and aged people intermarry on the basis, implied or agreed on, that they come together merely for companionship and without any thought of sexual relations. In some such cases, owing to advanced age or physical infirmity one or other of the spouses might be able to prove after the marriage his or her impotence, without having had any thought of it when the marriage was arranged or solemnised, and without putting it to the test afterwards. Supposing one of these elderly or aged spouses in that condition found that he or she was not happy in the union, would it be just or right to allow him or her to plead impotence for the purpose of getting rid of the marriage? Having regard to their agreement, I should say that that was an act, though pre-marital, which would bar the remedy.

I have already referred to *Scott* v. *Scott* (10). It was a case which was based on the ground of the wife's wilful refusal to consummate the marriage or her incapacity, and Sachs, J., rejected the petition, on the ground of the husband's

approbation of the marriage for four years, there having been a clear pre-marital understanding between the parties that, in view of the wife's expressed distaste for the sexual act, the husband would not seek marital intercourse against her wishes, unless he could persuade her to change her mind, but if he failed so to persuade her it would not matter. Within the first year after the marriage the husband made two or three half-hearted attempts at intercourse to which the wife demurred, and thereafter he abstained without indicating that her refusal was a grievance. He accepted the situation until he met another woman whom he wished to marry. In his judgment, SACHS, J., referred inter alia to *W.* v. *W.* (13) ([1952] 1 All E.R. 858), *Tindall* v. *Tindall* (14) ([1953] 1 All E.R. 139), and *Slater* v. *Slater* (15) ([1953] 1 All E.R. 246), and these cases have also been cited before me in the present case. From the cases cited, including pre-eminently *G.* v. *M.* (7), SACHS, J., extracted several principles, one of which is particularly relevant to the present case, namely (ante, at p. 535, letter D):

> " it is the overt words and acts of the husband that should be looked at and these should be judged by their own nature and declared intention, without regard to concealed thoughts . . ."

Following the same line, I cannot accept the husband's somewhat vague mention of his mental reservation as to perhaps having sexual intercourse in the future as reliable. It was the only point in his evidence which I felt was unreliable.

On this point I adopt the words used in the REPORT OF THE ARCHBISHOPS' COMMISSION ON THE LAW OF NULLITY OF MARRIAGE (1955) at p. 27:

> " In English ecclesiastical law no agreement or private determination is allowed to nullify a marriage, even though it involves the frustration of one of the principal ends of matrimony. English law looks to the consent as expressed, and will not allow the parties privately to derogate from their public professions."

In other words, mental reservations cannot in English law invalidate a marriage duly celebrated.

SACHS, J., held that on the authorities he was left with a discretion to refuse the relief sought, and, following *G.* v. *M.* (7), he did so. I feel that in this case I must do the same. I accept in substance the arguments put forward on behalf of the Queen's Proctor. The marriage was valid notwithstanding the pre-marital agreement. The husband's incapacity was not a factor in the marriage at all, and it would be contrary to justice and public policy to allow him successfully to plead his own impotence, having regard to the companionship agreement. His remedy would seem to rest on divorce for desertion in due course.

Petition dismissed.

Solicitors: *Girling, Wilson & Harvie*, Margate (for the husband); *Queen's Proctor.*

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

SIM *v.* H. J. HEINZ CO., LTD. AND ANOTHER.

[COURT OF APPEAL (Hodson, Morris and Willmer, L.JJ.), February 5, 6, 1959.]

Passing Off—Voice—Alleged simulation of actor's voice in broadcast of advertising commentaries—Action for libel and for passing off—Interlocutory injunction not appropriate on the ground of libel—Whether interlocutory injunction would be granted on the ground of passing off.

In an action for damages and an injunction, on the grounds of libel and passing off, the plaintiff, an actor, alleged that the defendants had caused to be broadcast advertising commentaries extolling the first defendants' goods, which commentaries were spoken by another actor than the plaintiff in a voice so closely resembling his as to be likely to induce in the minds of persons who knew the plaintiff's voice the false belief that the commentaries were spoken by the plaintiff. On application for an interlocutory injunction against broadcasting the commentaries the plaintiff abandoned the application in so far as it was based on libel. On appeal from the refusal of the interlocutory injunction on the ground of passing off,

Held: as the injunction would not have been granted on the basis of libel, neither would it be granted on the basis of passing off, since the issues were substantially the same on either claim; the interlocutory injunction had, therefore, been rightly refused.

Appeal dismissed.

[As to injunctions for libel, see 24 HALSBURY'S LAWS (3rd Edn.) 123, 124, para. 229; and for cases on the subject, see 32 DIGEST 180, 181, *2216-2231*. As to injunctions against passing off, see 32 HALSBURY'S LAWS (2nd Edn.) 665-667, para. 976; and for cases on the subject, see 43 DIGEST 332, 333, *1535-1544*.]

Cases referred to:

(1) *Bonnard* v. *Perryman*, [1891] 2 Ch. 269; 60 L.J.Ch. 617; 65 L.T. 506; 32 Digest 180, *2220*.

(2) *Samuelson* v. *Producers Distributing Co., Ltd.*, [1931] All E.R. Rep. 74; [1932] 1 Ch. 201; 101 L.J.Ch. 168; 146 L.T. 37; 48 R.P.C. 580; Digest Supp.

(3) *Spalding & Brothers* v. *A. W. Gamage, Ltd.*, (1915), 84 L.J.Ch. 449; 32 R.P.C. 273; 43 Digest 264, *1018*.

Appeal.

The plaintiff, an actor, brought an action by writ dated Nov. 13, 1958, against H. J. Heinz Co., Ltd., and their advertising agents, Young & Rubicam, Ltd., claiming: (i) damages for libel and malicious falsehood in respect of broadcasts by or procured by them on Independent Television of commentaries falsely purporting to be spoken by the plaintiff extolling the first defendants' goods; (ii) damages for passing off; and (iii) an injunction to restrain the defendants from broadcasting or procuring the broadcasting of any commentary purporting to be made by the plaintiff relating to the first defendants' goods. The plaintiff by his statement of claim pleaded that he enjoyed a high standing and reputation as an actor and that his voice was well known both by reason of his appearance in stage plays and in cinematograph films and by his participation in radio and television broadcasts; that the defendants had caused the broadcast by Independent Television Authority on various dates of six films advertising and extolling the goods of the first defendants; that the sound track of each of the films included a commentary extolling goods of the first defendants spoken by an actor other than the plaintiff in a voice that was an imitation of the plaintiff's so closely resembling the plaintiff's voice as to induce and be likely to induce in the minds of persons knowing the voice of the plaintiff the false belief that the commentaries were spoken by the plaintiff, and that in the premises the defendants had passed off such commentaries as and for commentaries made

by the plaintiff to the plaintiff's detriment. The plaintiff further pleaded, among other matters, that he had never made any television advertising commentary and that such commentaries were not normally made by actors of his standing and reputation. The plaintiff applied by summons dated Nov. 20, 1958, at which date the statement of claim had not yet been delivered, for an interlocutory injunction restraining the defendants and each of them until the trial of the action or until further order from broadcasting or procuring the broadcasting of any commentary purporting to be made by the plaintiff relating to the first defendants' goods or for such further or other order as might be just. The following statement of facts is taken substantially from the judgment of McNair, J., at the hearing of that application on Dec. 18, 1958.

In the earlier part of 1958 the first defendants were minded to embark on a very extensive programme of advertising their commodities on commercial television, and for that purpose they engaged the second defendants to prepare a scheme. The resulting scheme was that six short sketches, bearing the names "Living Like a Lord", "Tape Machine", "Packing Case", "Mandolin", "Rehearsal" and "Cowboy Breakfast", were prepared for the purposes of advertising the different specialities of the first defendants; and there was shown on the screen with, and as part of, these sketches a human figure in a cartoon form, not bearing a resemblance to any known person, and accompanying the production there was the voice of a commentator. The voice of the commentator was the voice of Mr. Ron Moody, who was also an actor and amongst his activities had in the past given performances in which he simulated the voice of the plaintiff, Mr. Alastair Sim. Mr. Moody denied that, on the occasion of the production of the voice of the commentator, he used his impersonation of the Alastair Sim voice. However, when these small sketches had been produced on a few occasions, a number of persons who knew the plaintiff well formed the view that the voice in fact being reproduced was the plaintiff's voice; and in different ways they formed or expressed the opinion that if he allowed his voice to be used in this way, he was doing something which was a bit beneath the dignity of his standing as an actor. The plaintiff, when it was brought to his attention that, without any authority from him, his voice, or what he was told was his voice, was being used, was extremely annoyed; and on Nov. 12, 1958, he caused his solicitors to write to the two defendants asking for an immediate undertaking that the "defamatory and deceptive broadcasts" should cease at once. Those letters stated that broadcasts had done and, if continued, would do the plaintiff great harm in his reputation: that it was derogatory to the reputation of a person in the plaintiff's outstanding position to suppose that he would be concerned in a broadcast of that nature; further, that the statement made about the goods did not represent the plaintiff's beliefs and that persons listening to the broadcast would think that he was prepared, for money, to make statements that he did not believe. No undertakings were given and accordingly the writ was issued. At the hearing on Dec. 18, 1958, McNair, J., refused the interlocutory injunction for reasons stated in his judgment which is printed at p. 550, post, and from his decision the plaintiff appealed. The grounds of appeal were that the judge misdirected himself as to the issues of fact to be decided in an action for passing off; that he was wrong in holding that it followed inevitably from the practice of the courts as laid down by the Court of Appeal applicable to the libel aspect of the plaintiff's claim that no injunction should be granted on that aspect of the matter which was comprised in the passing off action; and that he wrongly exercised his discretion in refusing the injunction asked for by the plaintiff.

G. T. Aldous, Q.C., and *J. N. B. Penny* for the plaintiff*.

P. H. R. Bristow for the first defendants*.

Gerald Gardiner, Q.C., and *H. P. J. Milmo* for the second defendants*.

* The same counsel appeared for the same parties at the hearing before McNair, J., on Dec. 18, 1958.

A **HODSON, L.J.:** This is an appeal from an order of McNAIR, J., dated Dec. 18, 1958. The order was made by the learned judge on a summons in an action brought by the plaintiff against the two defendants in which the plaintiff was basing his claim on libel and what is called passing off. He was seeking an injunction to restrain the defendants until the trial of the action or until further order from broadcasting or procuring the broadcasting of a B particular television commentary. This was an interlocutory application in the Queen's Bench Division. The summons was issued and heard in chambers, and the issues in the action as raised in the statement of claim—I do not think any defence has yet been delivered—have not been resolved, there having been as yet no trial. On his own volition, however, the learned judge did not dispose of the matter in chambers but disposed of it in open court, so that the case C has already been given some publicity which it would not otherwise have received.

I have heard read the admirable statement of the learned judge on the facts of this case and I have heard the reasons which he gave for refusing the interlocutory application for an injunction, and I cannot improve on that judgment*. It was an order made in exercise of his discretion, and in my view the way in which the discretion was exercised cannot be assailed. He based himself D fundamentally on this. There was here a claim that the use in the television broadcast of a voice that sounded as if it were the voice of the plaintiff but was the voice of another actor was a representation that the voice was the voice of the plaintiff. It was claimed that there was a cause of action in libel, but, in the light of the authorities, of which I need refer only to *Bonnard* v. *Perryman* (1) ([1891] 2 Ch. 269), the plaintiff abandoned, before the learned judge, the claim E for an injunction based on libel because it was clear that it could not succeed; for it has been held in many libel cases that the court will not prejudge the issue of libel or no libel where that is a live issue in the case and where the question is whether the words are capable of a defamatory meaning or whether they are justified.

F The learned judge came to the conclusion that, there being no right or duty in the court to grant an injunction in so far as this was a libel case, he ought, in the circumstances of the case, to take the same course on the footing of passing off. I think that his reasoning was correct. He pointed out that the issue was to all intents and purposes the same. The issue which was to be tried in the libel action was broadly the same as the issue to be tried in the passing-off action: G the issue being, in the first place, whether the voice could be reasonably understood to be the voice of the plaintiff, and, secondly, the question of damage. On the evidence which he put forward in his affidavit in support of this application, the plaintiff alleged damage to his property, i.e., his voice, as a general part of his stock-in-trade as an actor, which he said was damaged by being prostituted in the way in which it has been used on television. Counsel for the plaintiff says that it does not matter if the damage in the passing off action is H the same as the damage in the libel action, as the plaintiff is entitled to the assistance of the court on the basis of his claim in respect of passing off. I am, however, in agreement with the learned judge's reasoning that it would be inappropriate, while refusing an injunction on the basis of libel, to grant an injunction on the basis of passing off.

I I would only add this. On any view of the matter this is a novel form of action for passing off. The plaintiff contends that his voice as an actor is part of his stock-in-trade and therefore is something which he is entitled to protect as part of his goods. No doubt that is an arguable case, but there are various questions to be determined in this action, which has not yet been tried, including the question whether this voice can in truth be regarded as a property and whether in the circumstances of this case there could be said to be anything in the nature

* The judgment is printed at p. 550, post, the summary of facts at p. 548, letters C to H, ante, being taken substantially from the judgment.

of unfair trade competition in a common field, where one actor uses his voice in the performance of his particular occupation and another actor in some way imitates that voice on television for advertising purposes. In my view, it is not right for this court to express any opinion on those matters.

Samuelson v. *Producers Distributing Co., Ltd.* (2) ([1931] All E.R. Rep. 74) concerned the passing off of a theatrical sketch called "The New Car" of which the plaintiff owned the copyright. ROMER, L.J., said (ibid., at p. 81):

> "But the cases in which the court has restrained passing off in the popular and usual sense are merely instances of the application by the court of a much wider principle, the principle being that the court will always interfere by injunction to restrain irreparable injury being done to the plaintiff's property."

No doubt the learned lord justice had in mind the language of LORD PARKER in the leading case on this branch of the law, *Spalding & Brothers* v. *A. W. Gamage, Ltd.* (3) ((1915), 84 L.J.Ch. 449). That case concerned discarded footballs of the plaintiffs which were sold by Gamages as being of their own manufacture. LORD PARKER said that it was enough that the representation had in fact been made (ibid.)

> "whether fraudulently or otherwise, and that damages may probably ensue, though the complete innocence of the party making it may be a reason for limiting the account of profits to the period subsequent to the date at which he becomes aware of the true facts."

To my mind, the plaintiff in this case, through his counsel, has not made out a case of such a kind that he has persuaded the court that it ought to interfere by way of injunction on the ground that unless the court does so irreparable damage will ensue.

For these reasons, I think that the appeal fails and should be dismissed.

MORRIS, L.J.: I entirely agree with the judgment that my Lord has just delivered and, in view of the nature of the present proceedings, I do not think that there is anything that I wish to add.

WILLMER, L.J.: I also agree.

Appeal dismissed.

Solicitors: *Goodman, Derrick & Co.* (for the plaintiff); *Warmingtons & Trevor Jones* (for the first defendants); *Allen & Overy* (for the second defendants).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

The following is the judgment of MCNAIR, J., except for his initial statement of facts and of the nature of the application (as to which see p. 548, letters B to H, ante), referred to by HODSON, L.J., at p. 549, letter C, ante.

MCNAIR, J.: Counsel for the plaintiff based his claim for the injunction on two grounds. First, on the ground that, as under s. 1 of the Defamation Act, 1952, this broadcast was a libel, the plaintiff was entitled to have that libel restrained if, as counsel submitted the evidence established, the effect of using the plaintiff's unauthorised voice, or a voice which could be reasonably understood to be his voice, was to lower him in the estimation of right-minded people. Secondly, counsel claimed an injunction based on what he admitted, and I certainly feel, to be a novel ground, namely, that there was a passing off, the nature of which I will describe subsequently.

A considerable body of evidence was put in, and I do not at this stage propose to state my findings of fact on it. There was a substantial body of evidence, called on the plaintiff's behalf, that in fact there was confusion. Persons who knew the plaintiff and his voice well thought that it was his voice; and in different degrees they expressed their surprise that he should allow his voice to be used, and in different degrees they expressed their feelings as to the effect that the use of his voice in these circumstances would have on his professional reputation. On the other hand evidence was filed on behalf of the defendants that the plaintiff had a peculiarly characteristic voice, which was to be distinguished from the voice reproduced in the broadcast.

In the libel proceedings one acute issue of fact would be whether the voice which was heard on the broadcast could, by reasonable persons, be taken to be or be confused with the voice of the plaintiff himself. It would be a primary issue of fact. It is plain from authority which is binding on me that, if the claim in this case had been for libel alone, it would be wrong in that state of the evidence for me to grant an interim injunction. The matter is summarised in Gatley on Libel and Slander (4th Edn.) at p. 707, in these words:

> " Where the defendant continues to publish the false or defamatory words and immediate and irreparable injury to person or property is likely to result, the court has jurisdiction to grant an interlocutory injunction restraining the defendant from further publishing the words until the hearing of the action or until further order. But the jurisdiction is ' of a delicate nature ', and will only be exercised with great caution, especially in cases of slander. It will not in general be exercised unless there is ' strong prima facie evidence that the statement complained of is untrue,' for ' until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed '."

I pause to say that the defendants do continue to publish the words alleged to be false or defamatory. The passage in Gatley on Libel and Slander (4th Edn.) at p. 707, continues as follows, and this is the important passage:

> " Moreover, as the question of libel or no libel is eminently a matter to be determined by the verdict of a jury, and the court, in order to grant an interlocutory injunction, must necessarily come to a decision upon that question in advance, it will exercise its jurisdiction only ' in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the court would set aside the verdict as unreasonable '."

On the evidence at present filed it would be quite impossible to set aside the verdict of the jury, if they said on that evidence that the matter complained of was not libellous. That being the position, and it being supported by authority such as *William Coulson & Sons* v. *James Coulson & Co.* ((1887), 3 T.L.R. 846) where Lord Esher, M.R., for the first time laid down the principle, which was approved and adopted by the Court of Appeal in *Liverpool Household Stores Association* v. *Smith* ((1887), 37 Ch.D. 170) and was again adopted and approved by a full Court of Appeal in *Bonnard* v. *Perryman* ([1891] 2 Ch. 269), counsel for the plaintiff quite rightly abandoned his application at this stage for an injunction to restrain the further broadcasting of this matter based on the allegation that the broadcasts were defamatory of the plaintiff. Nevertheless counsel persisted in his application for the injunction, based on the submission that the broadcasting amounted to a passing off by the defendants of something which belonged to the plaintiff.

That submission, which is a novel point and was argued with great skill, was based in the first place on the judgment of Lord Parker in *Spalding & Brothers* v. *A. W. Gamage, Ltd.*, ((1915), 84 L.J.Ch. 449). Counsel said rightly that in Lord Parker's speech in that case the whole of the essential law relating to the action of passing off was really to be found. The action is, according to Lord Parker, based on the proposition that " nobody has any right to represent his goods as the goods of somebody else "; and it is pointed out in his speech that to found the action the representation need not be fraudulently made, that it is enough that it has in fact been made, whether fraudulently or otherwise, and that damage may probably ensue.

It was urged before me that in the case of a professional man like an actor, his reputation in the mind of the public, based on his performances, is a right of property capable of invasion, just as is the right of property contained in a particular kind of goods or method of get-up of goods, and that here the defendants were passing off as and for a performance by the plaintiff a performance that was not by him. Put in a slightly different way, it was said that an actor had business or trade resting in performance by him of dramatic or musical works and that his goodwill lay in that performance. To confuse the public as to his performances was to do injury to that goodwill.

I am not at this stage going to rule on the question whether, in any circumstances, an action of passing off would lie for the unauthorised use of a man's voice, be he actor or not an actor, though it would seem to me to be a grave defect in the law if it were possible for a party, for the purpose of commercial gain, to make use of the voice of another party without his consent.

What makes it unnecessary for me to solve the problem whether such an action lies is to be found, in my judgment, in this, that the essence of the action of passing off as urged before me by counsel for the plaintiff, as I understood his argument, was damage to the plaintiff's reputation as an actor. The issue whether his reputation as an actor was damaged raises two issues of fact which seem to be almost identical with the issues of fact which would have to be tried in the libel action; viz., first, whether the voice could reasonably be understood to be the voice of the plaintiff (as to which I express no view at all), and, secondly, if the answer to the first question is in the affirmative, whether the use of such a voice did damage the reputation of the plaintiff

in the minds of right-minded people. If by the well-recognised practice of these courts, laid down by the Court of Appeal in a manner which is binding on me, I am prohibited, or told that it is unwise, to grant an injunction in the case of the libel aspect of this action, it inevitably follows that I should not grant the injunction on that aspect of the matter which is comprised in the passing off action. Both those heads of claim, the libel and the passing off, will, if the action proceeds, ultimately have to be decided by a jury; and it is stated in the authorities that it is most unfortunate that a judge should have to decide in advance an issue which will ultimately have to be decided by jury.

Accordingly, the grant of an interlocutory injunction being a matter of discretion, I exercise my discretion in this case against the grant of the injunction asked for, either in its form on the summons or in the more modified form which was suggested in the course of the argument.

WINTLE *v.* NYE.

[HOUSE OF LORDS (Viscount Simonds, Lord Reid, Lord Tucker, Lord Keith of Avonholm and Lord Birkett), November 17, 18, 19, 20, 24, 26, December 18, 1958.]

Probate—Grant—Revocation of grant—Trial—Summing-up—Misdirection—Solicitor author of will and chief beneficiary—General direction to jury to regard with suspicion evidence of author of will—No sufficiently jealous scrutiny of evidence.

Solicitor—Gift by client to solicitor—Residuary bequest by testatrix to her solicitor in will prepared by him—Burden of proof on solicitor to prove that testatrix knew and approved the contents of the will in so far as it benefited him—No independent advice to client—Duty of judge in summing-up to scrutinise vigilantly to the jury the evidence supporting the bequest.

In summing-up to a jury on the question whether a testatrix knew and approved the contents of her will, a general direction by the judge to regard with suspicion evidence given by the author of the will, who is also its chief beneficiary, is of little value if the judge so far neglects his own precept that, on each item of evidence, he turns an indulgent eye and accepts without vigilance or jealousy testimony that demands the closest scrutiny (see p. 558, letter D, post).

In 1937 a lady of sixty-six years of age, unversed in business, whose property had been managed by her brother until his death in 1936, was being advised in the preparation of her will, by the respondent, her solicitor, who had for many years been her family solicitor and then had the management of her property. The value of her estate at that time was estimated at £38,000 after allowing for death duties. By the first draft of her will her executors were to be the respondent and a bank, and her residuary estate was to be given to charities. Between the first consultation in October, 1936, and the execution of the will, there were some twenty interviews between the testatrix and the respondent at which her will was discussed. The will that she ultimately executed appointed the respondent to be her sole executor and gave the residuary estate to him, a clause being included requesting him to apply the same in accordance with a letter not yet written; there were other bequests, including an annuity of £300 to the testatrix' sister with a provision that on her death one-third of the funds set aside for the annuity was to be given to charities. The residuary gift, however, was of substantial value. The will was drawn by the respondent and executed in his office. The testatrix had no independent advice, but the respondent deposed that he had advised her to consult a separate solicitor and that she had declined to do so. The respondent deposed that the testatrix' reason for leaving him her residuary estate was that she did not want to leave her sister in control of more of her estate than a limited

income, that the respondent could supply further funds for her sister's maintenance and that there was no one whom the testatrix preferred or could rely on, other than the respondent, to look after her sister. In 1939 the respondent advised the testatrix to execute a codicil, which he drew, revoking the gifts to charities on the death of the testatrix' sister; the respondent testified that he gave this advice as a consequence of reading of the depreciation in value of estates and of their possible inadequacy to meet legacies. The testatrix executed the codicil. The consequence of the revocation of the gifts to charities was that their amount fell into residue. The testatrix died in 1947 and the respondent proved the will and codicil. Her estate was assessed for death duty at £115,000. In an action to revoke the grant of probate on the grounds that the testatrix did not know and approve the contents of her will or of her codicils, fraud not being alleged, the trial judge directed the jury correctly on the law but did not scrutinise jealously to them the evidence tendered by or on behalf of the respondent. The jury found that the testatrix knew and approved the contents of her will and of her codicil.

Held: (i) the burden of proof on the respondent to establish that the testatrix knew and approved the contents of her will and codicil in so far as they benefited him was, in the circumstances of this case, a very heavy one.

Principle in *Barry* v. *Butlin* ((1838), 2 Moo. P.C.C. 480) adopted.

(ii) though the judge's summing-up correctly stated the law, it violated the law's requirements in its examination of evidence, because it in no way led the jury to a critical approach to the respondent's evidence and acts (see p. 559, letter I, p. 557, letter F, post); accordingly there was such misdirection that the verdict of the jury could not stand.

Appeal allowed.

[**Editorial Note.** In this case neither fraud nor undue influence was alleged. In the Court of Appeal HODSON, L.J., read the passage* from the judgment of SIR J. P. WILDE in *Atter* v. *Atkinson* ((1869), L.R. 1 P. & D. at p. 670) which contains this sentence—" Once get the facts admitted or proved that a testator is capable, that there is no fraud, that the will was read over to him, and that he put his hand to it, and the question whether he knew and approved of the contents is answered ". In relation to a complicated testamentary document the present decision may seem to impose some qualification on this statement, as indeed was outlined by LORD CAIRNS, L.C., in *Fulton* v. *Andrew* ((1875), L.R. 7 H.L. 448 at pp. 463, 464; cf., p. 561, letter B, post). With regard to the admissibility of questions where fraud is not alleged, see p. 560, letters B to D, post.

As to a will prepared by a person in his own favour, see 16 HALSBURY'S LAWS (3rd Edn.) 208, para. 373; and for cases on the subject, see 23 DIGEST (Repl.) 110, 111, *1098-1117.*

As to the position of a solicitor in relation to the taking of benefits under wills prepared by him for clients, see 31 HALSBURY'S LAWS (2nd Edn.) 126, para. 172; and for cases on the subject, see 42 DIGEST 88, 89, *797-810.*

As to obtaining revocation of grant of probate, see 16 HALSBURY'S LAWS (3rd Edn.) 275, para. 518; and for cases on the subject, see 23 DIGEST (Repl.) 252-257, *3062-3134.*]

Cases referred to:

(1) *Barry* v. *Butlin*, (1838), 2 Moo. P.C.C. 480 (12 E.R. 1089); 1 Curt. 637; 42 Digest 89, *804.*

(2) *Fulton* v. *Andrew*, (1875), L.R. 7 H.L. 448; 44 L.J.P. 17; 32 L.T. 209; 23 Digest (Repl.) 133, *1382.*

(3) *Atter* v. *Atkinson*, (1869), L.R. 1 P. & D. 665; 20 L.T. 404; 33 J.P. 440; 44 Digest 570, *3873.*

* The passage so read began with the words " If, being of sound mind . . ." and ended " . . . an end of the matter ".

Appeal.

Appeal by Alfred Daniel Wintle from an order of the Court of Appeal (HODSON, MORRIS and SELLERS, L.JJ.), dated Dec. 16, 1957, dismissing the appellant's appeal from a judgment of BARNARD, J., dated May 20, 1957, on the trial of an action with a jury in favour of the respondent, Frederick Harry Nye. The facts appear in the opinion of VISCOUNT SIMONDS.

The appellant appeared in person.

Ifor Lloyd, Q.C., and *C. A. Marshall-Reynolds* for the respondent.

Their Lordships took time for consideration.

Dec. 18. The following opinions were read.

VISCOUNT SIMONDS: My Lords, the right to trial by jury is traditionally precious to the citizen. If their verdict is to be lightly set aside and either a new trial ordered or the opinion of an appellate court substituted for theirs, the value of that right would be substantially diminished. I have not, I hope, in my consideration of this case, failed to pay that jealous regard to the verdict of a jury which is its due.

This appeal, my Lords, is from an order of the Court of Appeal of Dec. 16, 1957, dismissing the appellant's appeal from a judgment of BARNARD, J., in favour of the respondent, Frederick Harry Nye, a solicitor, on the trial of an action with a jury in the Probate, Divorce and Admiralty Division of the High Court. On Mar. 12, 1948, a grant of probate of the will dated Aug. 4, 1937, of Kathleen Helen Wells and a codicil thereto dated Nov. 13, 1939, was made to the respondent. She had died on the previous Dec. 6, 1947. On Jan. 27, 1956, the appellant, Colonel A. D. Wintle, who claimed to be interested in her estate in the event of her intestacy, together with another person, who has not now any concern in the matter, brought the action out of which this appeal arises against the respondent. It is sufficient at this stage to say that he alleged (inter alia) that, at the time when the will and codicil were respectively executed, the testatrix did not know and approve their contents. He claimed that the court should revoke the grant of probate, pronounce against the validity of the will and codicil and grant to him and his co-plaintiff letters of administration of the estate of the testatrix. The respondent denied the alleged want of knowledge and approval of the testatrix and counterclaimed that the court should pronounce for the will and codicil in solemn form of law. Here was the issue, and it is not in dispute that it was for the respondent to prove affirmatively the knowledge and approval of the testatrix.

A few words are necessary about the background of the case. The testatrix, whose mother had been a Miss Wintle, was born in 1871, and was, therefore, sixty-six years old when she made her will. She never married. She had one brother, Arthur, and a younger sister, Mildred. Her mother, from whom she derived almost the whole of her substantial fortune, died in 1909. She had, by her will, left her property equally between her three children but, by a codicil made in 1907, she revoked the gift of a share to Mildred and gave her only an annuity of £100. Her reason for doing so was that Mildred had become a Roman Catholic and the mother feared she might dispose of her property to that church. The result was that she died intestate as to one-third of her estate, and her son Arthur, as her heir-at-law, became solely entitled to that part of it, almost the whole of it, which was real estate. Arthur and the testatrix, however, agreed to make further provision for Mildred and, by a deed of settlement of Mar. 16, 1910, covenanted to pay to trustees the sum of £9,000 and in the meantime to pay her interest at the rate of four per cent. per annum (i.e., £360) on protective trusts. In 1913 Arthur and the testatrix entered into a deed of partition, whereby the whole of the property derived from their mother's estate was divided equally between them. In return for Arthur sharing the real estate with the testatrix, she agreed to pay the whole of the sum of £360 due to Mildred

under the deed of settlement. After the death of their mother, the testatrix and Mildred lived together, first at Clapham Park, then at Orpington, and finally, from 1929 onwards, at Leigh House, East Grinstead, where they stayed until the death of the testatrix. From the date of the deed of partition until her death her property consisted almost entirely of house property in Hove and Brighton. One of her houses in Hove she retained for her own use, staying there for two or three weeks at a time until 1937 and thereafter often going there for the day. On these visits she was usually accompanied by her cousin, Marjorie Wintle, a sister of the appellant. I can conclude this part of the narrative by reminding your Lordships that Arthur died in May, 1936, and that, on the death of the testatrix, her sister Mildred, who survived her, was her sole next-of-kin and that, on the death of Mildred, which took place shortly after, her next-of-kin were a numerous class, consisting of her Wells cousins.

The respondent was admitted to be a solicitor in 1906. He and his father before him had acted professionally for the testatrix and her father and mother. He had known her since his childhood, but there was no evidence of intimate friendship. On the death of Arthur, he had taken over the management of her property, having been given by her a power of attorney for that purpose. She was unversed in business and did not want to be worried with the details of management.

I now come to the events which led up to the execution by the testatrix of her will on Aug. 4, 1937. I can do so at no great length without, I hope, omitting anything that would favour the respondent's case. It was in 1929, while Arthur was still alive and managing her property, that the testatrix first consulted the respondent about making her will. It appears that, in that year, she had three interviews with him and that the matter mainly discussed was the increase of her sister Mildred's annuity, then £360, to a sum of £600 per annum free of tax. But she had not such details of her property as would enable him to advise her. Nor had he. It was for this reason that the matter was not then further pursued and it was not until Oct. 7, 1936, some months after Arthur's death, when he had taken over the management of the property, that she again consulted him about her will. For what follows I draw on the oral evidence of the respondent and the notes of attendance and instructions and drafts made by him. There is not a line in the handwriting of the testatrix nor any independent evidence.

I see no reason to doubt that, in 1936 as in 1929, the main anxiety of the testatrix was for her sister Mildred. It was twofold: on the one hand, that adequate provision should be made for her, on the other, in accordance with their mother's wishes, that she should have no more than that. At the first interview of Oct. 7 the preliminary wishes of the testatrix were stated to be the appointment of the respondent and the Westminster Bank as executors, the giving of annuities of £250 each to Marjorie Wintle and her sister Dorothy, the making up of Mildred's income to £650 per annum with the right to live in Leigh House, the giving of legacies of £200 each to three local hospitals and the establishment of two pensions at the cost of £600 each for patients at the Streatham Home for Incurables and the giving of legacies of unspecified amounts to the children of John and Frederick Wintle. Nothing was then said about residue. The testatrix did not then know the amount of her estate, but, shortly afterwards, the respondent produced to her, as he said, two pages of figures showing roughly her income and capital position. It is sufficient to say that her fortune, consisting of freehold and other property, was estimated to be worth £52,000 gross and, after payment of duties, £38,000. A draft will was then prepared for the testatrix. She required certain insertions and variations to be made in it, including the important naming of eight hospitals in the Brighton area as the residuary devisees. On Jan. 25, 1937, a further paper having been in the meantime prepared which contained further figures, the respondent presented an engrossment of the will as amended for the approval of the testatrix. She, however, said it was not quite what she wished and she wanted time to think it over.

For some time she thought it over. There then followed from Apr. 14 onwards a series of interviews in the course of which a number of changes were made. I say nothing of the complication and unusual structure of the will as it eventually emerged. But I must note the salient fact that, on Apr. 28 the testatrix, according to him, of her own motion, instructed him to make certain alterations but for which it is unlikely that these proceedings would ever have been started. They were (i) to omit the Westminster Bank as executor and to leave the respondent as sole executor, (ii) to leave the residue of the estate to him in substitution for the eight hospitals, and (iii) to include a clause providing that she could leave a letter giving him directions as to dealing with the residue in case she had forgotten somebody or thought of somebody afterwards to whom she wanted to leave a legacy. The respondent deposed that the reason given by the testatrix for leaving the residue to him was that she did not want to leave her sister Mildred more than £600 a year, but if she left the residue to him he would be able to supply further funds for her maintenance; there was no one whom she preferred or could rely on to look after her. He further deposed that, when the testatrix said she wished to leave the residue to him, he told her that she should consult another solicitor or be separately advised, but she said she did not wish to do so. One other matter must be mentioned which took place at about this time, since it assumed some importance in the case. Under the original draft, Marjorie Wintle and her sister Dorothy each got an annuity of £260; under the new will as drafted and as ultimately executed their annuities were deleted and they were each given the income of a sum of £1,000 (which was treated as an annuity of £40) with a general power of appointment over £300 part of that sum, the remainder of the sum falling into residue. The respondent deposed that the testatrix told him that, if there was money available, he might increase the annuity to Marjorie to £120. This was, in more than one aspect, a matter of vigorous comment. At further interviews in May, figures were again put before the testatrix which purported to show that the ultimate residue, after payment of legacies and duties and providing for the annuities, would amount to £15,000. This was, in any event, a miscalculation. Before the final engrossment and execution of the will a further important alteration was made. It was designed to meet the event of the respondent predeceasing the testatrix, and provided that the residue should pass to the respondent " his executors administrators and assigns to the intent that this gift shall not lapse ". The reason assigned for this was that the testatrix asked the respondent on whom she could rely to look after Mildred if he died before her, and he suggested that his executor could do so if the will was thus worded. After still further interviews, at which another clause was approved by which one-third of the investments set aside to provide the annuity of £300 for Mildred should on her death go to three named charities, the will was finally engrossed and duly executed by the testatrix in the office of the respondent on Aug. 4, 1937.

I come now to the codicil, and must again draw on the testimony of the respondent and the relevant documents, though I cannot refrain from the immediate comment that it was a most extraordinary transaction. Otherwise your Lordships might think that I had fallen into some error of statement. It was said that, shortly after the war began in 1939, the testatrix told the respondent that she was concerned about her freehold property depreciating in value, and she was anxious whether there would be sufficient in her estate to pay the annuities, and asked what she should do about it. To this he at first replied that he thought she need do nothing, but at a later date, having read an article in the Law Times which dealt with the depreciation in value of estates and their possible inadequacy to meet pecuniary legacies, he wrote to her advising her to revoke the legacies bequeathed to the three charities on the death of Mildred. She accepted this advice, and he drew a codicil to give effect to it which she duly executed on Nov. 13, 1939. The obvious result was that the whole of the funds set aside for the annuity fell into residue. No other codicil was executed, though one had

A been prepared by which the respondent's executors were named as her executors in the event of his predeceasing her and a further pecuniary legacy was given to a charity. It was overlooked for some reason.

The testatrix died on Dec. 6, 1947, at the age of seventy-six and on Mar. 12, 1948, probate of her will and codicil was granted to the respondent. The value of the estate was originally sworn at £82,000 but at a later date a corrective B affidavit was filed and the estate was finally assessed for duty at £115,000. The respondent proceeded to administer the estate. The testatrix was survived by her sister Mildred, who was her sole next-of-kin in the event of her intestacy. Mildred died intestate on Jan. 1, 1949. She was survived by thirty or more cousins german who were her statutory next-of-kin including Vera Sibeon Wells, originally a co-plaintiff in the action, and Frederick Leslie Wells, who, C on Jan. 24, 1956, assigned to the appellant all his estate and interest in the estates of the testatrix and Mildred. Three days later this action was commenced.

The action was tried by BARNARD, J., with a jury. The material questions left to the jury were whether the testatrix knew and approved of the contents of (i) the will and (ii) the codicil. To both these questions the jury answered " Yes ". With regard to the will they had been told by the learned judge that D they could answer: " ' Yes, save and except as to the residuary bequest '. That . . . is the bequest to [the respondent], of what turns out to be the bulk of the estate." The appellant appealed to the Court of Appeal, the ground of appeal being that the learned judge had misdirected the jury. That court, by a majority (HODSON and MORRIS, L.JJ.) dismissed the appeal. SELLERS, L.J., in a dissenting judgment*, expressed a contrary opinion.

E My Lords, I must, in fairness to the respondent, elaborate some of the points on which the learned judge's summing-up was so gravely at fault as to amount to a misdirection, but I would at the outset say that I cannot improve on, and would with respect adopt, these words of SELLERS, L.J. He said:

> " Having stated the law and the issues accurately and clearly the question F to my mind is whether the judge, as he continued the summing-up, complied with the approach to the investigation which the law, as stated, required. It is in this respect that I find that it fell short of the law's requirements. In my judgment whether it is regarded as a whole or is analysed in detail the summing-up provided, and encouraged in the minds of the jury, a benevolent and sympathetic consideration of [the respondent's] evidence G and in no way led the jury to a critical or hostile approach to what he said in his evidence and to what he would appear to have done. In effect the summing-up of the evidence substantially negatived the law which the learned judge had in terms enunciated."

My Lords, the relevant law is not, I think, in doubt. It was, as the Court of Appeal were unanimously of opinion, correctly stated by the learned judge by H reference in particular to the judgment of PARKE, B., in *Barry* v. *Butlin* (1) ((1838), 2 Moo. P.C.C. 480 at p. 482). It is not the law that in no circumstances can a solicitor or other person who has prepared a will for a testator take a benefit under it. But that fact creates a suspicion that must be removed by the person propounding the will. In all cases the court must be vigilant and jealous. The degree of suspicion will vary with the circumstances of the case. I It may be slight and easily dispelled. It may, on the other hand, be so grave that it can hardly be removed. In the present case, the circumstances were such as to impose on the respondent as heavy a burden as can well be imagined. Here was an elderly lady who might be called old, unversed in business, having no one on whom to rely except the solicitor who had acted for her and her family; a will made by him under which he takes the bulk of her large estate; a will made, it is true, after a number of interviews extending over a considerable time, during

* The judgment of SELLERS, L.J., is printed at pp. 563 to 567, post.

which details of her property and of her proposed legacies and annuities were said to have been put before her, but in the end of a complexity which demanded for its comprehension no common understanding; on her part a wish disclosed in January, 1937, to leave her residuary estate to charity which was, by April, superseded by a devise of it to him, and on his part an explanation of the change which was calculated as much to aggravate as to allay suspicion; the will retained by him and no copy of it given to her; no independent advice received by her and, even according to his own account, little pressure exercised by him to persuade her to get it; a codicil cutting out reversionary legacies to charities allegedly for the benefit of annuitants but, in fact, as was reasonably foreseeable, for the benefit of the residuary beneficiary. All these facts and others that I do not pause to enumerate demanded a vigilant and jealous scrutiny by the judge in his summing-up and by the jury in consideration of their verdict.

My Lords, I agree with SELLERS, L.J., that the summing-up fell short of what the law required, and that the jury did not get the guidance to which they were entitled. I am not saying that the judge was bound to call the attention of the jury to every detail of the evidence, nor that he was not entitled to express his own view on it. But a general direction to regard with suspicion evidence given by the author of a will, who is also its chief beneficiary, is of little value if the judge so far neglects his own precept that, on each item of evidence, he turns an indulgent eye and accepts without vigilance or jealousy testimony that demanded the closest scrutiny. In such a case as this, complicated as it was by many documents not easily understood, it was not enough for the judge to say to the jury that, if they believed the respondent, whom they had seen and heard, they could decide in his favour. It was imperative that he should at least point out the considerations, which were not lacking, for them to bear in mind in deciding whether they should, or should not, believe him.

But, my Lords, it is not merely the impression created by the summing-up as a whole which is open to criticism. As to that I would say no more than that, having read all the evidence and documents in the light of the relevant law, I should, myself, have unhesitatingly come to one conclusion but that I can at least understand how a jury, after listening to the learned judge's summing-up, could come to the opposite conclusion. But, turning to more detailed criticism, I find it significant how many are the points at which the learned lord justice and your Lordships in the course of the discussion in this House found the summing-up unsatisfactory. On all of them I agree with the criticism that was made, and would only make observations on some which appeared particularly defective or misleading. The first is one that was not much discussed. I agree that, in this case, the question of the testamentary capacity of the testatrix was not in issue. What was in issue was whether she understood and approved the contents of the will she executed. To this issue the quality of her understanding was relevant. So, at least, thought the respondent, who led evidence designed to show that she was able to understand and approve the contents of a very complicated will—not, of course, the language of art in which it was couched but the character of the disposition that she was making. It was meagre and unconvincing evidence and it was countered by the appellant. He called a doctor who had attended the testatrix over a number of years and gave his opinion that she was " a very unintelligent woman ", that she was " just content to exist ". The learned judge having first said that, if this were a case in which there was a charge of unsoundness of mind, he would direct the jury to pay great weight to the medical evidence*, added:

> " but there is no such charge. Dr. Pringle is only telling you, just as any other person will tell you, his impression of this old lady—and I am wondering whether a doctor would get the best impression of her; he only saw her when she was lying in bed and in pain and feeling miserable."

* The passage is at p. 562, letter I, to p. 563, letter F, post.

A But the evidence by no means justified this description of the doctor's knowledge of her. The jury were left with a direction that a matter which was, as counsel on both sides thought, of substantial importance, was of little or no importance and they were gravely misled as to the nature of the evidence on it.

Another particular example that I would give is this. In more than one passage of his summing-up*, the learned judge encouraged the jury to treat the B will and codicil as standing or falling together. That might be unobjectionable if he had then gone on to point out how fraught with suspicion was the codicil. He failed to do so. Counsel for the respondent, who, I take this opportunity of saying, conducted his case with great ability and proper candour, was constrained to admit that the effect of the codicil could hardly have been explained to the testatrix. It is very certain that the jury did not understand that its effect in C the likeliest contingency was to benefit the respondent by several thousand pounds. Had they done so, they might have found it more difficult to believe that the testatrix understood and approved its contents. Who can say what repercussion this might have had on their view of her understanding and approval of the contents of the will also?

D I referred at an earlier stage of this opinion to the annuity of £260 given by the first draft of the will to a cousin of the testatrix, Marjorie Wintle, with whom she lived on terms of intimate affection, and to its reduction by the final will to the income of a sum of £1,000 with a power of appointment over £300 part of that capital sum. There was, I think, room for grave criticism of the respondent in his dealings with this matter. He was singularly evasive in his letters to Marjorie and in his evidence about it. I will not repeat what SELLERS, L.J., E said† on this aspect of the case, but will call particular attention to the fact that, according to the respondent's own story, it was on Apr. 28, 1937, that the testatrix told him that he could increase her annuity to £120 if there was money available. This was at a time when (again according to his own story) figures had already been placed before her which, had she understood them, could have left her in no doubt that ample money would be available to meet the increased F annuity. Such a circumstance must create the gravest suspicion that the testatrix had little idea of the extent of the benefit she was conferring on the respondent. I am not suggesting that it would be necessary that she should know the precise amount; that, in the case of a residuary gift, would not be possible. But, if it is a legitimate inference that she thought that the residue was of a measure which might, or might not, support the increase of an annuity of £40 G to £120, then it is clear that she was unaware that she was conferring on him a substantial fortune. Having myself read the pages of complicated figures which were said to have been put before her and studied what appeared to me to be the very uncandid answers given by the respondent on this part of the case, I cannot think that the jury were directed to view the transaction with the vigilance and jealousy which the law requires.

H My Lords, I could give many other examples of the uncritical way in which the learned judge deployed the evidence for the consideration of the jury, some of them, if taken by themselves, of no great importance but adding up to a serious failure to give a true sense of their duty to the jury. I think it is unnecessary to do so, for at the end I come back to the words which, at the beginning of this I opinion, I cited from the judgment of SELLERS, L.J. It is with diffidence that I differ from the judgments of HODSON, L.J., and MORRIS, L.J., but I think, with great respect, that they have paid too much attention to the fact that the learned judge correctly stated the relevant law, too little to the fact that, having done so, he violated it over and over again in his examination of the evidence. In my opinion, there was such misdirection that the jury's verdict cannot stand. I will

* An example is at p. 562, letter A, post.

† This passage is at p. 566, letters C to H, post.

presently consider what order should be made, but, before doing so, I must deal with a procedural point that was raised by learned counsel for the respondent.

The issue, and the only issue, in this case was whether the testatrix knew and approved of the contents of the will and codicil. That was what the respondent was required to prove. The pleadings contained no allegation of fraud which, under the rules (see r. 40 A of the Contentious Probate Rules*), must be specifically pleaded if it is to be introduced into the case. Therefore, it was said, it was not admissible under the guise of requiring from the respondent strict proof of knowledge and approval for counsel to ask any question or make any suggestion from which it could be inferred that, if the testatrix did not know and approve, it was because the respondent was fraudulent. I should be prepared to overrule this submission on the single ground that no objection was taken before the judge to such questions, that the judge himself, however benevolently he himself appeared to regard the respondent, at least offered to the jury the alternative that they could think he was an " evil man ", that the Court of Appeal were not asked to consider the point and did not do so, and, finally, that there is no trace of it in the respondent's formal case and reasons. It is, therefore, too late to raise it now. But, apart from that, I think that there is no substance in the point. The appellant made no charge of fraud. If he had done so, he would have had to prove his case affirmatively. He put the respondent to the proof that the testatrix knew and approved the contents of the will and, if that could only be established by the evidence of the respondent himself, he was entitled to subject him to the severest cross-examination and at every point to challenge his veracity, even though the result might be that the jury would not believe him.

After the appellant had opened his case and learned counsel had concluded his speech for the respondent, their Lordships intimated that, in their opinion, the verdict of the jury could not stand and that the appeal must be allowed. It was then open to them either to send the case back for a new trial or, taking a less usual course, to declare the will and codicil invalid in their entirety or declare the codicil invalid and the will invalid so far as it purported to confer any benefit on the respondent. They, therefore, allowed a brief adjournment in order that the parties might consider their position. At the end of it the respondent, by his counsel, intimated that he no longer wished to assert the validity of the will or codicil so far as any benefit to himself was concerned. I propose, therefore, that the following order should be made. In the preparation of it their Lordships have had some assistance from the parties, but it is not to be regarded as a consent order. The appeal will be allowed and the order of the Court of Appeal of Dec. 16, 1957, and the verdict and decree of BARNARD, J. (save in so far as it provided for the costs of the first plaintiff, Vera Sibeon Wells), will be set aside. The cause will be remitted to the High Court of Justice, Probate, Divorce and Admiralty Division (Probate), on the footing that the will dated Aug. 4, 1937, of Kathleen Helen Wells is invalid in respect of the beneficial bequests and devises to the respondent contained in cl. 4 and cl. 5 thereof, and that the codicil of Nov. 13, 1939, is invalid, and that the said will except as aforesaid is pronounced for in solemn form of law and that the said codicil is to be pronounced against and that such further orders as are right are to be made as to recalling the probate of the said will and codicil granted on Mar. 12, 1948, and as to granting fresh probate of the said will omitting the said beneficial bequests and devises to the respondent and omitting the said codicil. The appellant will be paid his costs in the High Court and the Court of Appeal and this House out of the estate of the testatrix, the respondent will have his costs in the High Court out of the estate and will bear his own costs in the Court of Appeal and this House.

LORD REID: My Lords, I agree that this appeal should be allowed for the reasons given by my noble and learned friend, LORD SIMONDS, and I shall only

* See 7 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 244; TRISTRAM AND COOTE'S PROBATE PRACTICE (20th Edn.) 1050.

add a few observations. It is well established that the law to be applied is that stated by PARKE, B., in *Barry* v. *Butlin* (1) ((1838), 2 Moo. P.C.C. 480 at p. 482), but I do not think that, in a case of this kind, it is enough simply to explain the law to a jury by using the general expressions which are found in that judgment. To tell a layman that he must be vigilant or jealous or suspicious of the evidence may not convey to his mind the weight of the onus which must be discharged if the will is to stand. In *Fulton* v. *Andrew* (2) ((1875), L.R. 7 H.L. 448), LORD CAIRNS, L.C., referred (ibid., at p. 463) to the duty " to bring home to the mind of the testator the effect of his testamentary act ", and pointed out that failure to perform that duty might amount to a greater or less degree of fraud. In *Atter* v. *Atkinson* (3) ((1869), L.R. 1 P. & D. 665), SIR J. P. WILDE said (ibid., at p. 668):

> " The proposition, however, is undoubted that if you have to deal with a will in which the person who made it himself takes a large benefit, you ought to be well satisfied, from evidence calculated to exclude all doubt, that the testator not only signed it, but that he knew and approved of its contents."

In this case, on the respondent's own evidence, it was at least possible to doubt whether the testatrix had any real understanding of the magnitude of her estate in spite of the fact that figures had been shown to her, and whether she was not thinking of putting the respondent in a position to look after her sister Millie—in effect making him a trustee—rather than of conferring a large personal benefit on him; and there was really nothing to show that she intended to confer a large personal benefit on the respondent's executors, administrators or assigns in the event of his predeceasing her. To my mind, the direction of the learned judge was not at all calculated to make the jury realise that they must be " satisfied from evidence calculated to exclude all doubt " or even all reasonable doubt that the respondent had not only shown to the testatrix the relevant information and discussed the will with her but had brought home to her mind the effect of her will; and that applies with even more force to the codicil.

LORD TUCKER: My Lords, I agree, for the reasons which have been stated, that this appeal should be allowed. I concur in the order proposed by my noble and learned friend on the Woolsack.

LORD KEITH OF AVONHOLM: My Lords, I agree.

LORD BIRKETT: My Lords, I agree that the appeal should be allowed for the reasons already given by my noble and learned friend on the Woolsack, and I also agree with the order propounded by my noble and learned friend.

Appeal allowed.

Solicitors: *Janson, Cobb, Pearson & Co.*, agents for *F. H. Nye & Murdoch*, Brighton.

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

The following summary and extracts are prepared and taken from the first part of the summing-up of BARNARD, J., on May 20, 1957, and include extracts of the passages relevant to the absence of a plea of fraud (as to which compare p. 553, letter F, ante):—

BARNARD, J., stated the issues, viz.—(1) Was the will of August, 1937, duly executed ? (2) Was the codicil of November, 1939, duly executed? (3) Did the testatrix know and approve of the contents of the will ? (4) Did she know and approve of the contents of the codicil ? HIS LORDSHIP briefly discussed the first two questions, saying—

> " I think that you will probably have little doubt that, as far as the formalities of the Wills Act, 1837, are concerned, both the will and the codicil are all right. That does not make them valid documents. Very often where there is a charge of unsoundness of mind, the court says—' yes, the will was duly signed according to the Wills Act, 1837, but we have come to the conclusion that the testatrix was of unsound mind, therefore she did not know what she was doing and it is a bad will '. So far, however, as the execution is concerned, all is in order, so that I do not think that you will have any difficulty in answering those two questions . . . Now let me come to the next two questions—and they are really the important ones. It is the third question that is the all-important question, because I have little doubt that if you were to come to the conclusion that the testatrix did not

know and approve of the contents of the will, you would also say that she did not know and approve of the contents of the codicil. On the other hand if you were to come to the conclusion that she did know and approve of the will, you would come to the conclusion that she also knew and approved of the contents of the codicil, which is a very short document." A

His Lordship then referred to the law stating that there were really two rules. The first was that if a person put forward a will for probate he must satisfy the court not only that it was duly executed but also that the testator knew and approved of the contents. In regard to the first rule His Lordship said— B

" In most cases the burden is not a high one. If there is evidence before the court that the will was read over to the testator or that the testator read it himself before he signed it, the court accepts that evidence that he knew and approved of it. Equally so, if a testator chooses to get a solicitor to draw the will, and there is evidence from the solicitor of the instructions that he took how the testator wanted to dispose of his property—that is regarded as sufficient evidence that he knew and approved. Even in cases where the testator has been very ill, and so ill at the time of the execution of the will that he probably would not have understood it, then, provided that he gave careful instructions when he was not so ill and all that the will did was to carry out those instructions, the court has been satisfied that the testator knew and approved of the contents." C

After indicating that the result of giving annuities and directions for sums to be set aside to provide them out of the proceeds of sale of freehold property might be to produce a complicated will, full of legal jargon which a testator might not understand, His Lordship continued— D

" . . . it is not that the testator must understand the language of the document, it is that the testator must know and approve of the contents; and, if this complicated language carries out the wishes of the testator, it could not be said that she did not know and approve of the contents."

His Lordship then stated the second rule, viz., that if anyone took part in making a will and got a benefit under it, the will should be regarded as suspicious and that it was for the defendant to satisfy the jury by the evidence that that suspicion was removed. His Lordship referred to the early history of the case from 1909, when the testatrix' mother died, until the death of her brother, Arthur, in 1936, and to the defendant's then being given a power of attorney to manage her property. His Lordship then referred to the defendant's evidence that the testatrix said that her brother Arthur had been bothering her about her property, and reminded the jury that Miss Marjorie Wintle (who was often the testatrix' companion when she went to her house at Hove) had said exactly the same thing; and he pointed out that the obvious solution was to give the defendant the power of attorney to see about things, and that the power of attorney was given to the defendant in 1936 within a week of the death of the testatrix' brother. His Lordship then said that before coming to the crux of the case he would try to get rid of some of the trees so that the jury would be able to see the wood. He referred to the motive for the action being brought, to the object of Col. Wintle (a plaintiff) being to bring the defendant into court and expose him [this passage is set out in the judgment of Sellers, L.J., at p. 566, letter I, post], but that the jury must not let that affect their minds and must forget the motive. All that the jury had to consider, quite apart from motive, was—did the testatrix know and approve of the contents of her will ? Colonel Wintle had brought the action because he thought that his sister, Miss Marjorie Wintle, had been so badly treated, but if he were to win the action, she would get nothing for she had no claim on the testatrix' intestacy. [At the end of the summing-up, His Lordship, in response to a reference of counsel for the plaintiffs to this passage, reminded the jury that Col. Wintle had said that if he got anything out of the action he was going to give it to his sister.] Continuing his summing-up, His Lordship intimated that the jury might think the will to be a very unfair will, as the testatrix appeared to have had only two friends, her sister and Miss Marjorie Wintle. His Lordship then turned to his second tree, viz., that the plaintiffs' counsel had impressed on the jury that the testatrix was a simple old lady and that the defendant's counsel said that she was a very intelligent woman. His Lordship said— E F G H I

" You may come to the conclusion that the truth really lies somewhere between the two. Certainly she is not a simple old lady in a sinister sense, that she was practically mental. You have had a lot of evidence about this, which shows that counsel attach some importance to it. You have had Dr. Pringle—and if this were a case where there was a charge whether she was of unsound mind and Dr. Pringle had given you medical evidence, I would ask you to pay very great weight to his evidence; but there is no such charge. Dr. Pringle is only telling, just as any other person will tell you, his impression of this old lady—and I am wondering whether a doctor would get the best impression of her; he only saw her when she was lying in bed and in pain and feeling miserable. At any rate Dr. Pringle said

this—and he may be right, or he may be wrong—that she was quite indifferent to Marjorie as to everyone else. On the other hand you have Mrs. Skinner's evidence—' Oh, she was very affectionate to Marjorie. She was not able even to give me instructions when I was running the house. It was all left to Marjorie.' On the other hand you have the evidence of Mr. White, who was doing repairs to her house at East Grinstead—' Oh, she gave me clear and sensible instructions.' Well, where are you ? You may come to the conclusion that perhaps she was a lazy woman; if she could find someone else to do the work for her she let them do it, but when she had to do it herself she did it. You may think that is a sign of intelligence rather than lack of intelligence.

" The best way to judge the old lady is, as counsel for the defendant said—where you have this conflicting evidence, let us see what she wrote, look at her letters and make up your minds from that what sort of woman she was. It may show that she was a very selfish woman, but very alert where her own interests were concerned. You may remember a letter written in March, 1937. She had lived at Orpington for a time before she went to East Grinstead, and in March, 1937, she clearly remembered that she had got a deposit account with the branch at Orpington, and she was writing to the defendant saying, ' I want you to get it transferred to my Hove branch '. Then in June, 1937, you remember, she was very quick to realise that a field, which the rural district council or somebody seem to have wanted, would spoil her amenities, and she was very quick to write to the defendant and say ' Can't you see whether you can buy it ? ' She reverted to it in further correspondence about ' getting on with this business '—' get this field for me '. Then in September, 1937, within about a month of the will being executed, you remember that there was some land in front of her house at Hove and somebody had bought it, and there was a question of a building going up which would again spoil her view from her house, and she wrote to the defendant. Of course she got the expression wrong; she talked about ' ancient days ', which was what we call ' ancient lights '. Then in November, 1938, she was writing (which shows that she knew about it) about the insurance of her gardener and servants. Those are her letters. You may come to the conclusion that in many respects she was a simple old lady, and if you do not mean that in any sinister way, it is rather a nice way to be described—' a simple old lady '. Certainly we know that she was very old-fashioned in her views about money.

" It has also been said how eccentric she was. Well that would be very important if there were a charge of insanity, that she was of unsound mind when she made the will, because sometimes the borderline is close between eccentricity and insanity, but as long as it is only eccentricity and not insanity she is perfectly free and capable to make a will—and if she liked she could make an eccentric will . . ."

HIS LORDSHIP then continued as follows—

" Now I want to come to the real crux of the case—and I hope not to be too long with it. I did say, members of the jury—and it was not any reflection on you—that this case was not a very suitable case for a jury, because the plea of want of knowledge and approval stands by itself; there is no charge of undue influence; there is no charge that it was obtained by fraud; there is no charge that the testatrix was of unsound mind. When it stands by itself it is certainly a more technical question than questions of insanity and undue influence, because it must depend to a large extent on what instructions she gave to her solicitor and, of course, whether you believe his evidence about it, and on all the various scripts. From that point of view it is not a very suitable case for a jury to try."

HIS LORDSHIP then reviewed the evidence and the sequence of events at length, and discussed criticisms that had been made of the defendant in relation to the will and codicil.

The jury, having retired to consider their verdict, answered the four questions put to them, which have been stated at p. 561, letter H, ante, in the affirmative.

The judgments of the Court of Appeal were delivered on Dec. 16, 1957, after the appeal had been heard on six days, judgment being reserved. The dissenting judgment of SELLERS, L.J., with whose judgment VISCOUNT SIMONDS agreed (see p. 558, letter C, and p. 557, letter E, ante), was as follows.

SELLERS, L.J.: I would allow the appeal, disturbing as it is to contemplate that this dispute over the testatrix' will falls to be determined ten years after her death, and fully realising that in justice to the defendant and the other interested parties this litigation should end. As my opinion is contrary to the judgment of my Lords [HODSON and MORRIS, L.JJ.] and as the appeal is from a judge of long experience, I express my views with great deference. The main issue raised on the appeal is, as I see it, fundamentally a question of law. The learned judge stated the law clearly and efficiently to the jury. My Lords have amplified it and cited authority which I do not repeat. Likewise the judge put the issues clearly for the jury. I fully accept both these matters.

Having stated the law and the issues accurately and clearly the question to my mind is whether the judge, as he continued the summing-up, complied with the approach to the investigation which the law, as stated, required. It is in this respect that I find that it fell short of the law's requirements. In my judgment whether it is regarded as a whole or is analysed in detail the summing-up provided, and encouraged in the minds of the jury, a benevolent and sympathetic consideration of the defendant's evidence and in no way led the jury to a critical or hostile approach to what he said in his evidence and what he would appear to have done. In effect the summing-up of the evidence substantially negatived the law which the learned judge had in terms communicated.

Where any witness whose evidence is challenged in vital matters stands alone, unsupported by any corroborative testimony or circumstance in an ordinary trial, the tribunal, whether judge or jury, is under an obligation to scrutinise it carefully, to seek its inconsistencies and to balance the probabilities of its accuracy and reliability. In a trial of the present character there is an extraordinary burden of investigation. The approach to the evidence which is challenged should be suspicious and critical. The approach should be an unreadiness, but not an unwillingness, to believe it after close scrutiny and careful consideration. In the circumstances which have arisen and as this was a trial by jury, it is undesirable that I should express any view on the case beyond what is necessary in order to indicate the grounds for my decision.

Colonel Wintle conducted his own appeal and, whilst he made his submissions with courtesy, care and skill, he did not, quite understandably, advance all his arguments in the form which would have been the most helpful to the court. The substance of his appeal was that his case was not put adequately and clearly before the jury and that to some extent it was put, at least in effect, inaccurately. He enumerated some sixteen points of detailed complaints. In a sense Col. Wintle had no substantive or affirmative case. It was a critical and analytical attack on the evidence given in support of the will and involved to a great extent an attack on the credibility of the defendant.

The case, therefore, was a difficult one and the task of the jury was a refined and detailed one which called for the most careful assistance by the judge in his summing-up. The importance and gravity of the case is that the testatrix at the time when she made her will in 1937 was sixty-six years of age. At the time of the codicil she was about two years older. When she died in December, 1947, her net estate was £68,000* and of that sum when death duties expenses and legacies have been accounted for no less than £44,000 goes by the will to the defendant, the solicitor who took the instructions and drew up the will without the testatrix receiving any independent advice or having the benefit of some independent person to read through the will to ascertain that she fully understood the effect of her dispositions, including the gift of a very substantial sum of money to the defendant, her solicitor. This being the position, the learned judge put the law and the issues before the jury simply and clearly, and my Lords have quoted the passages from the summing-up. It was made clear that the real issues before the jury were two questions—did the testatrix know and approve of the contents of the will and did she know and approve of the contents of the codicil? The judge spoke several times of the suspicion on the defendant and the obligation on him to remove the suspicion. The judge's direction in law was, as he stated, derived from the judgment of PARKE, B., in *Barry* v. *Butlin* ((1838), 2 Moo. P.C.C. 480) which was expressly approved and applied in *Fulton* v. *Andrew* ((1875), L.R. 7 H.L. 448) and in *Tyrrell* v. *Painton* ([1894] P. 151). I would recall part of PARKE, B.'s words (2 Moo. P.C.C. at p. 482):

> "... if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

Those are powerful words and give rise to the question whether in this case the court was vigilant and jealous in examining the evidence in support of the will. As I read it, and I have read it more than once, the summing-up, far from applying the approach required by law, leaned throughout strongly in favour of the defendant with scarcely a word of criticism and possible distrust for the jury's consideration.

It was a striking and, I think, unusual feature that neither in respect of the will which was said to be discussed over many months from October, 1936, to August, 1937, in some twenty-one interviews between the testatrix and the defendant, her solicitor, nor in respect of the later codicil, was there any independent evidence to support the defendant's version except the signature of the testatrix to the two documents. There was no document of a testamentary character in the handwriting of the testatrix. There was no supporting witness whose evidence went to show (even to a minor degree) the testatrix' knowledge of the extent of her estate or size of her residue or her wish

* The testatrix' estate was originally sworn at £82,000, but a corrective affidavit was filed subsequently increasing the gross amount to £115,000.

A to benefit the defendant substantially or at all. There were some points in the defendant's version, where one might have expected a corroborative document. For instance, he said that the testatrix did not wish to comply with his suggestion that there should be an independent solicitor. One might have expected him, in the circumstances, to have asked her to sign a statement to that effect; but it is sufficient to recognise that the defendant's evidence on all material matters stood alone, unsupported, uncorroborated. It therefore had to stand, as well it might, on its own strength in face B of all suspicion and criticism. A witness can stand alone, sometimes must stand alone, and may well be believed.

The first draft will which was drawn up and ready for signature in January, 1937, indicated that the testatrix' wishes were to leave her sister, Mildred Mary Wells, an annuity of £290; to leave each of her nieces Marjorie Wintle and Dorothy Wintle an annuity of £260; to make certain pecuniary legacies to relatives and specified hospitals and to leave the net residue to some eight hospitals including three to whom pecuniary legacies had also been given. It was on that foundation that the subsequent alterations C were made and the will finally signed which by cl. 5 left the residue of her estate to the defendant, his executors administrators and assigns, absolutely. The will was signed on Aug. 4, 1937, and included in cl. 1 (d) some provision for three charities. These were cancelled by a codicil signed by the testatrix on Nov. 13, 1939 (after the outbreak of war) for reasons given by the defendant, but which in fact had the effect of enlarging the residue (which went to the defendant) by the amounts of which the charities were deprived by the codicil. There was, therefore, much to explain and there has been D no complaint that the defendant's case was not put fully before the jury.

Some of Col. Wintle's complaints were somewhat trivial. It is not incumbent on a judge to review every point in his summing-up, and he is fully entitled to express criticisms and views for the consideration of a jury. In my opinion, however, two vital matters, at least, were not dealt with or not dealt with adequately. I propose to indicate them rather than review them in detail, still less to pronounce a judgment on them, as the case was tried by a jury. A passage in the evidence of the defendant appears as follows. He was being questioned by his counsel.

E

> " Q.—What alterations were made then on Apr. 28 ? A.—That was the occasion on which she told me that she was anxiously concerned for her sister Millie, who she regarded as her chief responsibility, and she had decided to leave out the bank and make me her sole executor and to leave me the residue of her estate . . . Q.—She said she was concerned with Millie, her sister. What reason did she give you, if any, for leaving you as the sole executor of this will and not jointly with the bank ? A.—Well, she said that she did not wish to leave Millie more than £600 F a year, which she knew would be against her mother's wishes, and in leaving me the residue of her estate I should be able to provide Millie with any further funds that she might need for her maintenance. She also added that she had no one else to whom she preferred to leave the residue of her estate, and there was no one else whom she could rely on to look after Millie. Q.—Did she say why Millie required looking after ? A.—Well, there was a fear, or shall I say some impression in the family, that she would be giving her money away, and she might in her advanced G years probably have done that sort of thing, in which case she would have to be financed."

That was to be carried out by cl. 5 of the will as originally drawn. The learned judge dealt with that in his summing-up in this way:

> " Then there is the clause about the letter. There is nothing very unusual in that. If you feel you can trust your executor it is a very easy way of dealing with anything that you may have forgotten or anything that might arise after you H have made a will: ' Oh, I think that I would like so-and-so to have a small legacy ' and you write a letter to your executor. It avoids legacy duty, and if you can trust him to it it is far easier than making a codicil."

Those words would be appropriate to a clause leaving to an executor a relatively small sum and a letter to guide him, but placing no legal obligation on him. It was not pointed out, however, to the jury that in this case the sum was not a trivial one. It was at the making of the will some £17,000 unexpended in legacies and a further £10,000 I to £12,000 which would fall into residue on the death of the legatees for whom specific sums were to be set aside—a total of £27,000 to £29,000. Was that all that was necessary to ensure that no one had been forgotten or provided for or that the testatrix' sister Mildred, if improvident with the £600 a year which would be available for her, could be assisted by the defendant in accordance with the testatrix' desire ? But the clause, if that was its purpose, was in fact a most remarkable one and of a most unusual character. So much so that the jury ought to have been invited to consider whether it was likely that it could have expressed the testatrix' wish. The draft clause at one time made the gifts of residue to the defendant personally. But by the time when the will was signed it was made to the defendant his executors, administrators and assigns absolutely " to the intent that this gift shall not lapse." If the defendant

predeceased the testatrix, his estate would still benefit and any moral obligation which he may have felt would have gone and this alleged delicate act entrusted to the family solicitor would pass to his executors administrators or assigns, whoever they might be. There never was a letter and none was asked for by the defendant. The jury might have thought that this clause, if it and its implications had been put fully before them for their consideration, did not remove suspicion but accentuated it.

Apparently in 1946 the defendant prepared a codicil because he was not happy about the expression " the gift shall not lapse ", and he said that the testatrix wanted to put the defendant's executors into her will so as to make them the same. The codicil was never signed. The defendant might well not have been happy about it and the jury might have considered whether or not the draft codicil that he prepared was the invention of his own mind to seek to improve a position which he knew was highly vulnerable.

The second major point is to be drawn from two letters, one of Dec. 8, 1947, written two days after the testatrix' death, and the other of June 21, 1948—" Kitty's [the testatrix'] only intimation to me was to make yours up to £120 per annum, if I thought it could be done ". The summing-up deals with that in this way—

> " You remember that the defendant did write a letter to Miss Marjorie Wintle, who was saying that the £40 a year was not enough, and the defendant said that he had a discretion to double it. Then, much later on, when she was again complaining, he said that he had a discretion to treble it. Well, it is for you to make up your mind whether the defendant was an evil person who, although he had got the bulk of the estate, was trying to pay as little as possible, or whether, being a busy man as a solicitor, in that first letter he may have made a mistake (there is nothing in the will about it, it is something that took place between him and the testatrix), that he had a discretion to treble it and had made a mistake in the first letter and said ' double ', or whether he was really an evil person who was trying to get every possible penny into his own pocket."

It is true that that aspect of the letter only went to the defendant's credibility as a witness and the jury were asked to consider whether he was an evil person, but the matter could hardly have been put forward more favourably to the defendant. If the truth was that he had been told that he could increase Miss Marjorie Wintle's legacy of £40 a year to £120, how could he on Dec. 8, 1947, say that he had been left a discretion to aim at doubling it ? That was a matter which went to credibility and accuracy and that was one of perhaps only three comparisons which were available to be made of conflicting statements. Why did he write the letter at all at that date ? Was it to appease Miss Marjorie Wintle ? Could not the jury have been invited to consider its sinister possibilities ?

That, however, was not the sting of the matter. In December the defendant says that his discretion was to be exercised " if funds permit " and in June, 1948, " if I thought that it could be done ". In these words the writer gives some evidence, perhaps the nearest evidence of the mind of the testatrix. The defendant had drawn up the figures which he says were put before the testatrix showing an estate of £50,000. He had been managing the estate for her and knew her properties and their revenue. He must have known that on any reasonable view there could be no doubt of the sufficiency of the revenue for this relatively small purpose. If he didn't know, how could the testatrix know ? If she in fact used those words, might not the jury have considered that she had no knowledge what her residue was, or that it would, in all probability, be substantial and the bulk of her estate, but must have regarded it as small and probably inadequate ? I would agree with counsel for the defendant's submission that, if the testatrix knew her residue was substantial, it would not be necessary for the defendant to prove that she knew precisely or even approximately the amount. There is, however, a vast difference between a residue which is the bulk of an estate and can be described as large on any view and a small uncertain balance after all obligations for expenses and legacies have been met. In my view these two matters called for careful review by the judge to the jury and by the jury themselves. Properly and fully considered, they might well have produced a different result.

Colonel Wintle strongly complained that in the summing-up the learned judge said—

> " I do not suppose for one moment you would sympathise with Colonel Wintle's motive in bringing this action. You remember that shocking letter which he wrote to the defendant—and one must say this in fairness to Col. Wintle—he was quite frank about it: he said the object of this action was to bring the defendant into court and to expose him. Well, you can have little sympathy with that motive. You see, really, he never had any interest in this estate at all; he only acquired an interest by getting one of the Wells' family to assign his or her interest (I forget whether it was male or female) to him, which has enabled him to stand in that person's place, and thereafter he would be entitled to one-thirtieth or one-thirty-first of the share of the estate if there was an intestacy."

The effect of those observations is not wholly removed by the judge continuing:

" You must not let that affect your minds, because it is in court now and thereafter all you have got to consider quite apart from the motive is—did this old lady know and approve of the contents of her will ? Forget the motive."

The jury might have agreed with the judge's view but there was another view for their consideration, namely, that Col. Wintle felt genuinely and acutely that an injustice had been done and far from this being a righteous transaction it was one which reflected the greatest discredit on the defendant. Colonel Wintle no doubt laid himself open to criticism and even before us did not hesitate to denounce the defendant. Motive, as the judge rightly said, did not matter, but if it was introduced there were two sides clearly open for the jury's consideration.

Then I think that there was some misunderstanding over the position of Miss Marjorie Wintle and it seems to have been left somewhat obscure at the trial. Miss Marjorie Wintle is Col. Wintle's sister and, as the summing-up pointed out, she was an obvious person to receive benefits from the testatrix. She had been a great friend to her and had nursed her when she was ill. Colonel Wintle took the steps that he did, as the judge says, for his sister Marjorie, because she had been so badly treated. But early in the summing-up the judge says—" If he were to win this action, Marjorie Wintle gets nothing. She has no claim on an intestacy, she is too distant a relative ". Much later on the judge says again—" We cannot put Marjorie in the will. If you decide against this will, Marjorie gets nothing ". It is true that the jury could not put Marjorie back into the will, but I do not understand that, as the result of arrangements which have been made, as indicated by MORRIS, L.J., Marjorie would get nothing if the will were not established.* A jury might well be influenced by the plaintiff if they thought that both his motives were questionable and that a verdict in his favour would bring no benefit to the one person who deserved to benefit.

Again, the learned judge directed the jury that the will and the codicil stood together.† If they found for the one they would find for the other and vice versa. This may be so, but I think that there was material on which the jury might have been asked to differentiate or to consider whether to differentiate or not.

On a new trial some of Col. Wintle's other points might well be pursued, but I could not regard them as sufficient in themselves to invalidate the summing-up.

As I have formed the view, which full consideration of my Lords' contrary opinions has not dispelled, that the defendant's evidence was not examined " vigilantly and jealously " before the jury, but too benevolently and favourably to the defendant, who had a heavy burden of proof and whose evidence had to be approached with criticism, indeed severe criticism, I would allow this appeal and order a new trial, unless the parties otherwise agree.

MORTIMER *v.* SAMUEL B. ALLISON LTD.

[HOUSE OF LORDS (Viscount Kilmuir, L.C., Lord Goddard, Lord Reid, Lord Tucker and Lord Keith of Avonholm), January 13, 14, March 4, 1959.]

Building—Building regulations—Demolition—Need and practicability of safety precautions—Breaking of floor board—" Collapse "—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948 *No.* 1145), *reg.* 79 (7).

The appellant was employed by the respondents, who carried out demolition work. He had been set to work in a building which had been seriously damaged by fire and was in course of demolition. In the first floor of the building a large hole had been made, through which debris was dropped from a higher floor into a lorry standing beneath the hole. Over a period of time, the edges of the hole had been repeatedly struck by pieces of rubble and debris which had been thrown down and had missed the hole. Debris thus collected on the floor, and from time to time had to be cleared by a workman who lifted it and threw it through the hole. The appellant had just completed such a clearance when a floor board broke or moved beneath his feet and he fell through the hole, sustaining serious injuries. The extent of the break according to the only witness who testified that he saw it was twelve inches by six inches. The appellant brought an action against the respondents for breach of statutory duty under reg. 79 (7) of

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* Cf. p. 562, letter H, ante; the attention of the jury was called to this point before they retired.

† See p. 562, letter A, ante.

the Building (Safety, Health and Welfare) Regulations, 1948* which required precautions to be taken, where necessary, by adequate shoring or otherwise to prevent the accidental collapse of any part of the building. The respondents had taken no precautions, but there was no evidence that there was any weakness in, or danger of, collapse of the joists or the beams which supported the floor, such evidence as there was being to the contrary. A

Held: the breaking off of part of a floor board was not a "collapse" of a part of the building within reg. 79 (7) of the Building (Safety, Health and Welfare) Regulations, 1948, nor was it established that in fact it had been "necessary to take precautions by shoring or otherwise" (within reg. 79 (7)) to support the floor to prevent the accidental collapse of any part of the building; therefore, there was no breach of duty on the part of the respondents under reg. 79 (7). B C

Per VISCOUNT KILMUIR, L.C.: "collapse" in reg. 79 (7) means the action of falling together, or a sudden shrinking together, or a giving-way through external pressure or loss of rigidity or loss of support (see p. 570, letter G, post).

Appeal dismissed.

[As to the building regulations, see 17 HALSBURY'S LAWS (3rd Edn.) 125-128, para. 206. D

For the Building (Safety, Health and Welfare) Regulations, 1948, reg. 79, see 8 HALSBURY'S STATUTORY INSTRUMENTS 239.]

Appeal.

Appeal by William Mortimer against an interlocutor pronounced by the First Division of the Court of Session in Scotland (the Lord President (LORD CLYDE), LORD CARMONT, LORD SORN and LORD GUEST), dated Mar. 14, 1958, setting aside the verdict of a jury sitting with LORD GUEST pronounced on Oct. 18, 1957. The facts appear in the opinion of VISCOUNT KILMUIR, L.C. E

L. H. Daiches, Q.C., and *Ewan Stewart* (both of the Scottish Bar) for the appellant.

W. I. R. Fraser, Q.C., and *R. I. Sutherland* (both of the Scottish Bar) for the respondents. F

Their Lordships took time for consideration.

Mar. 4. The following opinions were read.

VISCOUNT KILMUIR, L.C.: My Lords, this is an appeal against an interlocutor of the First Division of the Court of Session in Scotland, dated Mar. 14, 1958. G

The appellant was the pursuer in an action for damages for personal injuries against the respondents, who carry out demolition work and who employed him as a labourer at the date of the accident which caused his injuries. He had been set to work by the respondents in a building which had been seriously damaged by fire and was in course of demolition. In the first floor of the building a large hole had been made, through which debris was dropped from a higher floor into a lorry standing in a pend beneath the hole. Over a period of time, the edges of the hole had been repeatedly struck by pieces of rubble and debris thrown down and missing the hole. Debris thus collected on the floor, and from time to time had to be cleared by a workman lifting it and throwing it through the hole. The appellant had just completed such a clearance when the accident occurred. A floor board broke beneath his feet and the appellant, who was then turning away from the hole, fell through the hole, sustaining serious injury. H I

The appellant's case was based entirely on breaches of the Building (Safety, Health and Welfare) Regulations, 1948. At no time was the case based on negligence at common law in regard, for example, to system of work or provision of a safe place of working for the respondents' workmen.

* The text of reg. 79 (7) is set out at p. 569, letter E, post.

The appellant originally relied on two paragraphs; namely, para. (4) and para. (7) of reg. 79. Paragraph (4) deals with overloading, and para. (7) with the taking of precautions to prevent accidental collapse of any part of the building. The respondents took no plea to the relevancy of the appellant's case. Issues were allowed and approved in ordinary form. The case was tried on Oct. 17 and 18, 1957, by a jury sitting with LORD GUEST. The jury unanimously answered the issue for the appellant in the affirmative and assessed damages at £1,500. The respondents moved for a new trial on the grounds that the verdict of the jury was contrary to the evidence, and that the award of damages was excessive. On Mar. 14, 1958, the motion was heard by the First Division along with LORD GUEST. The respondents did not maintain that the award of damages was excessive. On that date, the First Division pronounced the interlocutor now appealed against. This interlocutor applied the procedure introduced by the Jury Trials Amendment (Scotland) Act, 1910, s. 2, and was a final interlocutor entering judgment for the party unsuccessful at the trial, namely, the respondents. At the hearing of the respondents' motion for a new trial, the appellant's case under reg. 79 (4) was not persisted in. It had, however, been deployed both in the pleadings and at the hearing before LORD GUEST and a jury. It is, therefore, impossible to say what influence it had in obtaining the affirmative answer from the jury. Before this House, no request was made for a new trial on this ground, and I have assumed that the jury must be taken to have formed a view favourable to the appellant on every point which arose at the trial with regard to taking precautions to prevent accidental collapse.

Paragraph (7) reads as follows:

> "Before demolition is commenced and also during the progress of the work precautions shall, where necessary, be taken by adequate shoring or otherwise to prevent, as far as practicable, the accidental collapse of any part of the building or of any adjoining building the collapse of which may endanger any person employed: Provided that this requirement shall not apply in relation to any person actually engaged in erecting or placing shoring or other safeguards for the purpose of compliance with this regulation if appropriate precautions are taken to ensure his safety as far as circumstances permit."

It is important to observe how the matter was put in the third condescendence. After alleging the overloading, the pleader goes on:

> "It was the effect of this overloading that the said floor was rendered unsafe and that part of it near the said hole ultimately gave way as condescended on. Moreover in the circumstances it was necessary to take precautions by shoring or otherwise to support the said floor to prevent the accidental collapse thereof or any part thereof. The [respondents] well knew, or ought to have known, that the said floor was only supported by facade and said walls, as previously condescended upon, that it had further been severely weakened by fire damage, by the making of a large hole at least four or five feet wide in it, by the said overloading with debris, and by the repeated striking of the edges of the said hole by falling pieces of debris. The [respondents] took no steps by shoring or otherwise to support the said floor and to prevent, as far as practicable, the accidental collapse thereof. Had the [respondents] carried out the statutory duties incumbent upon them the accident would not have occurred."

The argument of counsel for the appellant before this House can, I think, be fairly summarised as follows:—The floor had been burnt, there was damage to the edges of the hole, and the perimeter of the hole had been (I use his words),

> "subject to a bombardment of debris which had been thrown towards the lorry but had landed on this perimeter."

The perimeter was, therefore, in a weak condition, and the plank that broke

and caused the fall of the appellant formed part of the perimeter which was in the condition alleged. On this part of his argument, the appellant prayed in aid this sentence from the opinion of LORD GUEST:

> "There was evidence which the jury were entitled to believe that the condition of the floor in the vicinity of the hole was dangerous."

The argument went on to urge that the jury could have properly taken the view that the fact that this part of the floor was dangerous should have caused a reasonable man engaged on demolition to have anticipated that a collapse of part of the floor might occur; that, therefore, it would have appeared necessary to such a reasonable man to take precautions by shoring or otherwise to prevent a collapse; that, in fact, part of the floor did collapse; that this collapse caused the fall of the appellant; that no precaution at any time had been taken, and that a witness called for the respondents had conceded that, if the state of the floor had been appreciated as being dangerous, he would have taken precautions. These last words referred to certain cross-examination of the witness Mr. McKay, which was in the following terms:

> "Q.—But if in fact the floor surrounding this hole had been bombarded by falling debris do you not agree that it would have been a wise and practical precaution to have shored or strengthened the flooring in some way or another? A.—If that had been necessary I would have done so.
>
> "Q.—But if it had been bombarded in this way don't you agree that it would have been a necessary precaution to take? A.—Only if there was material damage being done.
>
> "Q.—Suppose for a moment that in fact the sides of the planking at the sides of that hole were being visibly damaged by falling debris would you not agree that some kind of precautionary measure should have been taken? A.—If it had been visibly damaged.
>
> "Q.—But, of course, you say you saw no such visible damage? A.—Nothing untoward."

The argument contained and developed the following criticism of the opinions of the First Division:—(1) That they misconstrued reg. 79 (7) by holding that the giving-way of the floor was not an accidental collapse of a part of the building within the meaning of the regulation; (ii) that they further misconstrued the regulation by holding that the only precautions which the employers were thereby required to take were precautions by shoring or by some method akin to shoring.

In my opinion, the word "collapse" in this regulation must be given its ordinary meaning, which is the action of falling together, or a sudden shrinking together, or a giving-way through external pressure or loss of rigidity or loss of support. When one has to consider the words "collapse of part of the building", I do not think that it is necessary to delimit precisely the size of the part so long as that part is sufficient to allow the action described in my definition to operate. There may well be circumstances where the giving way of part of a floor through pressure or loss of rigidity or loss of support might constitute the collapse of part of a building. There must always be some element of degree in deciding whether damage constitutes a collapse; nevertheless, wherever the line may be drawn in particular circumstances, there will remain occurrences which cannot fairly be described as collapses of, but only as damage to, a part of the floor. The view that I have formed of the meaning of "collapse" is supported by the terms of para. (5).

In the present case, there was evidence of the danger of finding either a broken floor board or a floor board which might crack and break under the foot of the workman. Nevertheless, giving full weight to the evidence, and to the quotation from LORD GUEST, I cannot find that there was evidence of a collapse in the true sense of that term. Equally, I am unable to say that the jury could have inferred, from the state of the perimeter and the fact that

floor boards might break, that a reasonable man experienced in demolition would have anticipated a collapse of the perimeter (that is the part of the floor round the hole), or that it would have appeared necessary to such a reasonable man that precautions should be taken by shoring or otherwise to prevent a collapse.

I now turn to the construction of the words " by shoring or otherwise ". It was accepted in the argument before us that shoring means support from below. In my opinion, the words " or otherwise " cover other physical measures to prevent collapse. Such " anti-collapse " measures, as they were called in the course of the argument, could include lateral support which might be provided by some external means or, it may be, by binding. The proviso to para. (7) which I have quoted is in accord with this construction. If this be the true meaning of " precautions by shoring or otherwise ", the extract relied on from the cross-examination of Mr. McKay leaves the matter too vague and too much in the air to help the appellant. Before us, it was suggested that the precautions which should have been taken were either a withdrawing of the men from the floor or a laying of battens or planks over the perimeter of the hole and so giving the workmen a new platform on which to walk and work. In my opinion, these suggested precautions are not within those precautions prescribed by the paragraph. Further, they do not appear to me to be within the case made against the respondents in the pleadings of failing to support the floor.

I say nothing as to whether the absence of the precautions suggested would have been relevant in an action differently framed. The case before us is confined to an allegation of non-compliance with this paragraph. That case fails and I would dismiss the appeal.

LORD GODDARD: My Lords, I have had the advantage of reading the opinion just delivered by the Lord Chancellor and entirely agree with it. I agree that the appeal should be dismissed.

LORD REID: My Lords, the appellant was employed by the respondents in demolishing a building in York Street, Glasgow, which had been seriously damaged by fire. In order to remove the debris of the upper floors, a hole was made in the floor of the lower storey through which this debris was thrown into lorries brought through a pend to a position immediately below this hole. Some of the material thrown down from above did not fall through the hole; it accumulated on the floor round about the hole. On the occasion of the accident on Feb. 2, 1955, the appellant went down to the first floor to clear this material away by throwing or pushing it through the hole. When he had finished this work, he was standing about a foot from the hole and something happened which caused him to lose his balance and fall through the hole, with the result that he sustained injuries for which he seeks damages in this action.

The ground of fault averred against the respondents is breach of reg. 79 of the Building (Safety, Health and Welfare) Regulations, 1948 (S.I. 1948 No. 1145). No common law liability is alleged. The appellant succeeded before a jury, and was awarded £1,500 damages. The respondents moved for a new trial on the ground that the verdict was contrary to the evidence, and by an interlocutor of Mar. 14, 1958, the First Division, with LORD GUEST who presided at the trial, set aside the verdict and assoilzied the respondents from the conclusion of the summons. This appeal is taken against that interlocutor. The appellant maintains that there is sufficient evidence to support the verdict of the jury; but if the verdict is set aside he does not seek a new trial. Originally, the appellant alleged breaches of both para. (4) and para. (7) of reg. 79. Before the First Division it was rightly admitted that there was no evidence of a breach of para. (4), and the sole question now is whether there was evidence on which the jury were entitled to find that the respondents were in breach of para. (7).

Regulation 79 sets out a number of safety provisions which must be observed

in the demolition of any building or substantial part of a building. Paragraph (7) provides: A

> " Before demolition is commenced and also during the progress of the work precautions shall, where necessary, be taken by adequate shoring or otherwise to prevent, as far as practicable, the accidental collapse of any part of the building or of any adjoining building the collapse of which may endanger any person employed: Provided that this requirement shall not apply in relation to any person actually engaged in erecting or placing shoring or other safeguards for the purpose of compliance with this regulation if appropriate precautions are taken to ensure his safety as far as circumstances permit." B C

The respondents took no such precautions; their case is that there is no evidence from which it could legitimately be inferred that any such precautions were necessary, and that, in fact, there was no " collapse " of any part of the building. To determine whether any such precautions were necessary, one must, I think, take the time immediately before the accident, and consider whether a reasonable man, skilled in this work and having made a proper inspection, would have thought that there was any danger of collapse of any part of the building which could be obviated or reduced by taking any such precautions. Counsel did not dispute that this was the proper test. D

There was no evidence that there was any weakness in, or danger of, collapse of the joists or the beams which supported the floor; the evidence was all the other way and, in fact, there was no collapse or movement of the joists or beams. The evidence on which the appellant relies related entirely to the floor boards. This evidence is confused but, for the present purpose, I must take those parts of it most favourable to the appellant, because the jury may have accepted those parts and rejected the rest. On that basis, the jury were, I think, entitled to hold that parts of the floor surface had been damaged either by fire or by the impact of heavy pieces of debris which had been thrown down from the upper stories and had struck this floor instead of passing through the hole as they ought to have done; and, further, that there had been some enlargement of the hole where the impact of such debris had broken away some pieces of the floor boards at the edges of the hole. The jury were also entitled to find that the appellant fell through the hole because the floor board on which he was standing moved. It is not at all clear why, or how, it moved, but there is, perhaps, just enough evidence to entitle the jury to think that it broke when the appellant put his weight on it. The breaking of that board is said to have been the " collapse " of a part of the building. It is argued that, although one may generally think of a collapse as the giving way or crumpling up of a fairly large part of a building, it is impossible to draw a line and say that the giving way of one part would be a collapse but the giving way in similar circumstances of a slightly smaller part would not. That kind of argument is of respectable antiquity, but, when one is dealing with the meaning of words, it can never be conclusive. I would agree that the breaking away of a whole floor, or a part of a floor, might well be held to be a collapse of a part of a building. But I find it impossible to apply that expression to the breaking off of a part of a single floor board, especially when I look at the context in which the word " collapse " is found. E F G H I

The paragraph requires that where necessary precautions shall be taken " by adequate shoring or otherwise " to prevent accidental collapse. Shoring would not be appropriate unless the part liable to collapse was substantial, and the words " or otherwise " appear to me to refer to other methods of physical

A support which may be adopted in some cases in preference to shoring. The proviso refers to "erecting or placing shoring or other safeguards", and this appears to me to confirm the meaning which, I think, should be given to the words "or otherwise"; it indicates that what the paragraph requires is the erecting or placing of something calculated to prevent collapse. Additional support might be given to the beams or the joists of a floor, but it would seem B to be impracticable to have afforded additional support to individual floor boards in this case, and additional support to the beams or joists would not have prevented the accident.

Counsel for the appellant relied on certain evidence given by Mr. McKay, who was employed by a firm of architects in connexion with the demolition C operations. In examination in chief he was asked:

> "Q.—Did you ever feel the slightest danger of collapse of the floor? A.—No, I did not.
>
> "Q.—If you had of course I take it you would have taken appropriate measures? A.—Yes, I would have stopped any more loading of the motors."

D That must refer to something more extensive than the giving way of a single floor board. Then in cross-examination:

> "Q.—But if in fact the floor surrounding this hole was being bombarded by falling debris do you not agree that it would have been a wise and practical precaution to have shored or strengthened the flooring in some way E or other? A.—If that had been necessary I would have done so.
>
> "Q.—But if it had been bombarded in this way don't you agree that it would have been a necessary precaution to take? A.—Only if there was material damage being done.
>
> "Q.—Suppose for a moment that in fact the sides of the planking at the sides of that hole were being visibly damaged by falling debris would you F not agree that some kind of precautionary measure should have been taken? A.—If it had been visibly damaged."

It was argued that the jury, accepting the evidence that there was visible damage at the sides of the hole, were entitled to take this as an admission that some kind of precautionary measure should have been taken. Be it so. But G what kind of precautionary measure? The matter was taken no further in evidence, and in argument only two suggestions were made—that the workmen should have been withdrawn from the area or that the floor boards near the hole should have been covered with sound timber which would not give way under a man's weight. It was not, and could not, reasonably be suggested H that individual floor boards should have been given support and that was clearly not what Mr. McKay meant. The case made by the appellant in his condescendence is that

> "in the circumstances it was necessary to take precautions by shoring or otherwise to support the said floor to prevent the accidental collapse I thereof or any part thereof."

There is nothing in the evidence from which it could be inferred that this was necessary, and if additional support had been given to the floor that would not have prevented this accident.

I have already stated my opinion that precautions of the kind now suggested in argument are not within the scope of the regulation. Regulation 79 is not a codification of all the employers' duties to workmen engaged in demolition. It is not co-extensive with the common law. It deals with certain particular

perils, and it requires, under penalty, that certain particular things shall be done. But it may often be proper that other unspecified things should be done to protect workmen from injury—proper in the sense that these things would be done by a careful and reasonable employer, and that if a workman is injured by reason of their not having been done he can recover damages from his employer at common law. But the employer will not be in breach of the regulation if he fails to do these things. It may be that a case could have been made at common law that precautions such as those now suggested in argument should have been taken. I express no opinion whether such a case could have succeeded; there might have been further evidence if such a case had been made. But, in my opinion, there is no evidence to support the appellant's case under the regulation and, therefore, this appeal should be dismissed.

LORD TUCKER: My Lords, I felt some doubt during the hearing of this appeal whether there was not sufficient evidence to justify the jury's verdict that the appellant's injuries had been caused by the accidental collapse of part of the building in course of demolition within the meaning of reg. 79 (7) of the Building (Safety, Health and Welfare) Regulations, 1948, and my doubt on this score has not even now been entirely resolved. Assuming a collapse, I am, however, of opinion that, once the allegation of overloading was abandoned, there was no evidence that the condition of the plank was such that a reasonable demolition contractor would have considered it necessary to take precautions by shoring or otherwise to support the floor which was the allegation made against the respondents in the appellant's condescendence 3. The occurrence, if technically a collapse of part of the floor, was not one which a reasonable man would have considered it necessary to guard against by shoring or by any other supporting device, having regard to the fact that there was no suggestion that the joists, the beams or the iron pillars supporting the floor were not at all times firmly in position.

I, therefore, agree that the appeal fails.

LORD KEITH OF AVONHOLM: My Lords, I find it unnecessary to go into all the points that have been argued on the construction of reg. 79 (7) of the Building (Safety, Health and Welfare) Regulations, 1948, for I think that, in the circumstances of this case, the appellant pursuer must fail on two grounds. On the most favourable reading for the appellant of the evidence placed before the jury the most that, in my opinion, can be said is that a plank of the flooring situated between two joists, on which the appellant was standing, broke under his foot, as a result of which the appellant was thrown off his balance and fell off the floor through the hole in the floor which had been made for the passage of debris. The extent of the break spoken to by the only witness who professes to have seen it is given as twelve inches by six inches. The plank itself was undisturbed, and the broken piece was left hanging to the plank. In my opinion, this occurrence cannot be regarded as an accidental collapse of part of a building in course of demolition. I arrive at this view on a general consideration of the purpose and content of the regulation and particularly of para. (7) of the regulation. The meaning of " collapse " may, I think, be gathered from the method by which the paragraph contemplates that accidental collapse may, not necessarily always but as far as practicable, be prevented, namely, " by adequate shoring or otherwise ". It stands to reason that no amount of shoring or other protection would prevent the fall of a small piece of damaged plaster or a loose brick, and I cannot conceive that such an occurrence would be called a collapse of part of a building. Nor would I describe a small break in a floor less than one foot square, caused by the weight of a man's foot, a collapse of

A part of the floor within the meaning of the regulation. It may be tempting to say that the question is one of degree, and so was a question of fact for the jury. There may be some cases where the question is one of degree, but this, in my opinion, is not one of them. This occurrence, in my view, is so remote from collapse that the question of degree does not arise.

B On another ground also I think the appellant must fail. It would never occur, in my opinion, to a reasonable man, by whom I mean a reasonable man experienced in, or capable of estimating, the risks associated with demolition work, that it was necessary to take precautions by shoring or otherwise against the breaking of the plank said to have happened here. The flooring was carried by pillars, beams and joists which were quite unaffected when the accident C happened, and there is no evidence to suggest that it should occur to anyone that it was necessary to give further support to the planking in between the joists. No such natural inference arises in the case of a floor carried on joists and, in my opinion, no evidence led by the appellant was sufficient to warrant the jury in holding that it would occur to a reasonable man that any such special necessity existed. In this I agree with the opinions of the judges of D the First Division.

On the view that I take, it is unnecessary to consider what is the ambit of the words in the regulation " by adequate shoring or otherwise ". It was argued that there was no room here for the application of the ejusdem generis rule because there was no enumeration of instances from which a genus could be E inferred. I am not satisfied that a genus cannot be found from the content of the word " shoring " and from the context in which the words are found. My impression is that the words cover any device that will tend to prevent the accidental collapse of a building or part of a building in course of demolition. But, as it is unnecessary to determine the point in this case, I offer no concluded opinion on it.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Asher Fishman & Co.*, agents for *John S. Boyle & Co.*, Glasgow, and *Allan McDougall & Co.*, Edinburgh (for the appellant); *Clifford-Turner & Co.*, agents for *Jno. Shaughnessy & M'Coll*, Glasgow, and *Allan, Dawson, Simpson & Hampton*, Edinburgh (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

PRACTICE NOTE

Legal Aid—Costs—Registration in magistrates' court of order for ancillary relief obtained in matrimonial cause.

It is considered that where an applicant for the registration* in a magistrates' court of an order for ancillary relief has a civil aid certificate which covers the obtaining of that order, the application for registration (whether made on or after the making of the order) may be regarded on taxation under the Legal Aid and Advice Act, 1949, as part of the proceedings for obtaining the order and not as proceedings for its enforcement.

Registrar's Circular
Feb. 25, 1959.

B. LONG,
Senior Registrar.

PRACTICE NOTE

[QUEEN'S BENCH DIVISION (Lord Parker, C.J.), February 12, 1959.]

Practice—Trial—Estimated length of trial—Joint responsibility of counsel, counsel's clerk and solicitors to tell Clerk of the List of estimated length of trial of case in warned list—R.S.C., Ord. 36, r. 9 (2).

LORD PARKER, C.J.: The Fixed List is for the convenience of parties, solicitors and counsel. It is quite impossible to work it unless the Clerk of the Lists is given full and accurate information from day to day as to the course of a case—whether there are negotiations for settlement, whether an issue has been withdrawn, whether medical reports have been agreed, and what is the probable length of the case. That is why R.S.C., Ord. 36, r. 9 (2), provides:

> "It shall be the duty of all parties to an action entered in any list to furnish without delay to the officer who keeps the list all available information as to the action being or being likely to be settled, or affecting the estimated length of the trial, and, if the action is settled or withdrawn, to notify that officer of the fact without delay and take such steps as may be necessary to withdraw the record."

That is never done now, and I am concerned about it. It can be done. Anybody who has been on circuit knows that with co-operation between whoever is making up the day's list, counsel, counsel's clerks and solicitors, a very accurate estimate of the length of a trial can be made. No attempt is made to do that in London.

The only course, if we are going to work these lists, is that it should be the joint responsibility of counsel and their clerks and solicitors to tell the Clerk of the Lists, as from the moment the case comes into the Warned List on Thursday of each week, exactly what the latest estimate of the length of trial is. Of course, if there is any alteration in the position between the date when the case comes into the Warned List and the fixing of the Daily Cause List, that duty continues up to the last moment. Only in that way can these lists be worked. It is for counsel to see that their clerks know the position.

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

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* Under Maintenance Orders Act, 1958, s. 2.

Re EMERY'S INVESTMENTS' TRUSTS. EMERY *v.* EMERY.

[Chancery Division (Wynn-Parry, J.), February 25, 26, 27, 1959.]

Conflict of Laws—Foreign law—Recognition—Revenue law—Whether court will allow presumption of advancement to be rebutted where the purpose was to contravene foreign revenue law.

Husband and Wife—Presumption of advancement—Rebuttal—Stocks purchased by husband in name of wife—Intention to evade foreign tax.

Between 1953 and 1955 a husband, who was a British subject resident in South America, acquired shares in American companies in the sole name of his wife, who was an American citizen, the intention being that the shares should belong beneficially to them equally. The reason why the shares were solely in the wife's name was to evade a Federal tax, which would have been payable if the interest of the husband, a non-resident alien, had appeared. Differences arose between the husband and the wife, and she sold the investments and retained the proceeds. The husband now claimed one half of the proceeds.

Held: the husband's claim failed because—

(i) though the intention, when the shares in companies were acquired, was that they should belong equally to the husband and the wife, yet the presumption of advancement arose and, as the reason for the shares being solely in the wife's name was the desire to evade deduction of tax, the husband would have been unable to rebut the presumption if the tax had been United Kingdom tax, because he would not have been able to set up his own illegality in support of a claim for equitable relief.

Gascoigne v. *Gascoigne* ([1918] 1 K.B. 223) followed.

(ii) similarly the court would not give its aid to the husband's claim in the present case, because it was based on an arrangement to contravene the revenue laws of a friendly foreign country.

Regazzoni v. *K. C. Sethia (1944), Ltd.* ([1956] 2 All E.R. 487) applied.

[Editorial Note. The decision in *Regazzoni* v. *K. C. Sethia (1944), Ltd.* ([1956] 2 All E.R. 487) was affirmed in the House of Lords ([1957] 3 All E.R. 286); reference may be made to the dictum of Viscount Simonds ([1957] 3 All E.R. at p. 292, letter D).

As to the enforcement of contracts in violation of the revenue laws of foreign countries, see 7 Halsbury's Laws (3rd Edn.) 80, para. 148, and Supplement.

As to the presumption of gift by a husband to his wife, see 19 Halsbury's Laws (3rd Edn.) 832, para. 1360; and for cases on the subject, see 27 Digest (Repl.) 147-149, *1072-1092*.]

Cases referred to:

(1) *Gascoigne* v. *Gascoigne*, [1918] 1 K.B. 223; 87 L.J.K.B. 333; 118 L.T. 347; 27 Digest (Repl.) 148, *1076*.

(2) *Regazzoni* v. *K. C. Sethia (1944), Ltd.*, [1956] 2 All E.R. 487; [1956] 2 Q.B. 505; *affd.* H.L., [1957] 3 All E.R. 286; [1958] A.C. 301; 3rd Digest Supp.

(3) *Government of India* v. *Taylor*, [1955] 1 All E.R. 292; [1955] A.C. 491; 3rd Digest Supp.

(4) *Stamp Duties Comr.* v. *Byrnes*, [1911] A.C. 386; 80 L.J.P.C. 114; 104 L.T. 515; 25 Digest 517, *119*.

Action.

In this action, the plaintiff claimed a declaration that certain shares in the capital of American companies were, when placed in the defendant's name,

held by her in trust for the plaintiff and defendant jointly; and alternatively, payment of one half of the proceeds of sale of the shares as being money had and received by the defendant to the use of the plaintiff. A

The plaintiff, a British subject, and the defendant, an American citizen, were husband and wife respectively and were married in 1935 in Montevideo (Uruguay). Since 1929 the husband had been employed by the Shell group and had fulfilled a succession of tours of duty in South America and Mexico. He was entitled to B hold dollars. In September, 1945, the husband opened a joint account in the names of himself and his wife with a branch of the Irving Trust Company in New York, which account was throughout fed by money belonging to the husband, but the wife was entitled to draw on it equally with the husband. The wife had no capital or source of income and this arrangement was an alternative to the husband providing the wife with a fixed allowance. In 1947 the C husband decided to invest a sum from the joint account monthly in United States Savings Bonds Series E., which were not unlike the British National Savings Bonds in that over the years they increased in value, but no interest was payable. Accordingly, the husband, by letter dated Nov. 14, 1947, wrote to the Irving Trust Company, returning a form authorising them to invest seventy-five dollars a month in the bonds deducting the purchase price from the joint account. D The letter ended " The co-owner will be my wife . . ." The court found that this made it clear that, from the outset of this first phase of the financial transactions, the bonds were to be held for the joint benefit of the husband and wife. As the husband was a non-resident alien of the United States it was found not to be permissible to issue these bonds to him. They were cancelled and further bonds were issued in the name of the wife with the husband expressly named as E her beneficiary; this was within the law applicable. This arrangement continued and these bonds were regularly acquired. The wife was trustee of the bonds and she and the husband were beneficiaries in equal shares. In October, 1953, the husband was advised that from a financial point of view he would do better to invest any moneys available in common stock of first class American companies rather than to continue to invest in savings bonds. Accordingly, by F letter dated Oct. 14, 1953, the husband wrote to the Irving Trust Company:

> ". . . My wife and I have decided to withdraw the holdings of U.S. Goverment Series E. bonds which you hold in her name. Would you kindly arrange to redeem them, and invest the proceeds in Shell Oil Company stock in [the wife's] name; we should like to buy one hundred shares in Shell, and the difference would be made up by charging it to our [joint] account." G

This was carried out and the shares were registered in the wife's name. In February, 1954, one hundred Royal Dutch Petroleum Co. " New York " shares were purchased and later converted guilder stock was purchased in that company and converted into " New York " shares. In February, 1955, one hundred shares common stock of Curtiss Wright Corporation were purchased and in H February, 1955, twenty shares common stock of General Motors Corporation were purchased. All these shares were registered in the name of the wife and the dividends were paid into the joint account; the Irving Trust Company merely held the certificates. In July, 1955, as a result of a conversation with the manager of the Irving Trust Company in New York, the husband was informed that the Irving Trust Company wished to regularise the position by opening a I custody account in the name of the wife and a special form for this purpose was given to the husband, who read it and was party to it in the sense that he procured his wife to execute it and to appoint him her attorney. This form was addressed to the Irving Trust Company by the person—the wife—in whose name the custody account was intended to be opened. It stated as follows:

> " Gentlemen: you are hereby authorised and requested to open a custody account in the name of the undersigned [the wife] and as custodian to hold

A any securities or other property deposited with you for such account for, and subject at all times to the instructions of the undersigned and subject to the terms set forth between . . ."

Then authority was given to exchange securities in temporary form for securities in definitive form, and also other authorities. The document continued:

B "Third: you are authorised to execute as agents in the name of the undersigned all declarations, affidavits and certificates of ownership now or hereafter required in collecting income and principal payments, inserting thereon the name of the undersigned as the owner of the securities, without indicating thereon that the undersigned's net income does not exceed the undersigned's personal exemption and other credits for Federal income tax C purposes. In the event the status of the undersigned is such that withholding of tax from such income is required, you are authorised to withhold the required amounts."

The status of the signatory—the wife—was set out as "Citizen of U.S.A. with legal residence in Brazil . . ." Below the signature of the wife then followed D "Delegation of Authority" which was a power of attorney in which the wife appointed the husband as her attorney with full and wide powers for dealing with the securities.

The husband and wife became estranged and on the advice of a lawyer, whom the wife consulted in New York after having been asked for a divorce by her husband, the wife on Nov. 30, 1955, removed all the securities from the Irving E Trust Company, as she was entitled to do under the terms of the document authorising the custody account. The husband being unaware of his wife's withdrawal of the securities in a letter, dated Feb. 6, 1956, acting on the power of attorney given him by the wife, requested the Irving Trust Company to sell the securities and by letter dated Feb. 7, 1956, he was informed that the securities had already been withdrawn by the wife. The wife sold the securities and the F question was whether the husband was entitled to any relief.

E. A. Morrison for the plaintiff, the husband.

H. E. Francis for the defendant, the wife.

WYNN-PARRY, J., stated the facts and continued: There can be no doubt that initially the savings bonds were held in the name of the wife as trustee G for the husband and the wife in equal shares so far as the beneficial interest was concerned. In my view, however, immediately the first new investment (viz., that of the shares in the Shell Oil Company) was made and registered in the wife's name, there being no longer any reference whatsoever to the husband having a beneficial interest, the equitable presumption of advancement arose, and it became necessary to answer the question why the shares were put into the name H of the wife.

There are, to my mind, two relevant intentions to be considered in this matter, and it is essential to recognise that circumstance and to distinguish between them. I find as a fact that the intention of the husband throughout was that the beneficial interest in the Shell Company's shares, and the others to which I have referred, should be as to half to the wife and as to the other half to him. I I do not find, in effect, that he intended the beneficial interest in the whole to be his wife's. That is not enough to carry the husband to success, because I still have to ask myself the question why, when the shares were registered in the wife's name, was there, contrary to what was done before, a complete omission of any reference to his having a beneficial interest? The evidence disclosed that, under the Federal law of the United States, where dividends are payable to a non-resident alien the recipient is liable to what is called a withholding tax which it is the duty either of the company declaring the dividend, or a body in the position

of the Irving Trust Company receiving the dividends from the company, to deduct. Also I am quite satisfied from the evidence which I have had before me that the husband in this case was well aware of that provision of the United States' taxation law. That is perfectly plain from the correspondence alone. [HIS LORDSHIP then referred to the correspondence and continued:] I am quite unable to proceed except on the view that the husband knew that there was this withholding tax and that he, as a non-resident alien, was liable to suffer deduction of tax in respect of his beneficial interest in the securities. Indeed, the husband, in para. 3 of his statement of claim puts this tax position in the forefront of his case, because he says:

> "By reason of the fact that the [wife], being an American citizen, is not liable to pay to the American government a withholding tax of thirty per cent. on the value of dividends earned in the United States which by an American Federal statute is chargeable to non-resident aliens of that country and for no other reason on the [husband's] instructions and with the concurrence of the [wife] each and all of the said shares on purchase were placed in the [wife's] name to be held by her for the joint benefit of the [husband] and of the [wife]."

In the circumstances which I have detailed, it is clear that, had the tax involved been United Kingdom income tax, this case would have been covered by *Gascoigne* v. *Gascoigne* (1) ([1918] 1 K.B. 223), and would have been concluded against the husband. The headnote in that case is as follows:

> "A husband took a lease of land in his wife's name and built a house upon it with his own money. He used his wife's name in the transaction with her knowledge and connivance because he was in debt and was desirous of protecting the property from his creditors. In an action by him against his wife for a declaration that she held the property as trustee for him:—*Held*, that he could not be allowed to set up his own fraudulent design as rebutting the presumption that the conveyance was intended as a gift to her, and that she was entitled to retain the property for her own use notwithstanding that she was a party to the fraud."

In the course of his judgment, LUSH, J., who gave the judgment of the Divisional Court, said (ibid., at p. 226):

> "His [the county court judge's] findings of fact must be taken to mean that the plaintiff, with his wife's knowledge and connivance, concocted the scheme of putting his property in her name, while retaining the beneficial interest, for the purpose of misleading, defeating, and delaying present or future creditors. This was the whole basis of the plaintiff's case, and it could not be put in any other way consistently with his claim to be owner of the property. It was the reason he himself gave for his conduct. Now, assuming that there was evidence to support the finding that the defendant was a party to the scheme which the plaintiff admitted, but without deciding it, what the learned judge has done is this: He has permitted the plaintiff to rebut the presumption which the law raises by setting up his own illegality and fraud, and to obtain relief in equity because he has succeeded in proving it. The plaintiff cannot do this; and, whether the point was taken or not in the county court this court cannot allow a judgment to stand which has given relief under such circumstances as that."

In the analysis it will be found that there were two relevant intentions in *Gascoigne* v. *Gascoigne* (1). The first was the intention of the husband that the house and land should, so far as the beneficial interest was concerned, be and remain his. The second intention was that he put the land and house into his wife's name with a view to protecting it from his creditors in case he should

get into financial difficulties. In this case the first intention, which corresponds to the first intention in *Gascoigne* v. *Gascoigne* (1) is the intention which I find that the husband had, viz., that throughout the beneficial interest in the securities should be shared between himself and his wife. The second intention which corresponds to the second intention in *Gascoigne* v. *Gascoigne* (1) is the intention which the husband had in putting the securities in his wife's name, without any reference being made to the retention by him of any beneficial interest, namely, to avoid payment of withholding tax on his beneficial interest.

As I take that view, I do not propose to traverse the evidence in any detail. I think that it is enough to say this. The wife, who gave evidence before me, was clearly a witness of the truth. She was completely frank, but her evidence did not help me very much because she said that on the occasion of each purchase no doubt her husband did tell her about it, but she paid little or no attention. She was grateful to him. She formed the impression that he was doing it for her, but she could not pledge herself at all as to the terms of any of the conversations. I think that it is in her favour as a witness that she should, without hesitation, give evidence such as that. It has the result that it is not of much help to me in arriving at a conclusion.

The husband, on the other hand, satisfied me by his evidence that his intention was that the beneficial interest should be shared, and there are various indications to support that, such as the retention of control and the payment of the dividends into the joint account. But matters such as the retention of control and the payment into the joint account cannot be decisive when once the equitable presumption of advancement has arisen, and it is necessary for the husband, in his endeavour to rebut that presumption, to assert that the property in question was put into his wife's name to avoid the payment on his beneficial interest of tax which would otherwise have been payable. So on the basis that the tax had been United Kingdom tax, it appears to me that *Gascoigne* v. *Gascoigne* (1) completely covers the present case.

I am dealing here not with United Kingdom income tax, but with the Federal tax of the United States of America. There appears to me, however, authority which binds me, viz., a case decided by the Court of Appeal, *Regazzoni* v. *K. C. Sethia (1944), Ltd.* (2) ([1956] 2 All E.R. 487). I need refer only to a passage in the judgment of DENNING, L.J., where he says (ibid., at p. 490):

> "It is perfectly true that the courts of this country will not enforce the revenue laws or the criminal laws of another country at the suit of that other country, either directly or indirectly. These courts do not sit to collect taxes for another country or to inflict punishments for it; and this is so even between countries of the Commonwealth, as the House of Lords held in *Government of India* v. *Taylor* (3) ([1955] 1 All E.R. 292). These courts will not enforce such laws at the instance of the foreign country. It is quite another matter to say that we will take no notice of them. It seems to me that we should take notice of the laws of a friendly country, even if they are revenue laws or penal laws or political laws, however they may be described, at least to this extent that, if two people knowingly agree together to break the laws of a friendly country or to procure some one else to break them or to assist in the doing of it, then they cannot ask this court to give its aid to the enforcement of their agreement."

It is true that it is unnecessary for me to find in this case—and I do not propose to embark on that task—that there was anything in the nature of an agreement between the husband and the Irving Trust Company to evade improperly the Federal tax laws of the United States. But the principle underlying that passage which I have read from the judgment of DENNING, L.J., and which was part of the ratio decidendi of his judgment, applies, in my view, to such a case as this where a non-resident alien of the United States has so arranged his

affairs that he has avoided paying the withholding tax which he ought to have paid, and which he would have had to pay if the beneficial interest had been, as it should have been, disclosed to the American authorities.

It was urged on me by counsel for the husband that all the husband had done was so to arrange his affairs as legitimately to lessen the tax which otherwise would have been payable, and he referred me to *Stamp Duties Comr.* v. *Byrnes* (4) ([1911] A.C. 386) a decision of the Privy Council. That was a case in which the testator in question had purchased some properties which he put into the names of his two sons by way of advancement, and subsequently received the rents and paid for rates and repairs. The Commissioner of Stamps made a claim against the executors in respect of the properties, contending that the gifts were made with an intent to avoid payment of duty within the meaning of the New South Wales Stamp Duties Act, 1898. The case turned purely on the evidence, and it was held that the transactions were not colourable but gifts out and out passing the properties to the sons to the exclusion of all interest in the father. That was quite a different case from the present. In the course of his judgment, LORD MACNAGHTEN said (ibid., at p. 392):

> " It may be that in making these advances Mr. Byrnes was not insensible to the advantage of diminishing the burthen of death duties, but there is nothing wrong in that. No one may act in contravention of the law. But no one is bound to leave his property at the mercy of the revenue authorities if he can legally escape their grasp."

There is the nub of the whole thing—" No one may act in contravention of the law ". In my view there was a clear breach of the Federal law in the way these transactions were carried out by the non-disclosure by the husband of his beneficial interest in the securities and in the dividends paid thereon. He comes to this court seeking the aid of equity, and in the state of the authorities, and on that evidence, it appears to me that it is impossible for this court to help him.

There was an alternative claim for return of half the proceeds of the sale of the securities on the basis of that half being money had and received by the wife to the use of the husband. In my view, once the equitable presumption of advancement arises, there is no room to entertain that common law claim. Either the presumption is rebutted, in which case the husband is entitled to his half share in the property, or, as I hold, it is not rebutted and the presumption remains. In the result, for the reasons which I have given, this action will be dismissed with costs.

Judgment for the defendant.

Solicitors: *Bull & Bull* (for the plaintiff); *Malkin, Cullis & Sumption* (for the defendant).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

A

PHILIPSON-STOW AND OTHERS *v.* INLAND REVENUE COMMISSIONERS.

[CHANCERY DIVISION (Upjohn, J.), January 12, 13, 14, February 10, 1959.]

B *Estate Duty—Passing of property—Foreign property—Immovable property—English will—Trust for sale—Death of life tenant—"Devolution" and "disposition"—Proper law of disposition—Finance Act*, 1949 (12, 13 & 14 *Geo.* 6 *c.* 47), *s.* 28 (2).

Estate Duty—Practice—Agreed statement of points of law—Settlement before master—Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 & 24 *Geo.* 5 *c.* 36), *s.* 3.

C A testator who made his will in 1898 and died in 1908 resident and domiciled in England thereby declared that it was his wish and intention that his will should be construed and operate "as far as the case admits" according to the law of England. He devised and bequeathed his residuary real estate (which included land in South Africa) and his residuary personal estate to his trustees on trust for sale with full discretion to postpone sale, and, after usual administrative directions and some bequests, he provided that the ultimate residue should be held as if the moneys or investments representing the same were capital moneys arising under the Settled Land Acts, 1882 to 1890, from his "settled estates". His "settled estates", which comprised property in Sussex, were directed to be held, in the events which happened, on trust for the testator's widow for her life with remainder to the testator's son for life, and on his death for the testator's grandson for his life. The will contained wide powers for the trustees to manage and cultivate real, leasehold and immovable property whether in England or abroad. At the death of the testator's son, who had survived the widow and died in 1954, the testator's residuary estate included land in South Africa remaining unsold. The land was immovable property by South African law and by virtue of s. 28 (2)* of the Finance Act, 1949, estate duty would not be leviable on the death of the testator's son unless the proper law regulating the disposition or devolution under which the property passed was English law.

Held: the South African land should be treated as having passed, for the purposes of estate duty, on the death of the testator's son, because the proceeds of sale so passed by virtue of a disposition (the testator's will) and because the proper law of that will was English, since it showed an intention (by reason particularly of the provision blending the ultimate residuary estate into one mass as capital moneys for the purposes of the Settled Land Acts, 1882 to 1890) that English law was to govern the dispositions made by the will; therefore, the South African land was not within the exemption from estate duty enacted by s. 28 (2) of the Finance Act, 1949.

Duke of Marlborough v. *A.-G.* (*No. 1*) ([1945] 1 All E.R. 165) applied.

A.-G. v. *Johnson* ([1907] 2 K.B. 885) considered.

Per CURIAM: where, as in this case, the issue of a summons under the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 3, follows long correspondence between the parties in which a large number of points of law are taken, it is very desirable that the parties should agree before the hearing precisely on what points they will rely. The points can be put into an agreed statement of points of law. This should be done when the matter is before the master, before whom it is desirable that counsel should attend to settle the statement (see p. 590, letters E to G, post).

* The terms of s. 28 (2) are set out at p. 587, letters A to C, post.

[As to estate duty and the test of liability in the case of foreign property, see 15 HALSBURY'S LAWS (3rd Edn.) 56, para. 111; and for cases on the subject, see 21 DIGEST 17, *89-96*.

For the Finance Act, 1949, s. 28 (2), see 28 HALSBURY'S STATUTES (2nd Edn.) 523; and for the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 3, see 9 HALSBURY'S STATUTES (2nd Edn.) 451.]

Cases referred to:

(1) *Wallace* v. *A.-G.*, *Jeves* v. *Shadwell*, (1865), 1 Ch. App. 1; 35 L.J.Ch. 124; 13 L.T. 480; 21 Digest 63, *413*.

(2) *Zetland* (*Earl*) v. *Lord Advocate*, (1878), 3 App. Cas. 505; 38 L.T. 297; 21 Digest 96, *702*.

(3) *Northumberland* (*Duke*) v. *A.-G.*, [1905] A.C. 406; 74 L.J.K.B. 734; 93 L.T. 88; 21 Digest 84, *602*.

(4) *Marlborough* (*Duke*) v. *A.-G.* (*No. 1*), [1945] 1 All E.R. 165; [1945] Ch. 78; 114 L.J.Ch. 83; 172 L.T. 21; 11 Digest (Repl.) 493, *1149*.

(5) *Re Anziani*, *Herbert* v. *Christopherson*, [1930] 1 Ch. 407; 99 L.J.Ch. 215; 142 L.T. 570; 8 Digest (Repl.) 549, *52*.

(6) *Re Moses*, *Moses* v. *Valentine*, [1908] 2 Ch. 235; 77 L.J.Ch. 783; 99 L.T. 519; 11 Digest (Repl.) 393, *504*.

(7) *Re Miller*, *Bailie* v. *Miller*, [1914] 1 Ch. 511; 83 L.J.Ch. 457; 110 L.T. 505; 11 Digest (Repl.) 391, *497*.

(8) *Re Berchtold*, *Berchtold* v. *Capron*, [1923] 1 Ch. 192; 92 L.J.Ch. 185; 128 L.T. 591; 11 Digest (Repl.) 366, *339*.

(9) *British South Africa Co.* v. *De Beers Consolidated Mines, Ltd.*, [1910] 2 Ch. 502; 80 L.J.Ch. 65; 103 L.T. 4; *revsd. on other grounds*, sub nom. *De Beers Consolidated Mines, Ltd.* v. *British South Africa Co.*, [1912] A.C. 52; 11 Digest (Repl.) 376, *405*.

(10) *A.-G.* v. *Johnson*, [1907] 2 K.B. 885; 76 L.J.K.B. 1150; 97 L.T. 720; 21 Digest 98, *718*.

(11) *Re White*, *Skinner* v. *A.-G.*, [1938] 2 All E.R. 691; [1939] Ch. 131; *affd.* H.L., [1939] 3 All E.R. 787; [1940] A.C. 350; 108 L.J.Ch. 330; 161 L.T. 169; Digest Supp.

(12) *A.-G.* v. *Belilios*, [1928] 1 K.B. 798; 97 L.J.K.B. 139; 138 L.T. 294; Digest Supp.

(13) *Re Cigala's Settlement Trusts*, (1878), 7 Ch.D. 351; 47 L.J.Ch. 166; 38 L.T. 439; 21 Digest 101, *732*.

Adjourned Summons.

The plaintiffs as trustees of the will dated Mar. 14, 1898, of the testator, Sir Frederic Samuel Philipson Philipson-Stow, deceased, applied to the court by originating summons for the following relief: that pursuant to s. 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, it might be determined whether the seven-eighth undivided shares in the property known as "Steenbokspan" situated in the Orange River Colony in the Union of South Africa (which undivided shares formed part of the residuary estate of the testator) (i) ought to be treated for the purposes of estate duty as excluded by virtue of s. 28 (2) of the Finance Act, 1949, or otherwise from the property passing on the death of Sir Elliot Philipson Philipson-Stow deceased or (ii) ought to be treated for such purposes as passing on such death.

The facts appear in the judgment.

R. Cozens-Hardy Horne for the plaintiffs, the trustees.

John Pennycuick, Q.C., and *E. Blanshard Stamp* for the defendants, the Inland Revenue Commissioners.

Cur. adv. vult.

Feb. 10. **UPJOHN, J.**, read the following judgment: The first question on this summons is concerned with the liability to estate duty of a foreign immovable which is subject to the trusts of a settlement created by the will dated Mar. 14, 1898, of Sir Frederic Samuel Philipson Philipson-Stow, who died on May 17, 1908, resident and domiciled in England. The immovable in question is a farm property known as " Steenbokspan ", situate in the Union of South Africa. At the date of his death, Sir Frederic owned a five-tenths undivided interest in this property. Since his death there have been certain changes and partitions, and the property now consists of a seven-eighths interest in a slightly smaller area of the farm. Nothing turns on this, however, or on the fact that the interest is an undivided share in land, because the argument of both sides has proceeded on the footing solely that the property is an immovable situate outside the United Kingdom. The claim to duty arises on the death of a tenant for life under the trusts of the testamentary settlement, viz., Sir Frederic's eldest son, Sir Elliot Philipson Philipson-Stow (hereinafter called " Sir Elliot "), who died on Sept. 23, 1954.

I shall turn at once to the relevant clauses of the will. By cl. 2, Sir Frederic declared as follows:

> " I declare that inasmuch as I have an English domicil it is my wish and intention that this my will and any codicil I may make shall be construed and operate as far as the case admits according to the law of England."

By cl. 3, Sir Frederic appointed executors and trustees, an appointment which was altered by a codicil dated May 6, 1908, which is otherwise immaterial. By cl. 4, Sir Frederic devised his Blackdown Estate near Fernhurst in the county of Sussex, which he defined as " my settled estates ", to the use of his wife for her life with remainder to his trustees for a term of one hundred years on trusts which have long since come to an end with remainder to the use of his eldest son, Sir Elliot, for his life, with remainder to the use of the first and every other son of Sir Elliot in tail male and with remainders over. By cl. 5, Sir Frederic directed that, if any person to whom an estate in tail male was limited, was born in his lifetime, the estate tail was to be cut down to a life interest. By cl. 25, Sir Frederic devised and bequeathed all his real and personal estate whatsoever and wheresoever situate or being either in the United Kingdom or in South Africa to his trustees on trust for sale and conversion, but with the fullest power and discretion to postpone such sale or conversion, and directed them out of the proceeds of sale and conversion to pay his funeral and testamentary expenses and debts and the legacies and annuities bequeathed by his will or any codicil and to invest the residue at the discretion of his trustees. Then by cll. 26 to 36, Sir Frederic directed his trustees to set aside out of his residuary estate portions for younger sons and for daughters. By cl. 37, Sir Frederic dealt with the ultimate residue of his estate as follows:

> " The ultimate residue of the said investments representing my said residuary estate after setting apart and appropriating the several funds aforesaid for the benefit of my daughters and younger sons shall be held by my trustees upon the trusts following (that is to say) Upon trust after providing thereout if need be for such keeping up and repair of my said mansion house and settled estates as aforesaid to pay the annual income thereof to my said wife during her life she maintaining and educating and keeping a home for my sons and daughters And after her death such ultimate residue shall be held by my trustees as if the moneys or investments representing the same were capital moneys arising under the Settled Land Acts, 1882 to 1890, from my said settled estates."

By cl. 39, Sir Frederic gave wide powers for investing capital money in the usual trustee securities, and, in addition, on the stocks funds shares or securities of any corporation company or public body municipal commercial or otherwise in the United Kingdom the Colonies of the Cape of Good Hope, Natal, Dominion of Canada or Australasia or in the Orange Free State or Transvaal Republic and to invest on the security of real estate in any of those colonies or states. By cl. 42, Sir Frederic gave to his trustees the widest powers of managing and cultivating the real leasehold and immovable property whether in England or abroad thereinbefore devised and bequeathed in trust for sale with all the powers of absolute owners. By cl. 44, he conferred on his trustees power to delegate to trustees resident in Cape Colony or elsewhere abroad the execution of the aforesaid trusts or powers in Cape Colony or elsewhere abroad.

The executors and trustees duly got in the residuary estate, paid all debts and legacies, and have made full provision for the younger sons' and daughters' portions. They have retained, and still retain, the land at Steenbokspan in exercise of their discretion to postpone sale. The income arising from this land was paid to Sir Frederic's widow during her life, and after her death in 1930 to Sir Elliot. Sir Elliot was succeeded by his son, the second Sir Frederic, in the enjoyment of the settled estates and capital moneys. The fee tail to the second Sir Frederic was cut down to a life interest in accordance with the provisions of cl. 5 of the will.

Liability to duty of a foreign immovable is now governed by the Finance Act, 1949, s. 28, but, before turning to that section, I propose to make some reference to the history of estate duty legislation in connexion with foreign property. By the Finance Act, 1894, s. 2 (2), property passing on the death of a deceased when situate out of the United Kingdom was exempt from duty unless, under the law then in force, legacy or succession duty was payable in respect thereof. For the purposes of this case, it throws one back to the Succession Duty Act, 1853, s. 2. That defined the terms "successor" and "predecessor", and provided that every past or future disposition of property by reason whereof any person had or should become beneficially entitled to any property or the income thereof on the death of any person and any devolution by law of any beneficial interest in property, or the income thereof, on the death of any person to any other person in possession or expectancy, should be deemed to have conferred or to confer on the person entitled by reason of such disposition or devolution a "succession" and the term "successor" should denote the person so entitled and the term "predecessor" should denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successors was derived. It was soon decided that some limitation must be placed on the very wide generality of the words used in the Act, and in *Wallace* v. *A.-G.*, *Jeves* v. *Shadwell* (1) ((1865), 1 Ch. App. 1), LORD CRANWORTH, L.C., decided that the Act only operated to tax persons "who become entitled by virtue of the laws of this country".

Section 2 of the Act of 1853 was considered in a number of authorities in the House of Lords. In *Earl of Zetland* v. *Lord Advocate* (2) ((1878), 3 App. Cas. 505), LORD HATHERLEY pointed out that the section contemplated two classes of cases where the succession might be claimed, viz., a disposition by the instrument under which he claimed or a devolution by law such as heirship or kinship. LORD MACNAGHTEN in *Duke of Northumberland* v. *A.-G.* (3) ([1905] A.C. 406), pointed out (ibid., at p. 410) that the terms "disposition" and "devolution" must have been intended to comprehend and exhaust every conceivable mode by which property could pass, whether by act of parties or by act of law.

The position with regard to estate duty on foreign property was amended by the Finance Act, 1936, but still depended principally on liability to succession duty. The Finance Act, 1949, abolished succession duty, and so new legislation for the limiting of claims to estate duty on foreign property became necessary

A in justice to the subject. That led to s. 28 (2), the relevant parts of which I will now read:

> "As respects property passing on the death of a person dying after the commencement of this Part of this Act, s. 2 (2) of the Finance Act, 1894 (which exempts from estate duty property situate abroad and not chargeable with legacy duty or succession duty), and s. 24 of the Finance Act, 1936 (which restricts the exemption conferred by the said sub-s. (2)), shall not have effect; but that property shall be deemed for the purposes of estate duty not to include any property passing on the death which is situate out of Great Britain if it is shown that the proper law regulating the devolution of the property so situate, or the disposition under or by reason of which it passes, is the law neither of England nor of Scotland and that one at least of the following conditions is satisfied, namely,—. . . (c) that the property so situate is, by the law of the country in which it is situate, immovable property . . ."

Counsel for the Crown concedes that condition (c) is satisfied. It seems to me reasonably clear that the draftsman of this sub-section had in mind the terms of the Succession Duty Act, 1853, and the judicial comments thereon, and that, in using the words "proper law", "disposition" and "devolution", he was really following the general scheme of the old Act as interpreted in the courts. In my judgment, "disposition" in the sub-section means a disposition by instrument, and "devolution" means a devolution by law such as kinship. These are true alternatives and are together exhaustive. I do not accept the argument of counsel for the subject that a passing might be both a devolution and a disposition; it is one or the other. The fact that, unlike the Succession Duty Act, 1853, the sub-section does not speak of a "devolution by law" but only of a "devolution", is, in my view, explained by the context of the language used in the sub-section. Even if a wider meaning be given to "devolution" as suggested, it does not seem to me to advance the argument, for the question how it devolves, must inevitably bring the answer that it devolves by Sir Frederic's testamentary disposition. However, it seems to me to be perfectly clear that in the case before me the property passed on the death of Sir Elliot under or by reason of a disposition (Sir Frederic's will) and not by devolution. The question, therefore, which I have to determine is what is the proper law of Sir Frederic's will concerning the Steenbokspan farm?

The term "proper law", though very familiar in commercial contracts for many years, seems first to have been used in connexion with contractual settlements by LORD GREENE, M.R., in *Duke of Marlborough* v. *A.-G.* (*No. 1*) (4) ([1945] 1 All E.R. 165 at p. 168). He compared as precisely analogous the proper law of a contractual settlement with the law of the domicil in the case of a testator. In that case, however, LORD GREENE, M.R., was principally concerned to show that the true test in connexion with liability to duties in the case of a settlement was the proper law of the settlement and not the forum for proceedings. It has not been suggested before me that the domicil of Sir Frederic is by itself decisive of the question that I have to determine. In the case of a settlement, *Duke of Marlborough* v. *A.-G.* (4) clearly decided that the proper law was a matter of the mutual intention of the parties to be ascertained from the terms of the settlement in the light of all relevant and admissible surrounding circumstances.

In the case of a will, what is meant by its proper law? In my view it is really in the nature of a modern statement of the test propounded by LORD CRANWORTH, L.C., in *Wallace* v. *A.-G.* (1) in the light of the later authorities, e.g., see *A.-G.* v. *Belilios*, from which I quote later*. I do not think that the parties seriously dispute that the proper law means the law which the testator must have intended to govern the relevant disposition in the will, but there they part.

* See p. 589, letters B to D, post.

Counsel for the subject put his case in two ways. First, he said that the proper law governing the disposition of a foreign immovable must necessarily be the lex situs; and, secondly, he submitted that, if that were not so, yet on the true construction of this will the proper law was the law of the Union of South Africa in relation to the farm situate there. On the first point he really based his case on the well-known rule relating to immovables to be found in DICEY'S CONFLICT OF LAWS (6th Edn.), p. 529, which I will read:

> " 127. All rights over, or in relation to, an immovable (land) are (subject to the exceptions hereinafter mentioned) governed by the law of the country where the immovable is situate (lex situs)."

The rule was approved by MAUGHAM, J., in *Re Anziani, Herbert* v. *Christopherson* (5) ([1930] 1 Ch. 407 at p. 424). Counsel submitted rightly that all questions of transmission on death of foreign land must be decided by the lex situs, as must the rights of succession. Thus all questions of succession on intestacy and the validity of any testamentary disposition of foreign land must necessarily be determined by the lex situs, as must the incidence of enjoyment of such land: see, for example, *Re Moses, Moses* v. *Valentine* (6) ([1908] 2 Ch. 235); *Re Miller, Bailie* v. *Miller* (7) ([1914] 1 Ch. 511, per WARRINGTON, J., at p. 519). Counsel also relied on the decision of RUSSELL, J., in *Re Berchtold, Berchtold* v. *Capron* (8) ([1923] 1 Ch. 192), who held that the succession on intestacy to proceeds of sale of English land held on trust for sale but not yet sold is determined by the lex situs and not by the domicil of the intestate. So he submitted that, although the foreign land is held on trust for sale, you must look at realities, and you find in fact foreign land the succession to which must necessarily be governed by the lex situs, and that Sir Frederic must have intended that law to be the proper law of the disposition.

The Crown's case on the first point may simply be stated thus. The question of the proper law depends on the testator's intention, which you must ascertain in accordance with the principles laid down in *Duke of Marlborough* v. *A.-G.* (4), i.e., on the true construction of the will in the light of all admissible surrounding circumstances, what is the law which the testator has chosen to apply to his disposition of the Steenbokspan farm. It matters not, counsel submitted, that on a death the title to foreign land and the validity of the dispositions in the will concerning that land must necessarily depend on the lex situs. Counsel concedes that rights in relation to foreign land which are inconsistent with the local law cannot be created by will, but he submits that that does not preclude the settlor from choosing the law of another country to govern his dispositions in relation to that land so far as those dispositions are valid. He points out that in commercial contracts the proper law may be that of this country, though it relates to rights and obligations with regard to a contract to grant a mortgage in a foreign country: *British South Africa Co.* v. *De Beers Consolidated Mines, Ltd.* (9) ([1910] 2 Ch. 502). He relies strongly on *A.-G.* v. *Johnson* (10) ([1907] 2 K.B. 885), which he submits really covers this case. In that case a testator domiciled in England left the residue of his real and personal estate, which included a tea estate in Assam, to trustees on trust for sale and conversion and to pay certain annuities and to pay the surplus income to certain named persons and to the survivors of them in equal shares. The trustees, under a power contained in the will, retained the Assam estate. On the death of two of those entitled to surplus income, the question arose as to succession duty, and therefore estate duty, on shares of income accruing to the survivors. BRAY, J., held that the Assam estate, being held on trust for sale, must be treated as property in this country and liable to duty. I will not quote from the judgment, for, as SIR WILFRID GREENE, M.R., pointed out in *Re White, Skinner* v. *A.-G.* (11) ([1938] 2 All E.R. 691 at p. 696), the grounds of the decision are not clearly

A expressed. It does not bind me for it was a decision on a different Act. Furthermore, the Crown, through counsel, has expressly disclaimed any reliance on that part of the judgment which treated the property in Assam as an English chose in action. However, as a matter of decision, it is of great persuasive authority, for it was quoted without disapproval by SARGANT and LAWRENCE, L.JJ., in *A.-G.* v. *Belilios* (12) ([1928] 1 K.B. 798), and described during the course of B argument by LORD HANWORTH, M.R., as a very plain case. SARGANT, L.J., said (ibid., at p. 821):

> "In *A.-G.* v. *Johnson* (10) the succession held taxable was in property in Assam remaining unsold, but the succession was created by an English will devising the property to English trustees upon trust to sell and hold C for beneficiaries here. The law creating and governing the trust was English."

And LAWRENCE, L.J., said this ([1928] 1 K.B. at p. 827):

> "*Re Cigala's Settlement Trusts* (13) ((1878), 7 Ch.D. 351), and *A.-G.* v. *Johnson* (10) are cases where the trusts were established by persons domiciled D in England and were English settlements from the moment when they were made, therefore constituting dispositions under which the beneficiaries claimed title by virtue of the laws of England."

The test laid down by the Act is that of the proper law of the disposition, and, in my judgment, that is essentially a question of the intention of the testator to be ascertained on the true construction of the disposition in the light of all E the relevant surrounding circumstances. I do not accept the submission that the proper law of a testamentary disposition of foreign land must necessarily be the lex situs. That certainly is not true of contracts relating to foreign land: see, for example, DICEY'S CONFLICT OF LAWS (6th Edn.), p. 541, rule 127, exception 1, and I see no reason why a different rule should apply to a testamentary disposition. Furthermore, it would be quite inconsistent with the F observations of SARGANT and LAWRENCE, L.JJ., in *A.-G.* v. *Belilios* (12), which I have just quoted. Both lords justices plainly recognised that English law might govern a testamentary disposition of foreign land. It is, as I have said, a question of construction of the will, in the light of all the surrounding circumstances.

G I turn then to the second point of counsel for the subject, that, on the true construction of Sir Frederic's will, the proper law in relation to the Steenbokspan land is the lex situs. He submitted that there was no effective trust for conversion, for such a trust is only interposed to regulate the rights of the beneficiaries inter se and there is no conflict here. He drew attention to the undoubtedly very wide power to postpone sale and to manage and delegate management, H and also to the wide powers of reinvestment in South Africa. He pointed out, rightly, that, if the land were to be sold, the proceeds might be reinvested in a mortgage of land in South Africa. He suggested that on the true construction of the Settled Land Act, 1925, s. 73, the proceeds might be applied in the purchase of land in South Africa. I do not propose to decide whether that is so or not, but I will assume it to be so. Nevertheless, looking at the will of the I testator as a whole, it seems to me reasonably clear that he wanted English law to govern all the dispositions contained in his will. First, he said so in cl. 2, "as far as the case admits". Secondly, he wanted all his residuary estate wherever situate to be sold and applied first to pay legacies and make provision for younger children, next to provide an income for the upkeep of his mansion house, and the maintenance of his widow, and, finally, the residuary moneys were to be treated as capital moneys arising from "my settled estates". In my judgment, Sir Frederic has shown quite clearly that he wanted everything,

after providing for legacies and younger children, to go in one mass as capital moneys, for the benefit of his English settled estate, and that seems to me the strongest possible reason for coming to the conclusion that the testator intended English law to govern the whole of his dispositions notwithstanding the very wide administrative powers and discretions conferred on the trustees.

Counsel for the Crown in his argument conceded that different testamentary dispositions in the same will might have different proper laws, depending on the true construction of the will. Thus, if a testator devised foreign land to be enjoyed in specie by a number of persons in succession, it must almost necessarily follow that he intended the lex situs to govern the disposition, for only by an appeal to such law could the devisees enforce their rights. On the other hand, I would not regard a gift of foreign land to persons in succession, such gift taking the form of vesting the land in trustees for such persons, as necessarily leading to the conclusion that the testator intended English law to apply; it is a question of construction in each case. What seems to me decisive of this case is the blending of the whole of residue into one mass to be held as part of the testator's English settled estate.

I propose to answer the first question on the summons by saying that the seven-eighth undivided shares in the Steenbokspan estate ought to be treated for the purpose of estate duty as included as passing on the death of Sir Elliot.

This summons was taken out under the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 3, the terms of which make it clear that the subject must be the plaintiff, though the Crown is the claimant. As frequently happens in these cases, the issue of the summons followed long correspondence between the parties in which apparently a large number of points of law were taken by the Crown. Counsel for the subject, in opening this case, therefore, perfectly properly had to deal with all these points in his opening. When it came to the Crown's turn, all these points, except the two with which this judgment has been concerned, disappeared, and much of counsel's opening was wasted time through no fault of his own. In my experience, this happens from time to time in estate duty cases. Where, therefore, the argument between the parties has ranged over a large number of points in correspondence, it seems very desirable that the parties should agree before the hearing precisely on what points they will rely at the hearing. These points can be put into an agreed statement of points of law so that the court and the parties know exactly what issues of law they will have to meet at the trial. The suitable time for this to be done would seem to be when the matter is before the master, before whom it is desirable that counsel should attend to settle the statement where it is necessary.

Declaration accordingly.

Solicitors: *Norton, Rose & Co.* (for the plaintiffs); *Solicitor of Inland Revenue.*

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

BULLOCK (INSPECTOR OF TAXES) v. UNIT CONSTRUCTION CO., LTD.

[COURT OF APPEAL (Jenkins, Romer and Pearce, L.JJ.), January 20, 21, 22, February 12, 1959.]

Income Tax—Residence—Company—Place where management and control is exercised—Subsidiary company in East Africa—Parent company in fact exercising central management and control in London—Finance Act, 1953 (1 & 2 *Eliz.* 2 *c.* 34), *s.* 20 (9).

Three wholly owned subsidiary companies of a parent company resident in the United Kingdom were resident in East Africa. The subsidiary companies were registered there and carried on business there, their directors were resident there and the subsidiary companies' articles of association provided that board meetings and company meetings should be held anywhere except in the United Kingdom. The controlling power and authority over each subsidiary company, which by its constitution were vested in its board of directors, were exercised in fact to a very substantial extent by the board of the parent company. An English subsidiary of the parent company sought to deduct, in the computation of its profits for income tax purposes, payments made to the African subsidiary companies under s. 20 of the Finance Act, 1953, as being subvention payments to associated companies. By s. 20 (9) of the Act of 1953 a company could not be an "associated company" unless it was resident in the United Kingdom.

Held: the African subsidiary companies had not a second residence in the United Kingdom by virtue of the de facto control of them being exercised there, because only the place where the controlling power derived from the constitutions of the subsidiaries was to be found was relevant in determining their residence, and the constitutional control of the subsidiaries was vested in their directors in East Africa; therefore the payments were not deductible, for the African subsidiary companies were not associated companies within s. 20 (9) of the Finance Act, 1953.

Dicta of LORD LOREBURN, L.C., in *De Beers Consolidated Mines, Ltd.* v. *Howe* ((1906), 5 Tax Cas. at p. 213), of HAMILTON, J., and of LORD HALSBURY in *American Thread Co.* v. *Joyce* ((1913), 6 Tax Cas. at pp. 18 and 165) and of LORD SUMNER in *Todd* v. *Egyptian Delta Land & Investment Co., Ltd.* ((1928), 14 Tax Cas. at p. 151) explained.

Appeal from an order of WYNN-PARRY, J. ([1958] 3 All E.R. 186) dismissed.

[As to residence of a company for income tax purposes, see 20 HALSBURY'S LAWS (3rd Edn.) 302, para. 552, 395, para. 723; and for cases on the subject, see DIGEST Supp.

For the Finance Act, 1953, s. 20 (9), see 33 HALSBURY'S STATUTES (2nd Edn.) 123.]

Cases referred to:

(1) *Swedish Central Ry. Co., Ltd.* v. *Thompson*, [1925] A.C. 495; 94 L.J.K.B. 527; 133 L.T. 97; 9 Tax Cas. 342; 28 Digest 28, *144*.

(2) *Gramophone & Typewriter, Ltd.* v. *Stanley*, [1908] 2 K.B. 89; 77 L.J.K.B. 834; 99 L.T. 39; sub nom. *Stanley* v. *Gramophone & Typewriter, Ltd.*, 5 Tax Cas. 358; 28 Digest 30, *153*.

(3) *De Beers Consolidated Mines, Ltd.* v. *Howe*, [1906] A.C. 455; 75 L.J.K.B. 858; 95 L.T. 221; 5 Tax Cas. 198; 28 Digest 30, *155*.

(4) *American Thread Co.* v. *Joyce*, (1913), 108 L.T. 353; 6 Tax Cas. 1, 163; 28 Digest 30, *157*.

(5) *San Paulo (Brazilian) Ry. Co.* v. *Carter*, [1896] A.C. 31; 65 L.J.Q.B. 161; 73 L.T. 538; 60 J.P. 84, 452; 3 Tax Cas. 407; 28 Digest 28, *142*.

(6) *Egyptian Delta Land & Investment Co., Ltd.* v. *Todd*, [1929] A.C. 1; 98 L.J.K.B. 1; 140 L.T. 50; sub nom. *Todd* v. *Egyptian Delta Land & Investment Co., Ltd.*, 14 Tax Cas. 119; Digest Supp. A

(7) *Union Corpn., Ltd.* v. *Inland Revenue Comrs., Johannesburg Consolidated Investment Co., Ltd.* v. *Inland Revenue Comrs., Trinidad Leaseholds, Ltd.* v. *Inland Revenue Comrs.*, [1952] 1 All E.R. 646; *affd.*, H.L., [1953] 1 All E.R. 729; [1953] A.C. 482; 34 Tax Cas. 207; 3rd Digest Supp. B

(8) *Koitaki Para Rubber Estates, Ltd.* v. *Federal Comr. of Taxation*, (1940), 64 C.L.R. 15, 241.

(9) *Scottish Co-operative Wholesale Society, Ltd.* v. *Meyer*, [1958] 3 All E.R. 66.

(10) *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co. (Great Britain), Ltd.*, [1916] 2 A.C. 307; 85 L.J.K.B. 1333; 114 L.T. 1049; 9 Digest (Repl.) 573, *3780*. C

Appeal.

The taxpayers appealed to the Special Commissioners of Income Tax against assessments to income tax made on them under Case I of Sch. D to the Income Tax Act, 1952, for 1953-54 in the sum of £110,000 less £36,388 capital allowances and for 1954-55 in the sum of £200,000 less £50,000 capital allowances. The D appeal concerned payments made by the taxpayers which they claimed to deduct in computing their profits for the purposes of the assessments as follows: £15,000 paid to Booth & Co. (Africa), Ltd., in 1952; £8,000 paid to Booth & Co. (Africa), Ltd., in 1953; £29,000 paid to Booth & Co., Ltd. in 1952; £27,500 paid to Booth & Co., Ltd., in 1953; £33,000 paid to Bulleys Tanneries, Ltd., in 1952; £11,500 paid to Bulleys Tanneries, Ltd., in 1953. The sole question in dispute E was whether the three companies receiving the payments were companies resident in the United Kingdom in 1952 and 1953 within the meaning of s. 20 (9) of the Finance Act, 1953. It was common ground that, if they were so resident, the payments were subvention payments which the taxpayers were entitled to deduct in computing their profits under s. 20. The taxpayers were an English wholly owned subsidiary and the three companies were wholly owned African F subsidiaries of the parent company, Alfred Booth & Co., Ltd.

The facts in the Stated Case are set out in the report of the appeal before WYNN-PARRY, J. ([1958] 3 All E.R. 186 at pp. 187-190), whose judgment was approved by the Court of Appeal.

The taxpayers contended that each of the African subsidiaries was resident in the United Kingdom within s. 20 (9) of the Finance Act, 1953, and that the G taxpayers were accordingly entitled to deduct the payments made to the subsidiaries. The Crown contended that none of the African subsidiaries was resident in the United Kingdom and the taxpayers were not entitled to the deductions claimed. The commissioners found that the boards of directors of the African subsidiaries were standing aside in all matters of real importance and in many matters of minor importance affecting the central management and control and H that the real control and management was being exercised by the board of directors of the parent company in London. They also found that the controlling power and authority, which according to the constitution of each of the African subsidiaries was vested in its board of directors, was actually exercised to a very substantial degree by the board of the parent company in London. They held that, once that was found as a fact, it was not necessary to go further I and inquire whether such power and authority was exercised under the constitution of the company concerned by the officers to whom such constitution gave it; and they held that each of the African subsidiaries was resident in the United Kingdom in 1952 and 1953. They reduced the assessments to £46,546 (less £37,110 capital allowances) for 1953-54, and to £163,477 (less £54,712 capital allowances) for 1954-55. On appeal by the Crown by way of Case Stated, WYNN-PARRY, J., held ([1958] 3 All E.R. 186) that the payments could not be deducted,

since the subsidiary companies were not resident in the United Kingdom and so were not associated companies within s. 20. The taxpayers appealed to the Court of Appeal.

Heyworth Talbot, Q.C., and *J. L. Creese* for the taxpayers.
Roy Borneman, Q.C., and *A. S. Orr* for the Crown.

Cur. adv. vult.

Feb. 12. **JENKINS, L.J.:** The judgment which is about to be read by ROMER, L.J., is the judgment of the court in this case.

ROMER, L.J.: The question on this appeal is whether three wholly owned subsidiary companies of Alfred Booth & Co., Ltd., namely, Booth & Co. (Africa), Ltd., Booth & Co., Ltd., and Bulleys Tanneries, Ltd. (hereinafter collectively referred to as " the subsidiaries "), were in 1952 and 1953 resident in the United Kingdom for the purposes of s. 20 of the Finance Act, 1953. The Special Commissioners held that they were, but their decision was reversed by WYNN-PARRY, J., on the ground that it was wrong in law. The taxpayers, Unit Construction Co., Ltd., who are concerned to uphold the decision of the Special Commissioners, have appealed to this court against the learned judge's order.

It was admitted on behalf of the taxpayers before the commissioners that the subsidiaries were at all material times resident in East Africa. We think it is quite clear that this admission was rightly made and, as every possible step was taken, when the subsidiaries were incorporated in 1948 and 1949, to ensure beyond possibility of doubt that their residence should be regarded as being in East Africa, and as their articles of association were never altered, it would have been virtually impossible for the taxpayers to have contended to the contrary. As the learned judge observed in his judgment ([1958] 3 All E.R. at p. 190):

> " Not only were all those companies registered in East Africa, but they carried on business there; the members of the respective boards were resident there; and the articles of association provided in each case that the board meetings and general meetings of the company concerned could be held anywhere except in the United Kingdom."

The fact that in 1952 and 1953 the subsidiaries were resident in East Africa is naturally somewhat embarrassing to the contention that in those years they were resident in the United Kingdom. It is not, however, in any way destructive of that contention, because, ever since the decision of the House of Lords in *Swedish Central Ry. Co., Ltd.* v. *Thompson* (1) ((1925), 9 Tax Cas. 342), it has been well established that, for income tax purposes, a company can simultaneously have two " residences " in different countries. The view of the Special Commissioners that during the relevant period the subsidiaries could properly be regarded as resident in the United Kingdom as well as in East Africa was based on their finding that each of these companies was controlled and managed by the parent company, Alfred Booth & Co., Ltd., which is incorporated and resident in England. The commissioners say in the Stated Case:

> " We find that the position was at the material times that the boards of directors of the African subsidiaries (who are the people one would have expected to find exercising control and management) were standing aside in all matters of real importance and in many matters of minor importance affecting the central management and control, and we find that the real control and management was being exercised by the board of directors of Alfred Booth & Co., Ltd., in London . . . We find the controlling power and authority, which according to the constitution of each of the African subsidiaries is vested in its board of directors, is actually exercised, to a very substantial degree, by the board of Alfred Booth & Co., Ltd., in London."

The reasons for these findings, and the facts on which they are based, are stated with great care and clarity in the Case, and there is no doubt but that the findings are fully warranted. The only question before the learned judge, as it is before us, was whether those findings justified the commissioners' conclusion in law that the subsidiaries had a residence in the United Kingdom. Having found as a fact that the controlling power and authority over the subsidiaries was actually exercised by the parent company in London, the commissioners held, on their understanding of the authorities, that

> "it is not necessary to go further and inquire whether such power and authority is exercised under the constitution of the company concerned by the officers to whom such constitution gives it."

It is on that issue of law that the learned judge differed from the Special Commissioners and it is that issue which has been brought to this court for decision.

The question, in its briefest form, may be illustrated and posed as follows: Company A, resident in one country, is de facto, but not de jure, managed and controlled by company B, which is resident in another. Is a dual residence to be attributed to company A by reason of this de facto management and control? The Special Commissioners in effect answered this question in the affirmative. The learned judge came to a different conclusion and he expressed it in a judgment with which we so wholly agree that we would be content to adopt it as our own, both in its reasoning and in its language. Out of deference, however, to the arguments which were addressed to us by both counsel for the taxpayers, we will state as shortly as possible in our own words the reasons why, as it seems to us, the appeal must fail.

Leading counsel for the taxpayers submitted in support of his case the following three propositions: (i) the powers of shareholders as such do not invest them with the central management and control of the company's business; (ii) but, where a company is a wholly owned subsidiary, the powers of the parent company with regard to the dismissal of directors and the provision of finance on which the conduct of the subsidiaries' business may depend put the parent company in a position to assume and exercise de facto the management and control of the company's business; (iii) whether or not the parent company assumes an exercise de facto of the management and control of the subsidiary's business is a question of fact.

For our part we are prepared to accept each of these propositions as correct. The first of them is clearly established by the decision of this court in *Stanley* v. *Gramophone & Typewriter, Ltd.* (2) ((1908), 5 Tax Cas. 358). WYNN-PARRY, J., referred to this case in his judgment and cited extracts from the judgments of SIR H. H. COZENS-HARDY, M.R., and of BUCKLEY, L.J. We need not repeat them, but would refer only to a few passages from the judgment of FLETCHER MOULTON, L.J., which are perhaps of equal interest and relevance. He said (ibid., at p. 376):

> "This legal proposition that the legal corporator cannot be held to be wholly or partly carrying on the business of the corporation is not weakened by the fact that the extent of his interest in it entitles him to exercise a greater or less amount of control over the manner in which that business is carried on. Such control is inseparable from his position as a corporator, and is a wholly different thing both in fact and in law from carrying on the business himself. The directors and employees of the corporation are not his agents, and he has no power of giving directions to them which they must obey . . . [The shareholders'] course is to obtain the requisite majority to remove the directors and put persons in their place who agree to their policy. This shows that the control of individual corporators is something wholly different from the management of the business itself."

The lord justice then proceeded to examine what he described as "a more difficult question", namely, the position which arises when one individual owns the whole of the shares in a corporation—which is permissible under German law, or was at all events permissible when *Stanley's* case (2) was recorded. He said (ibid., at p. 377):

> "Treating it as an abstract proposition of law, I am of opinion that the acquisition of the whole of the shares of a corporation by one individual does not, of itself, alter the nature of his relationship to the corporation. His de facto control when he possesses ninety-eight per cent. is probably complete from a practical point of view, and although it is, no doubt, rendered more complete in theory when he possesses himself of the whole of the shares, it is still of the nature of a control exercised by corporators over the corporation, and does not make him and the corporation in any sense identical. The directors of the corporation do not become his agents. Their duties are still controlled by the rules and constitution of the corporation itself. Nor is this consideration one of theoretical law only. The fact that the whole of the shares of the corporation are held by one individual at one moment by no means implies that they will be so at a future time; and the responsibility of the directors and officers of the corporation is to the corporation itself, whatever be its composition at any moment as to the number of corporators. It would be no excuse to them, when called to account in the regular way and at the regular periods according to the constitution of the corporation, to plead that they obeyed the directions of the corporators at a particular moment (unless given in the manner prescribed by the constitution of the corporation) and on the strength of such directions failed to obey the corporate rules."

If, then, authority were required to establish the first proposition of counsel for the taxpayers, one need go no further than *Stanley's* case (2) to find it. His third proposition is also correct; the question of de facto control, if it should be relevant in any case, must clearly be one of fact. Counsel for the Crown was inclined to dispute the validity of the second proposition of counsel for the taxpayers on the ground that it was inconsistent with the judgments and decision in *Stanley's* case (2). A study of those judgments shows, however, in our opinion, that there is no such inconsistency, for they recognise that a shareholder who holds sufficient shares in a company can de facto control its affairs by his ability to remove directors who disagree with his policy and to vote others into their places. The weakness of the second proposition of counsel for the taxpayers, to our mind, is not that it is inconsistent with authority but that it is irrelevant to the issue which falls to be decided.

Counsel for the taxpayers was certainly able to point to passages in the judgments of learned judges who decided previous cases as supporting, at first sight, the view that the place in which is to be found the actual management or control of the company's business determines the residence of the company. We will quote a few examples. In *De Beers Consolidated Mines, Ltd.* v. *Howe* (3) ((1906), 5 Tax Cas. 198) LORD LOREBURN, L.C., accepted and enunciated the principle that (ibid., at p. 213):

> ". . . a company resides, for purposes of income tax, where its real business is carried on . . . and the real business is carried on where the central management and control actually abides."

Counsel for the taxpayers naturally laid stress on the use by LORD LOREBURN of the word "actually".

In *American Thread Co.* v. *Joyce* (4) ((1911), 6 Tax Cas. 1) HAMILTON, J., after referring to LORD LOREBURN'S test in the *De Beers* case (3), said (ibid., at p. 18):

> " This test, ' the real business is carried on where the central management and control actually abides ' does not differ to my mind in substance from the tests mentioned in earlier cases, such as ' the conduct and management, the head and brain of the trading adventure ' in *San Paulo (Brazilian) Ry. Co.* v. *Carter* (5) ((1895), 3 Tax Cas. 407), or the expression which has not been uncommonly used by commissioners ' the head and seat and directing power of the affairs ', but, owing to its being compact and precise, it appears to me to be the convenient one for adoption."

In the same case on appeal to the House of Lords, the EARL OF HALSBURY said (6 Tax Cas. at p. 165) that the real test

> ". . . which, after all, is only a question of analogy—you cannot talk about a company residing anywhere—and that which has been accepted as a test, is where what we should call the head office in popular language is, and where the business of the company is really directed and carried on in that sense."

This exposition by LORD HALSBURY of the test to be applied was referred to by VISCOUNT SUMNER in *Todd* v. *Egyptian Delta Land & Investment Co., Ltd.* (6) ((1928), 14 Tax Cas. 119), and he said (ibid., at p. 151):

> " This expression of opinion can only mean that for both British and foreign companies alike the test is where on the facts (including among all the others the fact of incorporation here or there) the company's business is really directed and carried on."

Relying on such judicial utterances as these, and there are others to the like effect, counsel for the taxpayers contends that on the findings of the commissioners it is clear that the central management and control of the subsidiaries actually abides in London and it is from there that their business is really directed and carried on. Counsel for the Crown, however, met this contention and, in our opinion, successfully met it, in two ways. First he said that the scope and significance of judgments can only be truly assessed in the light of the facts of the particular cases in which they are delivered. This, of course, is undeniably true. All the judgments to which we have referred, and on which counsel for the taxpayers relied, were delivered in what we might call ordinary cases, and there is no reason at all to suppose that the judges had in mind such a case as the present in which de jure management is vested in one company whilst de facto control is vested in another. In none of the relevant authorities was so special a case referred to in argument or adverted to in the judgments. Judicial language is only authoritative in so far as it is directed to the particular subject-matter which is present to the speaker's mind; and, whatever its apparent width, it has no force, even persuasive, outside the limits of its intended application. Accordingly the passages from the various judgments and speeches to which we have referred and on which counsel for the taxpayers sought to rely do not, in our opinion, advance the taxpayers' case.

The second point which counsel for the Crown took is, we think, equally well founded. He submitted that it is a legitimate assumption that, whatever judges may have said with regard to acts or other elements which may determine residence, such acts or elements were envisaged as being regular and not irregular, constitutionally lawful and not unlawful. We think this must prima facie be so and the relevance of the consideration arises very directly in relation to art. 67 of Table A in Sch. 1 to the Companies Ordinance of Kenya, 1933. This article, which was incorporated in the articles of association of each of the subsidiaries, provides (so far as material) that

> " the business of the company shall be managed by the directors, who may . . . exercise all such powers of the company as are not, by the ordinance, or by these articles, required to be exercised by the company in general meeting."

If, submitted counsel for the Crown, and as the Special Commissioners have found, the business of the company was in fact being managed by the parent company and not by the subsidiaries' own directors, the provisions of art. 67 were being wholly disregarded; and an act such as that, the flouting of a term of a subsidiary company's constitution, can never have been judicially contemplated as being a guide to the residence of that company. In other words, says counsel for the Crown, where the judges have referred to the place where the central management and control is to be found, they mean the constitutional management and control and nothing else. As we say, we accept that submission and the result of accepting it is that, inasmuch as under the constitutions of the subsidiaries their management and control was vested in their directors in Kenya and in them alone, there is no warrant in the authorities for attributing to the subsidiaries a second residence in England by reason of the usurpation of the directing power by the parent company.

The conclusion that only constitutional, and therefore authorised, management and control are relevant to an inquiry as to the residence of a company seemed to the learned judge, as it seems also to us, to be strongly borne out by the judgment of this court in *Union Corpn., Ltd.* v. *Inland Revenue Comrs.* (7) ([1952] 1 All E.R. 646; *affd.* H.L., [1953] 1 All E.R. 729). In the course of that judgment there appears the following passage, which WYNN-PARRY, J., cited ([1958] 3 All E.R. at p. 193):

> "The company may be properly found to reside in a country where it 'really does business', that is to say, where the controlling power and authority which, according to the ordinary constitution of a limited liability company, is vested in its board of directors, and the exercise of that power and authority, is to some substantial degree to be found."

SIR RAYMOND EVERSHED, M.R., who read the judgment of the court, then referred to a passage from the judgment of SIR OWEN DIXON, J., in the Australian case of *Koitaki Para Rubber Estates, Ltd.* v. *Federal Comr. of Taxation* (8) ((1940), 64 C.L.R. 15 at p. 19). This passage is also cited by the learned judge and so we will not repeat it. We will, however, refer to the learned judge's conclusion on the matter, with which we respectfully and entirely agree ([1958] 3 All E.R. at p. 194):

> "In my view this passage is conclusive of the question before me. In the first place, the words of the Master of the Rolls, 'that is to say, where the controlling power and authority which, according to the ordinary constitution of a limited liability company, is vested in its board of directors, and the exercise of that power and authority, is to some substantial degree to be found', indicate to my mind that he was contemplating only an exercise of authority which could properly be exercised within the framework of the constitution of the company concerned. This conclusion is, I think, inevitable when one considers the phrase used by DIXON, J., 'the superior or directing authority'. In that context 'authority' must have a narrower meaning than 'power'. It must connote something which has been regularly established, and because of that regular establishment is entitled and able to exercise direction. To my mind, the board of the parent company cannot fall within the phrase 'superior or directing authority'. As such it has no authority over the boards of the African subsidiaries. True, those boards may accept the instructions of the board of the parent company; but they are not bound to do so. It may be that they do accept instructions, because failure to do so would result in dismissal, but acceptance in fact of such instructions does not mean that the board of the parent company has authority to give the instructions. As I have said, it has no such authority. It must follow, to my mind, that in applying the test adumbrated by the Master of the Rolls no weight or attention can be given to the activities of the board of the parent company in relation to the taxpayers and the

African subsidiaries for the purpose of considering whether or not any of them are resident in the United Kingdom. In the result it cannot be said that any part of the superior and directing authority of these companies exists in the place claimed as a residence, namely, the United Kingdom. Further, even if 'authority' could be regarded as being synonymous with 'power', the word 'power' in the context would have to be read as 'power regularly exercised'."

We should perhaps make a brief reference to two cases on which both the counsel for the taxpayers respectively placed some reliance. The first was *Scottish Co-operative Wholesale Society, Ltd.* v. *Meyer* (9) ([1958] 3 All E.R. 66). In that case a company formed a subsidiary and caused its own nominees to be appointed on to the board of directors. These nominees exercised their powers in the interests of the parent company and to the detriment of the subsidiary to such an extent that the latter's business came virtually to a standstill. Some minority shareholders accordingly presented a petition under the Companies Act, 1948, s. 210, for an order on the parent company to purchase their shares. The House of Lords held they were entitled to the relief sought and that the parent company had acted towards the minority shareholders of the subsidiary company in an oppressive manner and that this conduct through the nominee directors of the company, who were also directors of the society, amounted to conduct of the affairs of the company, since the transactions of the two could not be separated. We do not think that that case is of any assistance. It shows that de facto control of a company's business from outside can constitute an oppressive conduct of its affairs for the purposes of s. 210, but that is far removed from showing that such control can affect the company's "residence".

The second case was *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co. (Great Britain), Ltd.* (10) ([1916] 2 A.C. 307). In that case one of the questions in debate was, in substance, whether a company which was incorporated in England but whose shareholders (save one) and directors were Germans resident in Germany could sue in this country in time of war between the two countries. LORD PARKER OF WADDINGTON, with the concurrence of another of the Law Lords, expressed the view that (to quote from the headnote) (ibid.):

"The character of individual shareholders cannot of itself affect the character of the company; but the enemy character of individual shareholders and their conduct may be material on the question whether the company's agents or the persons de facto in control of its affairs are in fact adhering to, taking instructions from, or acting under the control of enemies."

We cannot ourselves see how that view, or any of the speeches of their Lordships in that case, have any bearing on the effect on the residence of a company of its business being carried on under extraneous control. The only matter which their Lordships were discussing was the extent to which the character of an English company (British on the one hand or enemy on the other) should be determined by the character of those who de facto controlled its affairs.

It only remains to say that for the reasons which we have explained, and which are in substance the same as those expressed in the learned judge's judgment, this appeal, in our opinion, fails and must be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Herbert Smith & Co.* (for the taxpayers); *Solicitor of Inland Revenue.*

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

SHORDICHE-CHURCHWARD *v.* CORDLE.

[COURT OF APPEAL (Morris, Pearce and Willmer, L.JJ.), March 2, 1959.]

Jury—Trial by—Right to trial by jury—"Claim" in respect of libel—Action on covenant in deed—Covenant to be void if plaintiff libelled defendant—Defence that covenant avoided by such libel—No counterclaim—Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 & 24 *Geo.* 5 *c.* 36), *s.* 6 (1) (*b*).

The defendant covenanted by a deed to make periodical payments to the plaintiff. The deed provided that if the plaintiff "shall publish or make any libellous or defamatory allegation to any person with regard to [the defendant]" the covenant should be discharged. In an action by the plaintiff on the covenant in the Queen's Bench Division, the defendant pleaded in his defence that the plaintiff had libelled him and that the covenant had thereby been discharged. The defendant made no counterclaim. The plaintiff applied for trial by jury contending that she was entitled to such trial because "a claim in respect of libel" was "in issue" within the meaning of s. 6 (1) (b) of the Administration of Justice (Miscellaneous Provisions) Act, 1933*.

Held: the defendant was making no "claim" in respect of libel, and, therefore, the plaintiff was not entitled to trial by jury as of right.

Per PEARCE, L.J.: a "claim" in s. 6 (1) (b) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, means the assertion of a cause of action.

[As to when there is a right to trial by jury in the Queen's Bench Division, see 23 HALSBURY'S LAWS (3rd Edn.) 22, para. 38, note (u).

For the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 6 (1), see 18 HALSBURY'S STATUTES (2nd Edn.) 522.]

Application for leave to appeal.

The plaintiff applied to the Court of Appeal for leave to appeal against the order of HINCHCLIFFE, J., in chambers, made on Feb. 20, 1959, affirming the order of Master CLAYTON made on Feb. 6, 1959, and refusing the plaintiff's application that the action be tried with a jury. The facts are stated in the judgment of MORRIS, L.J.

G. H. Crispin for the plaintiff.

R. G. Dow for the defendant.

MORRIS, L.J.: This is an application by the plaintiff for leave to appeal against the refusal of the learned judge in chambers to give leave to appeal. The question that came before the learned judge, on appeal from the learned master, was whether there should be a trial with a jury.

Counsel for the plaintiff submits that the case comes within s. 6 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, and that he is, as of right, entitled to a jury. If he is not as of right entitled to a jury, he very frankly and properly agrees that the decision whether or not there should be a jury was one which rested on the exercise of discretion and was one which in the circumstances he could not challenge in this court.

The point that is raised is a short one. The plaintiff and the defendant were formerly wife and husband. After certain divorce proceedings which ended in favour of the defendant a deed was entered into between the parties. The defendant covenanted to pay certain sums to his wife, the plaintiff. There was a provision in the deed in these terms:

* Section 6 (1) is printed at p. 600, letter F, post.

" The covenant in cl. 1 of this deed [that is the covenant to pay the money] shall be discharged and shall thenceforth become wholly void and of no effect on either of the following events, namely, . . . (b) if [the plaintiff] shall at any time hereafter molest or interfere with [the defendant] or shall publish or make any libellous or defamatory allegations to any person with regard to [the defendant] whether or not such allegation was made in any of the proceedings for divorce which have now been concluded between the parties hereto . . ."

other words follow which I need not read. The plaintiff brought an action claiming a sum of money under the deed. The defendant by his defence admitted the deed, but said that the deed had been discharged and had become wholly void and of no effect because the plaintiff had published or made libellous or defamatory allegations to a certain person: he alleged that the plaintiff had published or caused to be published to a certain person defamatory allegations with regard to him, namely, the contents of the plaintiff's petition for the dissolution of the marriage between the plaintiff and the defendant. By her reply the plaintiff said that the matters referred to were published to the person named

" by the plaintiff's present husband who without the knowledge or consent or approval and not acting as the agent of the plaintiff showed [to the said person] the whole of the pleadings."

The real issue, therefore, is whether the plaintiff published libellous or defamatory allegations to some person. I might add that there is a further matter included by para. 2 of the reply which does not call for present comment.

Section 6 (1) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, provides as follows:

" Subject as hereinafter provided, if, on the application of any party to an action to be tried in the King's Bench Division of the High Court made not later than such time before the trial as may be limited by rules of court, the court or a judge is satisfied that—(a) a charge of fraud against that party; or (b) a claim in respect of libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage, is in issue, the action shall be ordered to be tried with a jury . . ."

There is a proviso which I need not read as for present purposes it is not material.

The question therefore arises whether there is in these proceedings " a claim in respect of libel " which claim is " in issue ". It is not without importance to note that the section uses the words " a charge of fraud against that party " and in contrast the words

" a claim in respect of libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage."

The point is really a neat one. Counsel for the plaintiff submits that the defendant is saying in his defence that he is excused from paying, and that he has put forward a claim that he is excused from paying because the plaintiff has defamed him. There is no counterclaim by the defendant. What the defendant says is: I am not liable because the deed is now discharged and is wholly void and of no effect and it has become so because the plaintiff has published libellous or defamatory allegations in regard to me. It seems to me that on those facts and those issues the defendant is not making " a claim " in respect of libel. He is advancing a contention which involves an inquiry whether there has been a publication of libellous or defamatory allegations: but he makes no claim in

A respect of libel. If he succeeds in the action, the judgment will be one dismissing the claim of the plaintiff and in all probability awarding him costs. He is making no claim in respect of libel.

Counsel for the plaintiff has put the matter as well, if I may say so, as it could be put for the plaintiff by his submission that the defendant is advancing a claim to be relieved of his obligation under the deed and that such claim is in respect B of libel and is " in issue ". However, if the words of the section are looked at it does not seem to me that it can fairly be said here that the defendant is making a " claim " in respect of libel or that a claim in respect of libel is " in issue ".

For these reasons, I consider that the learned judge was correct in refusing leave to appeal, and I do not think that leave should be given.

C

PEARCE, L.J.: In my view, the allegation by the defendant that the covenant sued on is void owing to the libellous or defamatory allegations by the plaintiff does not bring this action within the words of s. 6 (1) (b) of the Administration of Justice (Miscellaneous Provisions) Act, 1933. " A claim " in that sub-section means the assertion of a cause of action. That is the normal use of D the word in various passages in the ANNUAL PRACTICE. Even if s. 6 (1) (b) stood alone I should consider that the word " claim " had that meaning here; but the wording of s. 6 (1) (a) puts the matter beyond doubt. The words in sub-s. (1) (a) " a charge " are in contradistinction to the words in sub-s. (1) (b) " a claim ". They are used in order that the party charged with fraud may have a jury even though there be not a claim in respect of fraud and the fraud charge E is merely an issue in the action. Had the meaning for which the plaintiff contends been correct, there was no need to alter the words " a charge " in para. (a) into the words " a claim " in para. (b).

For these reasons, in my view, the application fails and should be dismissed.

F **WILLMER, L.J.:** I agree so entirely with what my Lords have said that I find it quite unnecessary to add anything further.

Application refused.

Solicitors: *S. Sydney Silverman* (for the plaintiff); *Joynson-Hicks & Co.* (for the defendant).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

DE JEAN AND ANOTHER *v.* FLETCHER.

[COURT OF APPEAL (Lord Evershed, M.R., Ormerod, L.J., and Lloyd-Jacob, J.), February 23, 24, 1959.]

Rent Control—Excess rent—Recovery—Rent of premises fixed and registered—Subsequent letting of premises to another tenant at rent exceeding that registered—Some money spent by landlord on repairs, etc. before the subsequent letting—Right of tenant, under subsequent letting, to recover excess rent—Furnished Houses (Rent Control) Act, 1946 (9 & 10 *Geo.* 6 *c.* 34), *s.* 4 (1) (*a*), (2).

In 1955 a rent tribunal, on the application of a tenant, reduced the rent of two furnished rooms with the use of a bathroom from £2 to £1 a week, under s. 2 (2) of the Furnished Houses (Rent Control) Act, 1946, and the rent, as reduced, was registered pursuant to s. 3 (2) of the Act. The period for which the rent was so fixed was stated in the registered entry of the decision to be the duration of the Act. In July, 1956, the landlord let the same premises to new tenants, the plaintiffs, at a rent of £3 a week, after spending some £70 in redecorating and refurnishing the premises. In 1958 the plaintiffs brought an action under s. 4 (2)* of the Furnished Houses (Rent Control) Act, 1946, to recover from the landlord the sum of £192 as rent paid by them in excess of the registered rent.

Held: once a rent for premises was entered on the register, then that was the rent for those premises until the entry was changed by some subsequent determination or until the period for which the entry was made expired (see p. 605, letter H, post); therefore the plaintiffs were entitled to recover rent paid by them in excess of the registered rent.

R. v. *Fulham, Hammersmith & Kensington Rent Tribunal, Ex p. Gormly* ([1951] 2 All E.R. 1030) approved.

Appeal dismissed.

[As to the right to recover rent paid in excess of that entered on the register, see 23 HALSBURY'S LAWS (3rd Edn.) 865, para. 1671.

For the Furnished Houses (Rent Control) Act, 1946, s. 2, s. 3, s. 4 and s. 9, see 13 HALSBURY'S STATUTES (2nd Edn.) 1086-1089, 1091.]

Cases referred to:

(1) *Lazarus-Barlow* v. *Regent Estates Co., Ltd.*, [1949] 2 All E.R. 118; [1949] 2 K.B. 465; [1949] L.J.R. 1539; 31 Digest (Repl.) 635, *7440*.

(2) *Gluchowska* v. *Tottenham Borough Council*, [1954] 1 All E.R. 408; [1954] 1 Q.B. 438; 118 J.P. 175; 3rd Digest Supp.

(3) *R.* v. *Fulham, Hammersmith & Kensington Rent Tribunal, Ex p. Gormly*, [1951] 2 All E.R. 1030; [1952] 1 K.B. 179; 116 J.P. 22; 3rd Digest Supp.

(4) *R.* v. *Adamson*, (July 15, 1957), "The Times", July 16.

Appeal.

This was an appeal by the defendant, Arthur William Fletcher, from that part of a judgment of His Honour JUDGE DAYNES, Q.C., sitting as deputy judge of the West London County Court on Sept. 18, 1958, whereby he held that the plaintiffs were entitled to recover from the defendant £192 as rent received by the defendant in excess of the registered rent for furnished premises consisting of two rooms on the top floor of No. 31, Ashchurch Grove, Shepherds Bush, with the right to share the use of a bathroom.

The same furnished premises had been previously let by the defendant to other tenants, Mr. and Mrs. Gatens, at a rent of £2 a week. In 1955, on an application by the Gatens under the Furnished Houses (Rent Control) Act, 1946, the Fulham and Hammersmith Rent Tribunal reduced the rent from £2 to £1

* Section 4 (1) (a) and (2) are printed at p. 605, letters B and C, post.

A a week, under s. 2 (2) of the Act, for the duration of the Act, and that rent was entered on the local authority's register of rents, pursuant to s. 3 (2), and was still on the register. On July 7, 1956, after the Gatens had left, the defendant let the same furnished premises to the plaintiffs, Alphonso De Jean and his wife Margarette De Jean, at a rent of £3 a week. Before the plaintiffs took possession, the defendant, at the plaintiffs' request or, at any rate, for their convenience, B spent about £20 in redecorating the rooms and about £50 in improving the furnishings. The plaintiffs, on their part, agreed to pay the £3 a week, and they paid this rent until May 17, 1958. They then refused to make any further payment. On May 30, 1958, the defendant served on the plaintiffs notice to quit expiring on June 28, 1958. The plaintiffs then brought this action.

In the action, the plaintiffs claimed the sum of £192 as rent which they had C overpaid, and they also claimed damages against the defendant for trespass on their premises before the expiry of the notice to quit. The defendant, on his part, alleged assault by the male plaintiff. The learned judge found the issues of assault and trespass proved, and awarded £15 damages to the plaintiffs in respect of the trespass and £10 damages to the defendant in respect of the assault, and he gave judgment for the plaintiffs on their claim for the repayment D of the excess rent.

The defendant appeared in person.
Elson Rees for the plaintiffs.

LORD EVERSHED, M.R.: This is an appeal, on one important and not altogether easy point, from a judgment of His Honour JUDGE DAYNES, sitting E as deputy judge in the West London County Court. The learned judge felt impelled on this point to decide against Mr. Fletcher, the defendant in the action, contrary to his own inclination, because (as he thought) certain authorities compelled him to do so.

[HIS LORDSHIP stated the facts, and continued:] Speaking without knowledge of anything that went on between the two parties, one's sympathies are with the F defendant. The plaintiffs made this bargain, they paid the rent and had the advantage of living on the premises; and suddenly to be told that one has to pay back nearly £200 would come as a nasty shock to anybody. As against that, however, it can be said with force that the defendant was a party to the determination by the tribunal and knew, or should have known, that the rent fixed by the tribunal was registered under the Furnished Houses (Rent Control) G Act, 1946; he cannot, according to the principles of our law, claim to be ignorant of the legal provisions which bind him, and he took the risk of charging a rent which was three hundred per cent. more than that which was on the register. The question is: Did the determination of the tribunal, on the application made by the Gatens, and the subsequent registration of its result operate to make the rent which could lawfully be charged for these premises limited to H £1 a week unless and until, on further application, it was altered? I shall refer in a moment to the necessary provisions of the Act of 1946, but I would like to say one thing by way of caveat. In the course of listening to the careful and fair presentation of the matter by counsel for the plaintiffs, we have had some discussion on what might be comprehended by the word "premises" which occurs in certain of the relevant sub-sections. To take a simple example— I if the subject-matter of the letting is a furnished house, are the premises, for the purposes of the Act of 1946, the same if the house itself is the subject of a later letting, even though there may be some, and even substantial, alterations within it, or even additions to it? Or again—to what extent are the "premises", within the meaning of the Act, liable to be affected by substantial changes in the internal equipment, including furniture? I do not propose to embark on any questions of that kind, since, for the purposes of this case, it can, I think, be taken that the subject-matter of the letting to the plaintiffs was the same, for all relevant purposes, as the subject-matter of the letting to the Gatens. Money

had been spent on redecoration and improving the furniture, but it must, I think, be taken, on the facts before us, that the premises were the same in the two cases. A

I now turn to the Act itself. Section 2, in sub-s. (1) and sub-s. (2), appears to be dealing, and dealing only, with a particular contract of letting. Section 2 (1) reads:

> " Where a contract has . . . been entered into whereby one person (hereinafter referred to as the ' lessor ') grants to another person (hereinafter referred to as the ' lessee ') the right to occupy as a residence a house or part of a house situated in [a relevant district] in consideration of a rent which includes payment for the use of furniture . . . it shall be lawful for either party to the contract or for the local authority to refer the contract to the tribunal for the district . . ." B C

Then there follow certain provisions which are of an administrative nature. Section 2 (2) reads:

> " Where any contract . . . is referred to a tribunal, then . . . the tribunal shall consider it and, after making . . . inquiry . . . shall approve the rent payable under the contract or reduce it to such sum as they may, in all the circumstances, think reasonable, or may . . . dismiss the reference, and shall notify the parties and the local authority of their decision in each case." D

So far, it cannot be in doubt that what these two sub-sections are doing is to say that either party to a contract of letting of a furnished house, or the local authority, may apply to the relevant tribunal, which may vary the contract in the way indicated. Then comes s. 2 (3), and it will be seen at once that there is a change of emphasis, to put it no higher, as the sub-section reads: E

> " Where the rent payable for any premises has been entered in the register in accordance with the provisions hereinafter contained, it shall be lawful for the lessor or the lessee or the local authority to refer the case to the tribunal for reconsideration of the rent so entered on the ground of change of circumstances . . ." F

I need not, I think, read any more of s. 2. The reference to the register which is forecast in s. 2 (3) is explained in s. 3, which provides, in sub-s. (1), that the local authority is to " prepare and keep up to date a register for the purposes of this Act " and that the register is to be open for inspection. Then s. 3 (2) reads:

> " The register shall be so prepared and kept up to date as to contain, with regard to any contract under which a rent is payable that has been approved, reduced or increased under the last foregoing section . . . entries of . . . (b) a specification of the premises to which the contract relates; and (c) the rent as approved, reduced or increased by the tribunal, and, in a case in which the approval, reduction or increase is limited to rent payable in respect of a particular period, a specification of that period." G H

To my mind s. 3 creates difficulties. In the first place, as will be appreciated from my reading of sub-s. (2), it seems to go back in emphasis to the contract. Particularly does that appear from para. (b), which says that the entry is to be the " specification of the premises to which the contract relates ". Then under para. (c)—and a point of difficulty arises here, as I think—" the rent as approved . . . ." is to be entered, and there is a distinction made where the reduction (and so on) " is limited to rent payable in respect of a particular period . . ." It may be argued: Does that mean a particular period being something less than the contractual period; or is it a particular period without limitation?—as the words say*, any period short of (or, of course, not greater than) the duration in operation of the Act itself. I

* The words " duration of the Act " were in the certificate of the entry in the register of the decision of the rent tribunal.

For the moment I pass over these difficulties to go to s. 4 which undoubtedly, in point of emphasis, swings back, and swings back somewhat heavily, in the direction forecast in s. 2 (3). Section 4 (1) reads:

> " Where the rent payable for any premises is entered in the register . . . it shall not be lawful to require or receive—(a) on account of rent for those premises in respect of any period subsequent to the date of such entry, (or, in a case in which a particular period is specified, in respect of that period) payment of any sum in excess of the rent so entered . . ."

Then (and I refer to this because I think that it is helpful), as the Act originally ran there was a para. (b)* which contained a provision dealing with the grant of a new tenancy and prohibiting the demand of a premium in addition to the rent. Section 4 (2), as amended by the Landlord and Tenant (Rent Control) Act, 1949, s. 12 (4), reads:

> " Where any payment has been made or received in contravention of the foregoing sub-section, the amount thereof shall be recoverable by the person by whom it was made."

The only other sections to which I propose to allude are s. 8 and s. 9. Section 8 empowers the Minister to make regulations, and the certificate which is before us, stating what was the effect of the registration in this case, was issued in pursuance of those regulations†. Section 9 (1) makes it an offence to require payment in contravention of s. 4, and the offender is liable on summary conviction to a fine not exceeding £100—and he may also be ordered, be it observed, to repay any excess payment which he may have received.

The fact that disregard of the requirements of the Act involves penal consequences is beyond doubt a strong ground for saying that one has to construe it fairly strictly; and I proceed so to do. Ultimately, however, the question turns on the true effect of s. 4 as applied to this case; for, putting it in the form of a question—did the plaintiffs prove that, " the rent payable for [these] premises " having been entered in the register, there had been a " requirement " or a " receiving " by the defendant of a payment in excess of the recoverable rent?

There is no doubt that " the rent payable for [the] premises ", on the face of it, was entered in the register; and it seems to me that the plaintiffs must be entitled to succeed unless it could be said that the effect of any registration was limited to the duration of the particular contract which was the subject of the tribunal's determination. If sub-s. (2) and sub-s. (3) of s. 2 stood alone, there would be no doubt, I think, that the determination would be limited to the contract which was presented to the tribunal. I have, however, come to a clear conclusion that, when one looks at sub-s.-(3) of s. 2, which speaks of a rent payable for the premises being entered on the register, and, in particular, at s. 4, to which I have already referred, one cannot avoid the conclusion that the effect of the Act is that once, quoad any premises, a rent has been entered on the register, then that is the rent for those premises until it is changed by some subsequent determination or until the period for which the entry has been made expires; and I cannot think that it would be justifiable to read words in—particularly into s. 4—so as to limit the " rent payable " to the rent payable during the currency of the particular contract. The Act does not say so; and, indeed, when one considers the obvious scope and purpose of the Act, it would make all this business of registration rather nonsensical if the registration ceased to have any effect whenever a contract ended. We all know that these contracts may be of quite short duration, and the requirements of registration, the notification of the local authority,

* Paragraph (b) of s. 4 (1) was repealed by the Landlord and Tenant (Rent Control) Act, 1949, s. 12 (4), with a saving for anything done before the commencement of that Act (June 2, 1949).

† Furnished Houses (Rent Control) Regulations, 1946 (S.R. & O. 1946 No. 781).

and the register being open to the public seem to me to lose nearly all their force if the registration is to have such a very ephemeral effect. A

That view is, I think, clearly borne out in the decisions of the courts in which the question has been involved. It is true that there is no decision of this court which governs us, or covers this point. The only decision of this court which was referred to here and below was *Lazarus-Barlow* v. *Regent Estates Co., Ltd.* (1) ([1949] 2 All E.R. 118). That was a case which arose under the Rent Restrictions Acts, and the only relevant point in it was that, in the course of reading the judgment of SOMERVELL, L.J., and myself, I observed that there were some dangers in using the phrase " in rem " when one spoke of determinations under the Rent Acts. That obviously does not help very much in this case, although it has been referred to as perhaps having an analogy in cases under the Furnished Houses (Rent Control) Act, 1946. There has, however, been a number of cases before the Divisional Court and the Court of Criminal Appeal, and I think that this may quite clearly be said of all of them: the answer which, I think, is the right answer, and which was the answer reached by His Honour JUDGE DAYNES in the court below, is certainly assumed in all of them, save in those cases in which it was directly so decided. That sounds perhaps rather an involved way of putting it. In a number of cases the point was a different one, but the assumption clearly was that the registration continued to operate in the way which I have stated and was not limited to the duration of the particular contract. I give one example of that—*Gluchowska* v. *Tottenham Borough Council* (2) ([1954] 1 All E.R. 408). In that case, there had been registration in respect of particular premises —that is, a set of rooms—and at a later stage the landlord had let, not all those rooms, but some of them, herself occupying the others. The question which was debated in the court was whether the premises were the same in the second letting. By a majority, the Divisional Court came to the conclusion that they were not, and that, therefore, the provisions of s. 4 did not apply. There would have been nothing in the case if the right answer had been that the registration lasted only for the original contract, as that contract had come to an end some time before. B C D E

The point was directly considered, and, indeed, determined, in *R.* v. *Fulham, Hammersmith & Kensington Rent Tribunal, Ex p. Gormly* (3) ([1951] 2 All E.R. 1030). That was a case of the following kind. In 1949, on the application of the landlord, a rent tribunal fixed the rent of a furnished house at £4 a week, which rent was registered under s. 3 (2) of the Furnished Houses (Rent Control) Act, 1946. Two years later, on the reference of a new tenant, the tribunal ordered a further reduction, no change of circumstances being alleged. As the learned judge in the court below pointed out, that case might have been sufficiently decided on the short point that, since there was no change of circumstances, no question of altering the rent downwards could arise; but beyond doubt the court (consisting of LORD GODDARD, C.J., SLADE and DEVLIN, JJ.) expressed their views on this question of the duration of a registration. The conclusion is sufficiently stated in the headnote as follows ([1951] 2 All E.R. 1030): F G H

> ". . . the rent fixed by a rent tribunal under s. 2 (2) of the Act and registered under s. 3 (2), was the rent payable in respect of the premises and not merely the rent payable as between the particular parties who took the case to the tribunal; that rent remained until, if it were fixed for a period, the expiration of that period, or until it was altered by the tribunal on an application made under s. 2 (3) of the Act on consideration of changed circumstances . . . " I

LORD GODDARD, C.J. (with whom DEVLIN, J., agreed) after stating that a register had to be kept, said (ibid., at p. 1034):

> " This seems to me to point strongly to the intention that decisions of tribunals should be registered for the information of the public, that the rent so registered should be the rent payable in respect of the premises and

A not merely the rent payable between two particular parties who first took the case to the tribunal . . ."

—a passage reflected in the headnote, but also indicating a point which I have earlier made, namely, the sense and purpose of the legislation which seems clearly to emerge.

B The last case that I propose to mention is *R.* v. *Adamson* (4) ((July 15, 1957), "The Times", July 16), which came before the Court of Criminal Appeal. There the circumstances were closely similar to those which we have here. A rent tribunal had ordered a reduction in the rent of furnished premises. By a later contract with a new tenant, the landlord had charged a rent in excess of the registered rent. She was charged with an offence under s. 9 of the Act of 1946 C and convicted. According to the short note of the judgment, LORD GODDARD, C.J., said:

> "... this was a case in which a landlord whose power to charge rent was controlled by the Furnished Houses (Rent Control) Act, 1946, had refurnished the rooms which she intended to let and thought that she was thereby entitled to increase her rent. It had been argued on behalf of the D [landlord] that the expression 'premises', referred to in s. 4 of the Act of 1946, meant not merely the bare shell . . ."

I need not pursue that aspect of it, because, as I have earlier said, I am expressing no view on that kind of point. The report ends:

E > "His Lordship said that, although the conviction was right and must stand, the case was a proper one for the grant of an absolute discharge, on the condition that [the landlord] repaid the excess rent which she had charged."

That case, on its facts, is obviously closely similar to this; and the sum of F the matter seems to be that all these cases have for an appreciable period of time—the Act has now been in operation for twelve years—uniformly followed the view which the learned judge adopted in the present case, although he indicated that his own view, unaided by authority, would be the other way. With all respect to him, my own view, unaided, is in line with the authorities. I venture a criticism of the learned judge with diffidence; but he concentrated somewhat G on sub-s. (1) and sub-s. (2) of s. 2 of the Act and did not (as I think) give sufficient weight to sub-s. (3) of s. 2 and, in particular, to s. 4. However, that is by the way. I have given my reasons for thinking that the conclusion reached by the judge was the right one.

As the case is somewhat important, I have dealt with it at some length. The defendant, as he frankly conceded, did not feel that he was altogether well H qualified to debate in this court a problem which is a pure problem of construction of an Act of Parliament, and I feel some sympathy with him. He has, however, come to this court. He may perhaps have been encouraged by the learned judge's expression of what his own view was. Although we have not had the advantage of argument on this matter of law from the defendant, I counsel for the plaintiffs has drawn our attention scrupulously to all the cases on the points, and, having considered them to the best of my ability, I reach the conclusion that this appeal must fail and, therefore, should be dismissed.

ORMEROD, L.J.: I am of the same opinion, and there is very little that I wish to add. The learned county court judge expressed the view that, had he not been bound by authority, he would have come to a different conclusion from the one to which in fact he did come, but that he was bound by the decisions in the Divisional Court to which LORD EVERSHED, M.R., has referred.

The view which the learned county court judge would have liked to take is expressed in his judgment when he says that, on consideration of s. 2 (1) and (2), the key word is " contract ", and that he would regard that as the key word which should dominate the whole of the interpretation of the statute. As LORD EVERSHED, M.R., pointed out—and I agree with the view which he has expressed—if it were not for s. 2 (3) and s. 4, there might be something in the view expressed by the learned county court judge. It appears to me, however, that the change of wording which takes place in s. 2 (3) and s. 4 puts beyond doubt that the view expressed by the Divisional Court in the various cases to which we have been referred is the proper one. The opening words of s. 2 (3) are, " Where the rent payable for any premises has been entered in the register . . . " Had the proper construction of the Act been that it would relate only to entries in the register is respect of an existing tenancy, the simple way to have done it would have been to say " Where the rent payable under any contract of tenancy " (or words to that effect) " has been entered in the register . . ." Those words have not been used, and the change appears to be a deliberate one. I can only come to the conclusion that it has been made so that, once the rent has been determined, that rent should remain, irrespective of the duration of the tenancy, for so long as was provided by the order, or, alternatively, for the duration of the Act. Again, in s. 4 (1) the wording is:

> " Where the rent payable for any premises is entered in the register under the provisions of this Act . . ."

—and not, " Where the rent payable under any contract of tenancy is entered in the register under the provisions of this Act . . ." That again, I think, confirms the view that the proper interpretation is that the rent fixed by the tribunal should continue until it is altered by the tribunal or until the period for which the order has been made has expired.

It may be unfortunate in this case that the defendant has to repay money which he has overcharged in respect of this tenancy. It may be—I am expressing no opinion on it—that, had he gone back to the tribunal, having regard to the improvements that he had made to the premises, there might have been some increase in the rent which the tribunal had determined. But that was not done, and there is no answer to the claim for the repayment of the money which the defendant has overcharged the plaintiffs. I agree that the appeal must be dismissed.

LLOYD-JACOB, J.: I also agree.

Appeal dismissed.

Solicitors: *D. J. A. Griffiths* (for the plaintiffs).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re STEED'S WILL TRUSTS.
SANDFORD *v.* STEVENSON AND OTHERS.

[CHANCERY DIVISION (Harman, J.), February 24, 25, 1959.]

Trusts and Trustee—Variation of trusts by the court—"Arrangement" substituting absolute beneficial interest for discretionary interest—Whether court had jurisdiction to sanction an arrangement that would eliminate discretionary powers that trustees wished to exercise—Variation of Trusts Act, 1958 (6 & 7 *Eliz.* 2 *c.* 53), *s.* 1.

A testator by his will devised a farm on trust for sale and gave the proceeds of sale on protective trusts for the plaintiff for her life and after her death on trust for such persons as she should by deed or will appoint and in default of appointment on trust for those who would be entitled in distribution to her estate; and he empowered his trustees to apply capital money for the plaintiff's benefit, it being his wish that she should have the capital during her life if she needed it. He also bequeathed a legacy of £4,000 to his trustees to use in their discretion for providing a residence for the plaintiff, the residence, if provided, or the legacy to be on the like protective trusts and subject to the like general power of appointment and other powers as the farm. After the testator's death in 1954 the trustees bought a café for the plaintiff to live in and run, but subsequently the plaintiff wanted the café to be sold and a house to be provided for her on the farm, which was let at a rent to her brother, who, however, had paid no rent to the trustees. The trustees proposed to sell the farm to a stranger, and the plaintiff, who had exercised the general power of appointment in her own favour, applied to the court for an order under the Variation of Trusts Act, 1958, approving, and directing the trustees to effect, an arrangement whereby they would stand possessed of the farm and legacy on trust for the plaintiff absolutely. The trustees were not party to the arrangement and did not surrender their trust discretion to the court.

Held: (i) "arrangement" in s. 1 of the Variation of Trusts Act, 1958, meant something arranged between two or more persons, not an arrangement made by one person, and

(ii) the power given to the court by s. 1 to approve an arrangement did not give it jurisdiction to override the discretionary powers of responsible trustees who wished to exercise them; accordingly the application would be dismissed.

[As to the right of trustees to decide on the exercise of their discretionary powers, see 33 HALSBURY'S LAWS (2nd Edn.) 245, para. 433; and for cases on the subject, see 43 DIGEST 876-881, *3202-3239*.

As to the exercise of trustees' discretionary powers in an administration action, see 33 HALSBURY'S LAWS (2nd Edn.) 268, para. 474; and for cases on the subject, see 43 DIGEST 881, 882, *3240-3247*.

For the Variation of Trusts Act, 1958, s. 1, see 38 HALSBURY'S STATUTES (2nd Edn.) 1130.]

Case referred to:

(1) *Gisborne* v. *Gisborne*, (1877), 2 App. Cas. 300; 46 L.J.Ch. 556; 36 L.T. 564; 43 Digest 877, *3211*.

Administration Action.

By the will of the testator, Joshua Owen Steed, of which the relevant clauses were cl. 9 and cl. 10, it was provided as follows:

"9. I give and devise unto my trustees my farm known as the Loft Farm Cockfield upon trust to sell the same with power to postpone such sale for so long as they in their absolute discretion shall consider desirable and until any sale shall be effected to hold such property and on sale the proceeds of sale thereof upon protective trusts as defined by s. 33 of the Trustee Act,

1925, for the benefit of [the plaintiff] during her life and from and after the death of [the plaintiff] upon trust to hold the said properties or the proceeds of sale thereof in trust for such person or persons as [the plaintiff] may by deed revocable or irrevocable or by will or codicil appoint and in default of appointment upon trust for the persons who may be entitled in distribution to her estates Provided nevertheless and I hereby Declare that the settlement of this property upon [the plaintiff] is made for the purpose of providing for her during her life but it is my wish that she shall have the use and enjoyment of the capital value thereof if she needs it during her life And I direct that if and when such properties shall be sold my trustees may apply capital moneys from such sale to or for her benefit at such times and in such proportions as they may consider to be most to her advantage and that any portion of the capital may be paid to her as income annually or at any other periods which my trustees may think desirable provided that they shall consider the necessity for retaining sufficient capital to prevent her from being without adequate means at any time during her life and if they shall think it desirable in her interest to buy an annuity for that purpose.

" 10. I give to my trustees a sum of £4,000 upon trust to invest the same and to pay the income therefrom to [the plaintiff] during her life and I hereby authorise my trustees to use this legacy if they in their discretion shall deem it desirable for the purpose of providing a residence for [the plaintiff] either by purchase or the building of a suitable residence with its appurtenances in the names of my trustees or by lending it or any part thereof on mortgage to her if she should purchase such a residence and so that any residence purchased by my trustees and this legacy shall be held by them on the same protective trusts and with similar powers to use capital for her benefit and with similar powers to her of appointment as are directed with regard to the Loft Farm Cockfield but if [the plaintiff] shall not at any time live in the residence or any residence so purchased she shall be entitled to the income therefrom during her life and my trustees shall have power to sell any residence so purchased and to buy or build another for her use or to lend the said money to her for that purpose. My trustees may accept a second mortgage as their security so long as the total amount of the first and second mortgages does not exceed the value of the property included in them. The amount of this legacy is intended as a recognition of the interest which I feel sure [the plaintiff] will take in the welfare of her brother Alfred."

The testator, who was a solicitor and had practised for many years at Long Melford and Sudbury in Suffolk, died on Dec. 13, 1954, and his will was proved by the defendants, the executors and trustees thereby appointed, on Mar. 17, 1955. Before the date of the action the plaintiff in exercise of the power conferred by the will irrevocably appointed by deed the property subject thereto in her own favour. Loft Farm, which was in Suffolk, had been let by the testator to the plaintiff's brother, Percival, and he had farmed it at the time of the summons for some thirteen years. After the testator's death the plaintiff, who had for many years been his housekeeper, lived in Long Melford, Suffolk, where the trustees bought her a café. Subsequently she wished to get rid of the café and to have built for her a bungalow on her brother's farm and to live there. The defendants as trustees felt unable to accede to her wishes, and considered that any such arrangement would not be for her benefit but for her brother's. He had not paid the defendants anything by way of rent, and they had taken no proceedings against him. There was evidence that a number of judgments for debt were outstanding against him. The defendants wished to sell the farm and to invest the proceeds in some more profitable manner; they were bound under the testator's will to consider the necessity of retaining enough capital to prevent the plaintiff being without means at any time, and she had incurred losses in running the café. At the end of 1957

A the plaintiff heard that the trustees were proposing to sell the farm to a stranger. The plaintiff's brother offered to buy the farm, and the plaintiff requested the trustees not to sell it, because she wished to live on part of it herself. In March, 1958, it came to the plaintiff's knowledge that the trustees were about to exchange contracts for the sale of the farm to a stranger and accordingly she instituted this action by writ, issued on May 9, 1958, claiming administration of the trusts of B the testator's will and an injunction to restrain the defendants from selling the farm. She applied in the action by summons dated May 15, 1958 (subsequently amended in view of the commencement of the Variation of Trusts Act, 1958, on July 23, 1958) for an order directing the defendants, as trustees of the testator's will, to abstain from selling Loft Farm, Cockfield, except with the previous consent of the plaintiff, and that an arrangement specified in the schedule to the summons C might be approved in pursuance of powers conferred by the Variation of Trusts Act, 1958, and alternatively that the defendants might be empowered and directed pursuant to s. 57 of the Trustee Act, 1925, to deal with Loft Farm and the property, investments and cash representing a sum of £4,000 (viz., the legacy given by cl. 10 of the testator's will) in accordance with the provisions set forth in the schedule. The schedule provided (by para. 1) that the defendants D should stand possessed of Loft Farm on trust for the plaintiff absolutely subject only to any rights or liabilities of the defendants arising under or by virtue of any contract for the sale thereof which might have become binding on them prior to the date of the order; and that the defendants should stand possessed of a property known as Melkreme Café, Long Melford in the County of Suffolk and all other property, investments and cash representing the legacy of £4,000 on trust E for the plaintiff absolutely. The hearing of the summons was adjourned into open court.

E. W. Griffith for the plaintiff.
L. H. L. Cohen for the defendants.

HARMAN, J., after referring to cl. 9 and cl. 10 of the testator's will, and F reviewing the facts, and after intimating that the defendants, as trustees, had a discretionary power which they did not surrender to the court and that, as there was no case for a full administration order, the court could not interfere with the trustees' discretion, continued: Pending this summons, the Variation of Trusts Act, 1958, has been passed, and the writ has now been amended to refer to that Act, and also to the Trustee Act, 1925, though I think that the present matters do G not come within s. 57 of the Act of 1925. It is said now that what is wanted of the court is that " the arrangement specified in the schedule hereto may be approved in pursuance of the powers conferred by the Variation of Trusts Act, 1958 ". The " arrangement " is that the trustees shall stand possessed of the farm and of the £4,000 on trust to hand them over to the plaintiff absolutely, the effect of which would be to revoke the trusts in cl. 9 and cl. 10 of the will and to turn them H into plain legacies to the plaintiff. Section 1 of the Act of 1958 says:

> " Where property, whether real or personal, is held on trusts arising, whether before or after the passing of this Act, under any will, settlement or other disposition, the court may if it thinks fit by order approve on behalf of . . .",

I and then there is a list of persons being persons contingently interested, or children unborn, or persons having only a right under a discretionary trust which has not come into effect. On behalf of any of those classes of persons the court may approve

> ". . . any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts ";

and there is a proviso that no approval shall be given unless the court is of opinion that it will be for the benefit of the person on whose behalf the approval is sought unless such a person is a mere possible object of a discretionary trust. A

The so-called " arrangement " here is an arrangement which is simply an application at the plaintiff's behest to revoke all the trusts which stand between her and absolute dominion over this property. What she wants to do is to override the discretionary powers given to the trustees, and to take command instead. B It is true that if everybody possibly interested came to the trustees, they having such a discretion as this, and applied to them to hand over the funds, the trustees must do so. But the plaintiff has no husband; and assuming (as I do) that she is past possibility of issue, so that any husband she might marry would be the only object of the discretionary trust, then, counsel for the plaintiff said, it is on his behalf that the court may approve the arrangement. One need not have regard C to his benefit because he would be only the object of a discretionary trust, and, therefore, the court need not have regard to anyone's benefit because the benefit of the plaintiff herself is not a matter mentioned in the Act, and it is an arrangement made by her. She has, says counsel for the plaintiff, so arranged her affairs, and the court has no further concern in the matter except to approve it on behalf of this hypothetical and shadowy spouse. D

I am not going to take that view of the Act. It seems to me that the " arrangement " to which the Act refers must be something arranged between A., B. and C., whoever they may be. It is true that the Act specifically provides that there need be no other person beneficially interested capable of assenting to the arrangement; so that she might come to an " arrangement " with the trustees but in my judgment it does not follow that the " arrangement " can E be made by her alone in face of the opposition of the trustees. Can this be called an " arrangement " ? I do not think so. The trustees here will not surrender their discretion to the court, and in law for all the years since the decision in *Gisborne* v. *Gisborne* (1) ((1877), 2 App. Cas. 300) where trustees are properly exercising their discretion, the court is without power to override them, or to take that discretion out of their hands. Is it to be said that this Act was meant to F enable a beneficiary to override the discretionary powers and protective trusts which the trustees desire to exercise ? I think not. I do not think that there is any authority for me to do so, even if I would.

Supposing, however, that is wrong. Suppose that I take a different view, namely, that which counsel for the plaintiff so ably pressed on me, that there G is here an arrangement which the court may, if it thinks fit, by order approve. I am not, therefore, bound to approve even though there be an arrangement, and though everybody of age approves of it, and it is for the benefit of the non-existent parties. I still may think that it is not an arrangement that I ought to approve on behalf of the proposer. As I see it, the court's discretion is still absolute. The words " if it thinks fit ", after all, are put in to reinforce the word H " may "; and I should not feel it right, even if this were within the word " arrangement ", to override the discretion of the persons appointed by the testator to look after this lady's affairs. He knew better than the court does, or thought that he did. This was the testator's money, and he was entitled within limits to dispose of it as he thought fit. In my view, it would not be right, where responsible trustees, clothed with this kind of delicate and difficult discretionary I power by the testator, wish to exercise it in a certain way, for the court to say " I know better than you, and override the exercise of your discretion ". That is not a thing which, in my view, was within the contemplation of the legislature when it conferred these powers on judges under this Act.

In my judgment, therefore, I cannot override the discretion of these trustees who, I am sure, will look with every sympathy on the plaintiff because she is, to all intents and purposes, the only person interested in this money, and it is only against herself that she has to be protected. Consequently, what may appear a

right decision on the financial ground, but which would break her heart, would not be for her benefit. All those things, however, are matters for the trustees, and not for me, and I do not wish to say anything more about them. All I can do with this present summons is to dismiss it, which I do; the trustees must have their costs and expenses out of the corpus of the fund.

Application dismissed.

Solicitors: *Field, Roscoe & Co.*, agents for *Pretty, Dawson & Butters*, Ipswich (for the plaintiff); *Sharpe, Pritchard & Co.* (for the defendants).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

BRAGG *v.* CROSVILLE MOTOR SERVICES, LTD. AND OTHERS.

[COURT OF APPEAL (Hodson, Morris and Willmer, L.JJ.), February 24, 25, 1959.]

Costs—Joint tortfeasors—Offer before trial by one defendant to contribute proportion of damages and costs—Notional payment into court—Liability for costs after payment in—R.S.C., Ord. 16A, *r.* 12A.

A passenger in a lorry, who had been injured in a collision between the lorry and a bus, sued both the owners of the lorry and the owners of the bus for damages for his injuries. In the action neither defendant pleaded contributory negligence or inevitable accident against the plaintiff, who was therefore bound to succeed, and his special damage and the medical reports as to his injuries were agreed. On Apr. 17, 1958, the lorry owners made a written offer to the bus owners "to contribute towards the plaintiff's claim and costs to the extent of one-third thereof". The offer was made with a denial of liability, and the right was reserved to bring it to the notice of the trial judge as if it were a payment into court. On Sept. 26, 1958, the plaintiff was awarded £255 damages, including £65 the agreed special damage, and costs against the defendants, as between whom liability was apportioned as to two-thirds against the bus owners and as to one-third against the lorry owners. No order was made as to the defendants' costs. On appeal as to these costs only, the lorry owners contended that by virtue of R.S.C., Ord. 16A, r. 12 A*, the judge should have taken the offer made in the letter of Apr. 17, 1958, into account in exercising his discretion as to these costs.

Held: as between the defendants the bus owners should pay all costs incurred after Apr. 17, 1958, because the contest in court was in reality between the two owners only and had the offer of Apr. 17 been accepted by the bus owners there would have been saved either all subsequent costs, as was probable, or all except any incurred in assessing the damages.

Basted v. *Cozens & Sutcliffe, Ltd.* ([1954] 2 All E.R. 735n.) explained and distinguished.

Appeal allowed.

[Editorial Note. The present case may be considered with *Clarke* v. *E. R. Wright & Son* ([1957] 3 All E.R. 486 at pp. 495, 496).

As to contribution between joint tortfeasors, see 32 HALSBURY'S LAWS (2nd Edn.) 190, para. 284.]

* This rule is printed at p. 615, letters B to D, post.

Case referred to:

(1) *Basted* v. *Cozens & Sutcliffe, Ltd.*, [1954] 2 All E.R. 735n.; 2 Lloyd's Rep. 132; 3rd Digest Supp.

Appeal as to costs.

By notice of appeal dated Oct. 16, 1958, and addressed to the first and second defendants and the plaintiff, the third defendants gave notice that they would move that the order of His Honour JUDGE FRASER HARRISON made at Liverpool County Court on Sept. 26, 1958, as to the third defendants' costs should be varied so that the first and second defendants should be liable for all the plaintiff's costs, and for the third defendants' costs subsequent to a written offer made by the third defendants to the first and second defendants on Apr. 17, 1958, under R.S.C., Ord. 16A, r. 12A. The plaintiff had recovered damages against all the defendants for personal injuries sustained from negligence in the driving of two motor vehicles, a motor lorry and a bus. The county court judge had directed that, as between the defendants, the third defendants, the owners of the lorry, should be liable for one-third of the damages and costs and that the first and second defendants, the owners and the driver of the bus, should be liable jointly for two-thirds of the damages and costs. The owners of the lorry were the employers of the plaintiff. They appealed against the order for costs. The first defendants were the owners of the bus and the second defendant was the driver of the bus, their servant; they were the respondents to the appeal. The facts appear in the judgment of HODSON, L.J.

R. R. Leech for the appellants, the owners of the motor lorry.

F. J. Nance for the respondents, the owners and the driver of the bus.

HODSON, L.J.: The plaintiff was a passenger in a motor lorry which was owned by the appellants. While the plaintiff was riding in the motor lorry, it collided with a motor omnibus which belonged to the first respondents, and was driven by the second respondent. In the first instance, the plaintiff sued both these respondents alone; that is to say, he brought his claim against the owners of the vehicle in which he was not riding and their employee. He subsequently joined the appellants, his own employers, who were the owners of the vehicle in which he was riding, as third defendants. Contribution notices were served by the appellants on the respondents and by the respondents on the appellants. The claim arose out of a collision between the two vehicles at a cross road. It was a straightforward case, being one in which the plaintiff, who was the innocent passenger, was bound to succeed against one or all the defendants. No allegation was made by any of the defendants against him that he had been guilty of contributory negligence, nor did any of the defendants seek to say that the accident happened inevitably without negligence on the part of the defendants.

On Apr. 17, 1958, a letter was written by the solicitors for the appellants to the solicitors for the respondents which is in these terms:

> " Further to our letter of the 8th instant we have now received instructions concerning the matter. We regret to say that our clients are not prepared to make any increase on the offer previously made and we therefore repeat the offer made in our letter of Mar. 11 last, namely, that the [appellants] offer to contribute towards the plaintiff's claim and costs to the extent of one-third thereof. We confirm that the offer is made with the denial of liability and we reserve the right to bring such offer to the notice of the judge at the trial, as if it were a payment into court, to be taken into account if necessary in the exercise of his discretion concerning the costs of the proceedings."

A contribution notice was enclosed with that letter. At the hearing the learned judge's assessment of liability was in accordance with the prophesy contained in that letter of Apr. 17, 1958. He gave judgment in favour of the plaintiff finding that the respondents were two-thirds to blame and that the appellants were one-third to blame.

The appellants' solicitors' letter was written with an eye on R.S.C., Ord. 16A, r. 12A:

> "A party to an action who, either as a third party or as one of two or more tortfeasors liable in respect of the same damage, stands to be held liable in the action to another party to contribute towards any debt or damages which may be recovered by the plaintiff in the action, and who, at any time before the trial of the action, makes a written offer to that other party (whether absolute or conditional and whether limited or not as respects the time for acceptance thereof) to contribute to a specified extent to the debt or damages, may, in making that offer, while stipulating that it is to be without prejudice to his defence (whether as against the plaintiff or as against the party to whom the offer is made or as against any other party to the action), nevertheless reserve the right to bring the offer to the attention of the judge at the trial as if it were a payment into court (that is to say, after all questions of liability and amount of debt or damages have been decided); and if such an offer is so brought to the attention of the judge in pursuance of a right so reserved, the judge shall, to such extent, if any, as he may think appropriate in all the circumstances, take the offer into account in exercising his discretion as to costs."

The learned judge, as we understand the position, would have acceded to the application of the appellants that in the exercise of his discretion as to costs he could give effect to the letter of Apr. 17 by ordering the respondents to pay the costs after that date. He was, however, deflected from this by his attention being drawn to the judgment of DEVLIN, J., in *Basted* v. *Cozens & Sutcliffe, Ltd.* (1) ([1954] 2 All E.R. 735n.) which is reported in various reports. There is a full report only in [1954] 2 Lloyd's Rep. 132. The attention of the learned county court judge was not drawn to the report in the Lloyd's List Reports. It appears from an examination of the report that there was considerably more in that case than in this one*. The two defendants were each seeking to cast the blame on the other. The second defendant was the Port of London Authority, and the first defendants, whose name appears in the title of the case, were the employers of the plaintiff. The second defendant alleged contributory negligence against the plaintiff and attempted to avoid liability by saying that the crane, which was the cause of the accident, and which turned out to be defective, was in that condition without negligence on their part. It is dangerous in the exercise of discretion to take a reported case as a guide for that exercise in another case. This is specially true when the judgment on costs is taken apart from its context of the findings of fact which are contained in the same judgment.

In the case as reported in Lloyd's Reports it appears that the time of the court was taken up substantially not only in considering a heavy claim for damages, but also in considering the condition of this allegedly defective crane and the reason for its condition. DEVLIN, J., as I read his judgment, did not intend to lay down as a proposition of law that a defendant who paid in or did the equivalent vis-à-vis another defendant is to be deprived of the benefit of that payment in even if at the trial he shows that he is not liable to the plaintiff. I should make it clear that the learned judge was not dealing with the rule which I have read but with an earlier rule which is not now in force†, namely, R.S.C., Ord. 30, r. 2 (2) (j),

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* See footnote p. 617, post.

† Order 16A, r. 12A, was added by the R.S.C. (Summons for Directions, etc.), 1954.

which provided that on the hearing of the summons for directions the master might make an order as follows: A

> " In cases where two or more tortfeasors are sued together in respect of the same tort or damage and any one of them in the same proceedings claims contribution from the other or others, order that a written offer of contribution made by any one of such tortfeasors to the other or others of them shall be treated for the purposes of such claim as a notice of payment into court." B

I should read the judgment in the *Basted* case (1), and read it as it was read to the learned county court judge out of context. DEVLIN, J., said ([1954] 2 All E.R. at p. 736): C

> " I think that I can give full effect to the rule [R.S.C., Ord. 30, r. 2 (2) (j)] in this case in the way in which I imagine it ought to be given effect to. The offer that the second defendants made is to be treated as if it were equivalent to a payment into court. That means, I think, that any person who unsuccessfully disputes whether the payment into court or the offer was sufficient should pay all the costs which have been incurred as a result of the continuance of such dispute. The rule may be very effective in a case where there are, for example, separate proceedings for contribution. The rule may be effective where a large part, or some appreciable part, of a single trial is taken up by a dispute whether the proper proportions, if there is any liability, are fifty per cent. or are not fifty per cent.; but in this case there has been no dispute of that sort at all. Neither party at any time during the trial has even so much as addressed me on what the proper proportion of contribution should be. They were content to leave it, as, no doubt, it must be left, to the view that I took of the facts of the case. Accordingly, in the circumstances of this case no costs have been thrown away at all as the result of the first defendants having failed to agree the apportionment at fifty per cent., and they cannot be made liable under this rule for costs which the second defendants have incurred in continuing (wrongly as it turned out) to resist that they were liable at all." D E F

In saying what he did, the learned judge was, I think, doing no more than alluding to the absence of any real contest between the two defendants in the case before him. If he had intended, which I do not think that he did, to go further and deprive the defendant of the advantage of the rule in a case such as we are now considering, I think that the judgment could not be supported. The object of the rule and its predecessor is to enable the parties to save costs and it draws their attention to a method in which this can be done, and then requires the court to take into consideration the fact that the rule has been acted on. It is scarcely necessary to add that, apart from the rule, unsuccessful efforts by parties such as are exemplified by the letter of Apr. 17, directed to save costs, are properly taken into account by the court in the exercise of its jurisdiction as to costs. G H

In my view the learned county court judge was misled by the reference to *Basted's* case (1) and wrongly allowed his discretion to be fettered thereby. I

It would be indeed unfortunate, the damages here being only £200 odd, if it were found necessary to send this case back for a further order about costs. I think that the court is in a position to exercise its discretion on the simple facts of this case. Apart from liability, as to which the contest was between the respondents and the appellants, there remains only the question of damages. The special damages having been agreed, and the medical reports also having been agreed, there is only a small margin attributable to general damages, and

A I cannot think that the case would ever have gone to trial on this question alone. I would therefore give effect to the rule and exercise the court's discretion in favour of the appellants by giving them the costs of the action after Apr. 17, 1958. The judgment obtained by the plaintiff against all the defendants is unaffected.

MORRIS, L.J., read the following judgment: I agree. There was a collision
B at cross roads between two vehicles, a bus belonging to the first respondents and a lorry. The plaintiff, who was injured, was a passenger in the lorry. No one suggested that the plaintiff had done anything wrong. He was therefore entitled to succeed in recovering damages in one of three ways: (a) against the owners and driver of the bus (the respondents); (b) against the owners of the lorry (the appellants); (c) against all three.

C As between the owners of the two vehicles there were certain communications. The respondents said that they would pay half the damages to which the plaintiff was entitled if the appellants would do likewise. The appellants would not, but they said that they would pay one-third if the respondents paid two-thirds. The respondents would not agree to this. So each party served a contribution
D notice on the other, and the letter of Apr. 17 was written on behalf of the appellants.

If the two owners had been able to agree, there could and would have been an admission of liability to the plaintiff. Either the amount of the damages would have been agreed, as indeed seems probable, or there could have been an offer and a payment into court, and in any contest in court relating to damages only
E there would probably have been one representation by counsel or solicitors for both defendants. As it was, there was a contest; but no one suggested that the plaintiff could lose. Either of the owners could have admitted liability to the plaintiff while reserving the claim to contribution, but it was unlikely that one would do this when the other was not doing so. In the result the contest in court
F was in reality one between the two owners. Each wanted the sole blame to be held to be in the other, or, failing such a result, to have as high a proportion of blame as possible ascribed to the other. In every practical sense the two owners were fighting each other.

The learned judge eventually held that all the defendants were liable to the plaintiff, but that as between themselves the respondents should bear two-thirds
G and the appellants one-third of the liability to the plaintiff. That result, however, could have been reached if the respondents had agreed to the proposal made in the letter of Apr. 17. The costs would have been saved either in whole, as is probable, or as to all except any incurred in assessing the damages.

When the letter of Apr. 17 was made known to the learned judge, it seems
H clear from what we have been told that he was disposed to make an order that as between the defendants the respondents should be liable for the plaintiff's costs subsequent to Apr. 17 and should pay the appellants' costs in that subsequent period. He was deflected by a consideration of *Basted* v. *Cozens & Sutcliffe, Ltd.* (1) ([1954] 2 All E.R. 735n.). But that case had very different issues, as the full report ([1954] 2 Lloyd's Rep. 132) shows*. The employee sued his employers
I alleging faulty system and the suppliers of the crane alleging negligence. The latter alleged contributory negligence against the plaintiff. It was not a case in which he was sure to succeed against one or both. The decision of DEVLIN, J.,

* The plaintiff alleged negligence against both defendants, and the first defendants denied negligence and contended that the second defendant was to blame. The Port of London Authority, the second defendant, denied negligence and contended that the accident was caused or contributed to by the plaintiff's own negligence or by the negligence of the plaintiff and other servants of the first defendants, or was due to accidental causes that imposed no liability on the second defendant.

is not under appeal and it is not necessary to express either concurrence or dissent from his decision in regard to the costs. DEVLIN, J., in his judgment ([1954] 2 All E.R. at p. 736) said in reference to the rule then existing:

> "The rule may be very effective in a case where there are, for example, separate proceedings for contribution. The rule may be effective where a large part, or some appreciable part, of a single trial is taken up by a dispute whether the proper proportions, if there is any liability, are fifty per cent. or are not fifty per cent.; but in this case there has been no dispute of that sort at all. Neither party at any time during the trial has even so much as addressed me on what the proper proportion of contribution should be."

The present was essentially a case in which the effective contest, save as to the actual amount of the damages, was between two defendants, and the issues need never have been fought if the respondents had accepted the offer made by the appellants. The latter had said on Apr. 17: "We will contribute one-third", leaving the respondents to contribute two-thirds. That was what the judge decided should be the result. The decision of DEVLIN, J., does not, in my judgment, debar the appellants from advancing their claim for costs but tends to support it, and had the learned judge taken this view, he would, I think, on the facts of this case, have said that the contentions of the appellants were just and reasonable.

His discretion in favour of the appellants was not exercised only because he felt that the decision in *Basted's* case (1) prevented him: as it does not, we can make the order which I have no doubt he would have made.

WILLMER, L.J.: I agree. I had prepared myself to deliver a separate judgment of my own, but, having listened to what has fallen from my Lords, I find it quite unnecessary to do more than to say that I wholly agree with everything that has been said by them.

Appeal allowed: respondents ordered to pay all the costs of the proceedings after Apr. 17, 1958.

Solicitors: *Field, Roscoe & Co.*, agents for *Guy Williams & Co.*, Liverpool (for the appellants); *Stanley & Co.*, agents for *A. W. Mawer & Co.*, Liverpool (for the respondents.)

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

A

NEVILL *v.* NEVILL (LEWIS cited).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), February 9, 10, 11, 12, 13, 1959.]

Legal Aid—Certificate—Discharge—False statement made by wife in application B *for legal aid—Wife's failure to disclose adultery—Whether wife's certificate should be discharged by court—Legal Aid (General) Regulations,* 1950 (*S.I.* 1950 *No.* 1359), *reg.* 11 (4).

The wife was granted a civil aid certificate to enable her to petition for divorce. In her application for legal aid she made a false statement, that she had not committed adultery. She petitioned on the ground of cruelty and, C secondarily, on the ground of the husband's adultery, condoned but revived. She did not ask for the court's discretion and her reply denied adultery. At the trial she admitted adultery and both parties were given leave to make appropriate amendments to the pleadings. The husband then sought to have the wife's certificate discharged, invoking reg. 11 (4)* of the Legal Aid (General) Regulations, 1950, because the wife, in applying for legal aid, D had made a false statement denying an act of adultery. The statement rendered her liable to criminal proceedings under s. 15 of the Legal Aid and Advice Act, 1949.

Held: the application to discharge the civil aid certificate would be refused because, if the wife had in the first instance admitted her adultery, it would have been appropriate to grant her legal aid for the determination E of the question of her being entitled to a decree on the ground of her husband's cruelty or the revival of condoned adultery.

Divorce—Practice—Pleading—Answer—Sufficiency—Allegation in wife's petition of false accusations of her "improperly associating with other men"—Admission that accusations were made, but allegation in answer of reasonable belief in their truth, followed by a general traverse—Sufficiency of answer.

F Where one party to a divorce suit alleges that the other has made false accusations of improper conduct, an answer alleging belief in their truth followed by a general traverse is not an allegation of their truth and thus is not sufficient to entitle evidence of immoral conduct to be led (see p. 622, letters C and D, post).

G [As to the need to set out facts with sufficient particularity in an answer to a petition, see 12 HALSBURY'S LAWS (3rd Edn.) 339, para. 704.

For the Legal Aid and Advice Act, 1949, s. 15, see 18 HALSBURY'S STATUTES (2nd Edn.) 551.

For the Legal Aid (General) Regulations, 1950, reg. 11 (4), see 5 HALSBURY'S STATUTORY INSTRUMENTS 212.]

H **Petition.**

The wife petitioned for divorce on the grounds of cruelty, adultery and desertion and asked for the court's discretion in her favour. The husband cross-prayed for divorce on the ground of adultery. There were two children of the marriage, the paternity of the younger child being disputed. The wife had been granted

I * Regulation 11 (4) of the Legal Aid (General) Regulations, 1950, provides:—"At any time during the hearing of any proceedings to which an assisted person is a party the court may, upon application by or on behalf of any other party to the proceedings or by the Law Society, consider whether the assisted person—(a) has wilfully failed to comply with any regulation as to the information to be furnished by him; or (b) in furnishing any such information has knowingly made a false statement or false representation; and on any such application the court may make an order revoking the certificate or discharging it from such date as may be appropriate and the court's decision shall be final: Provided that no order shall be made under this sub-paragraph until the assisted person has been given an opportunity to show cause why the certificate should not be discharged, or, as the case may be, revoked."

a civil aid certificate. Invoking reg. 11 (4) of the Legal Aid (General) Regulations, 1950, the husband sought to have the wife's certificate discharged on the ground that she had knowingly made a false statement in answer to a question on her application form for legal aid, viz., that she had not committed adultery. A

In para. 12 of her petition the wife alleged that the husband had " frequently but falsely accused her of improperly associating with other men ". The husband, in para. 4 (c) of his answer, admitted that he often accused her of improperly associating with other men, but alleged that he reasonably believed her to have done so. He also made a general traverse of the charges of cruelty. The ruling of SACHS, J., on this plea is at p. 622, letters C and D, post. B

Anthony Cripps, Q.C., and *G. F. B. Laughland* for the husband.

J. P. Comyn for the wife. C

Feb. 9. **SACHS, J.:** There is at present before me an application by counsel for the husband that the wife's legal aid certificate be discharged. That application is made with a view to invoking the court's powers under reg. 11 (4) of the Legal Aid (General) Regulations, 1950, as amended, made under the Legal Aid and Advice Act, 1949.

The way in which the matter has arisen is as follows. On the pleadings the wife is seeking a decree of divorce primarily on the grounds of the husband's cruelty, and as a second string, on the ground of the husband's adultery in war-time, condoned but revived either by acts just short of cruelty or by desertion in October, 1956. The husband cross-prays for divorce on the ground of his wife's adultery in 1947, as revived, so he alleges, by desertion on her side in October, 1956. The husband asks, on the pleadings as they stand at present, for discretion, and will in due course urge in that behalf that he has only been guilty of a single act of adultery, and that a long time ago. D E

The wife's petition, however, contains no prayer for discretion, and by her reply she denies the 1947 adultery. If that denial were right, she would indeed have no need to invoke the discretion of the court. Now, at the fifty-ninth minute of the eleventh hour the legal advisers of the wife, who have no doubt subjected her to some very proper questions, have elicited that she herself was guilty of the adultery alleged in 1947 and, what is more, that it was adultery which unfortunately resulted in the birth of a child. According to her instructions given to counsel, it was a single act of adultery. Moreover, according to the instructions given on both sides to their counsel, it is common ground that the husband forgave her that adultery and took the child into the family as if it were in truth one of the family. In those circumstances, this morning the wife, by her counsel, asks leave to make the appropriate amendments in her pleadings, and to this counsel for the husband did not object. In fact, he could hardly have done so. The result is that so far as the pleadings are concerned both sides are in agreement that the appropriate amendments should be made; and, in order that I may not omit this point, I now give leave for amendments appropriate to the facts to be made to the pleadings on both sides, reserving the costs to the conclusion of the hearing, but stating forthwith that in no event should the costs occasioned by the amendments fall on the husband. F G H

In those circumstances counsel for the husband founded his application on the admission, frankly and naturally made by counsel for the wife, that in her application for legal aid to the Law Society the wife had made a false statement. It is admitted that a false statement was made in answer to the usual question on a form of application for legal aid in a divorce suit whether the person applying for legal aid had herself or himself committed adultery. Counsel for the wife at the outset very properly put the matter into the hands of the court whether, there being that admitted mis-statement in the application, it was right for the I

cause here and now to proceed, or whether there should be an adjournment for the Law Society to consider whether they desired to apply to the court to discharge the certificate or even to revoke it themselves. Counsel for the husband, as I have indicated, has gone further and has made, as he is in law entitled to make, an application that the court should take immediate action under reg. 11 (4). In so doing he submitted that whilst clearly this was not a case where there should be revocation, yet it was a cause for the discharging of the certificate—discharge, of course, involving less serious consequences to the assisted person than revocation.

The position, as I see it, is very clear. Supposing in the first instance the wife had admitted her adultery on this form there would still have emerged the question whether she was entitled to a decree on the ground of her husband's cruelty; there would still have emerged the question whether she was entitled to a decree on the ground of the revival of this long-condoned single—or maybe more than single, it matters not—act of adultery. It would seem to me quite impossible to suppose that any committee of the Law Society would have done otherwise, in the circumstances, than grant her legal aid. Accordingly, it follows that really legal aid is a matter which is appropriate to this particular cause, and the only question that can arise from the Law Society's point of view, taking a practical outlook, is whether they happen to want to pursue the question of criminal proceedings for the breach of s. 15 of the Legal Aid and Advice Act, 1949. That is a matter entirely for them.

So far as the court is concerned, to my mind reg. 11 (4) is one in regard to which the court will only, as a rule, give an immediate decision in clear cases. Either it is clear that for one reason or another the cause is not one in which there is any real likelihood of the Law Society revoking the certificate, in which case it is obviously, from the point of view of costs, the right thing to say that the cause should proceed and to reject any application such as has been made by counsel for the husband. Alternatively, in a case where it would be idle to think that the Law Society would do anything else but revoke the certificate as where in a contract case the legally assisted plaintiff has to face in the witness-box the plain fact that the document on which he is proceeding was, to his knowledge at all material times, forged, the obvious course would be for the court to take advantage of its powers under reg. 11 (4).

In the present case it seems to me abundantly clear that the right course is to reject the application and, accordingly, no question arises about having an adjournment in order that the Law Society may consider the position. Any such adjournment is in its nature bound to involve undue additional costs. (Such an adjournment would, of course, be necessary if, as counsel for the wife pointed out, it had been desirable for the assisted person to be cross-examined, because one does not want to conduct a preliminary trial before one comes to the true trial.) In those circumstances, I need say no more than that I propose to reject the application made by counsel for the husband and to proceed with the cause.

Application refused.

[The hearing then continued. Counsel for the husband proposed to lead evidence given by an inquiry agent to show that the wife was guilty of the improper associations alleged in para. 4 (c) of the answer. Counsel for the wife having objected, HIS LORDSHIP refused to allow that evidence to be given but admitted the reports* of the inquiry agent's activities to which no objection was offered de bene esse.]

* The reports might explain the husband's alleged belief and thus might explain conduct which otherwise might be regarded as cruelty; see, however, as regards belief induced by extraneous circumstances, *Elliott* v. *Elliott*, [1956] 1 All E.R. 122.

Feb. 13. **SACHS, J.:** I turn separately to para. 12 of the petition as a matter of some importance. Paragraph 12 charges the husband with having frequently and falsely accused the wife of improperly associating with other men. Unfortunately, the phrase " improperly associating " is an ambiguous one. Counsel for the wife submitted, and I think rightly, that it covered anything from adultery, through immorality in the way of petting or the like, down to being unduly seen about with some other men. My own, if I may say so, jury reading of what the layman would take that phrase to mean is that it connoted a degree of immorality.

The husband admitted by para. 4 (c) of his answer that:

> " He often accused the [wife] of improperly associating with other men, but on all such occasions reasonably believed her to have done so . . ."

After para. 4 came a general traverse. The effect was that there was no affirmative allegation of improper conduct or of any facts which could constitute improper conduct. If counsel wishes in answer to an allegation of false accusations of adulterous, immoral or other improper conduct, to say that the wife was in fact guilty of such conduct, he cannot in my view do so by alleging belief in the truth of the allegations and, stopping short of alleging that truth, relying on the general traverse.

The husband received certain reports from the inquiry agent. Whether in law the husband is entitled by reference to such reports to say that he reasonably believed something is a matter with which I do not, having regard to the facts of the present case, propose to concern myself, for that might involve a considerable embarkation on the line of authorities that follow *Glenister* v. *Glenister* ([1945] 1 All E.R. 513)*.

[His Lordship then went on to consider the evidence and held that the wife was entitled to a decree on the ground of the husband's cruelty and refused the husband's cross-prayer.]

Decree nisi.

Solicitors: *Collyer-Bristow & Co.*, agents for *Bird & Lovibond*, Uxbridge (for the husband); *Edward Mackie & Co.*, Hayes (for the wife).

[*Reported by* N. P. Metcalfe, Esq., *Barrister-at-Law.*]

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* E.g., *Baker* v. *Baker*, [1953] 2 All E.R. 1199.

BIRTLEY DISTRICT CO-OPERATIVE SOCIETY, LTD. *v.* WINDY NOOK & DISTRICT INDUSTRIAL CO-OPERATIVE SOCIETY, LTD.

[QUEEN'S BENCH DIVISION (Streatfeild, J.), November 3, 4, 5, 6, 10, December 16, 1958.]

Industrial and Provident Societies—Rules—Arbitration rule—Dispute submitted to arbitration while defendant was a member of the society—Award made in final amended form after defendant's membership had ceased—Whether term implied that member no longer bound by rule after membership ceased.

Trade—Covenant in restraint of trade—Arbitration rule in rules of registered co-operative union—Award restricting area within which a co-operative society, member of the union, might trade—Society ceasing to be member of union—Validity of award—Industrial and Provident Societies Act, 1893 (56 & 57 *Vict. c.* 39), *s.* 22.

Trade Union—Definition of trade union—Whether Co-operative Union Ltd., registered as an industrial and provident society, was a trade union—Trade Union Act Amendment Act, 1876 (39 & 40 *Vict. c.* 22), *s.* 16—*Trade Union Act,* 1913 (2 & 3 *Geo.* 5 *c.* 30), *s.* 2 (1).

The plaintiffs and the defendants were co-operative societies registered under the Industrial and Provident Societies Act, 1893, and were members of the Co-operative Union Ltd., which was also registered under that Act. Individuals could not be admitted as members of the union, whose members consisted only of such bodies as co-operative societies or companies. By s. 22* of the Act of 1893 the rules of a registered society bound all its members as though each had covenanted to conform thereto. The objects of the union were, by r. 2, to "carry on the trades and businesses of accountants, booksellers, commercial and general advisers, publishers, and arbiters in matters of dispute arising between societies which cannot be settled locally, and of propagating co-operative principles and ideas . . . with a view to the ultimate establishment of a co-operative commonwealth". Rule 10 provided, among other things, that "any disagreement that may arise as to overlapping or any other matter . . . shall . . . be submitted to persons appointed . . . as arbitrators and their decision shall be final and binding on all parties". A society could, by r. 15 (1), withdraw from the union on giving notice in writing. Disagreement arose between the plaintiffs and the defendants, who had failed to agree a boundary for their spheres of operation, in relation to overlapping in a new district where each had established a shop, but where the plaintiffs had predominance. The plaintiffs were financially able to provide the co-operative needs of the district. There was no disagreement over a neighbouring area, outside the district, where the defendants formerly had had, and continued to have, predominance. The disagreement was referred by the plaintiffs to arbitrators under r. 10, but the defendants did not attend the proceedings. An award was made in the plaintiffs' favour. Shortly afterwards the defendants terminated their membership of the union. Subsequently the award was remitted to the arbitrators by order of the High Court on summons taken out by the plaintiffs, at which time an application by the defendants to set aside the award was rejected. The arbitrators reconsidered the award,

* Section 22 of the Industrial and Provident Societies Act, 1893, provides: "The rules of a registered society shall bind the society and all members thereof and all persons claiming through them respectively to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were contained in such rules a covenant on the part of such member, his heirs, executors . . . and assigns, to conform thereto, subject to the provisions of this Act: . . ."

the defendants declining to attend, and amended it on Sept. 18, 1956, on which date the defendants were no longer members of the union. The plaintiffs applied for a declaration that the amended award was binding on the defendants, and the defendants contended, among other contentions, (a) that r. 10 did not entitle the arbitrators to make an award that would bind the defendants after they ceased to be members of the union, (b) that as the award restricted their trading after their membership of the union had ceased it was illegal as being in unreasonable restraint of trade, and (c) that the action was barred by s. 4* of the Trade Union Act, 1871, as the union was a trade union within s. 16* of the Trade Union Act Amendment Act, 1876, and s. 2 (1)† of the Trade Union Act, 1913.

Held: the award was binding on the defendants for the following reasons—

(i) no term would be implied in r. 10 that the decision of the arbitrators should cease to be binding on members after their membership of the union had ceased, for the contract between members to conform to the rules was not so analogous to an ordinary trading contract or licence as to justify the view that the obligation under r. 10 to be bound by an award was intended to be terminable while the arbitration was pending (see p. 628, letter H to p. 629, letter D, post).

Llanelly Ry. & Dock Co. v. *London & North Western Ry. Co.* ((1875), L.R. 7 H.L. 550, *affg.* (1873), 8 Ch. App. 942); dictum of LORD MACDERMOTT in *Winter Garden Theatre (London), Ltd.* v. *Millenium Productions, Ltd.* ([1947] 2 All E.R. at pp. 343, 344), and dictum of LAWRENCE, L.J., in *Palmolive Co. (of England)* v. *Freedman* ([1928] Ch. at p. 285) considered.

Martin-Baker Aircraft Co., Ltd. v. *Canadian Flight Equipment, Ltd.* ([1955] 2 All E.R. 722) distinguished.

(ii) the award was lawfully obtained, there was nothing on the face of it to indicate that it was in unreasonable restraint of trade, and the court was not entitled to look behind it; moreover it was not in unreasonable restraint of trade, for the defendants were not thereby restricted from carrying on business as they had done before 1956, nor was it unreasonable, in the interests of economical co-operative trading and in the interests of the public, to confine trading in a particular area to one co-operative society that was financially able to provide for the needs of the area (see p. 631, letters H and I, post).

(iii) the Trade Union Act, 1871, s. 4, was not a bar to this action, because the Co-operative Union Ltd. was not a trade union within the definition in s. 16 of the Trade Union Act Amendment Act, 1876, for it was neither a " combination for regulating the relations between masters and masters " nor a combination for " imposing " restrictive conditions on the conduct of any trade or business, as its purpose was to promote co-operative principles which its members already possessed; moreover r. 10, the arbitration rule, was not a principal object of the union within s. 2 (1) of the Trade Union Act, 1913 (see p. 634, letter A, post).

[As to the determination of disputes between industrial and provident societies, see 21 HALSBURY'S LAWS (3rd Edn.) 50, paras. 119, 120, and ibid., pp. 52, 53, para. 126.

As to the effect of provisions in articles of association concerning arbitration, see 2 HALSBURY'S LAWS (3rd Edn.) 4, para. 6, note (g).

As to contracts in restraint of trade, see 32 HALSBURY'S LAWS (2nd Edn.) 403-418, paras. 674-698; and as to the definition of a trade union, see ibid., 456-458, paras. 740, 741.

For the Industrial and Provident Societies Act, 1893, s. 22, see 12 HALSBURY'S

* The terms of s. 4 of the Act of 1871, and of s. 16 of the Act of 1876 are printed at p. 632, letters B and E, post.

† Section 2 (1) of the Act of 1913 is printed in the footnote on p. 633, post.

A STATUTES (2nd Edn.) 888; for the Trade Union Act, 1871, s. 4, s. 5, s. 23, see 25 HALSBURY'S STATUTES (2nd Edn.) 1245, 1246 and 1255; for the Trade Union Act Amendment Act, 1876, s. 16, see ibid., 1263; and for the Trade Union Act, 1913, s. 1, s. 2, see ibid., 1270, 1271.]

Cases referred to:

B (1) *Buccleuch* (*Duke*) v. *Metropolitan Board of Works*, (1872), L.R. 5 H.L. 418; 41 L.J.Ex. 137; 27 L.T. 1; 36 J.P. 724; 2 Digest (Repl.) 663, *1817*.

(2) *Marsh* v. *Bulteel*, (1822), 5 B. & Ald. 507; 1 Dow. & Ry. K.B. 106; 106 E.R. 1276; 2 Digest (Repl.) 507, *534*.

(3) *London Sack & Bag Co., Ltd.* v. *Dixon & Lugton, Ltd.*, [1943] 2 All E.R. 763; sub nom. *London Bag & Sack Co., Ltd.* v. *Dixon & Lugton, Ltd*, 170 L.T. 70; 2 Digest (Repl.) 423, *33*.

C (4) *Llanelly Ry. & Dock Co.* v. *London & North Western Ry. Co.*, (1875), L.R. 7 H.L. 550; 45 L.J.Ch. 539; 32 L.T. 575; *affg.* (1873), 8 Ch. App. 942; 42 L.J.Ch. 884; 29 L.T. 357; 2 Digest (Repl.) 452, *190*.

(5) *Martin-Baker Aircraft Co., Ltd.* v. *Canadian Flight Equipment, Ltd.*, *Martin-Baker Aircraft Co., Ltd.* v. *Murison*, [1955] 2 All E.R. 722; [1955] 2 Q.B. 556; 72 R.P.C. 236; 3rd Digest Supp.

D (6) *Winter Garden Theatre* (*London*), *Ltd.* v. *Millenium Productions, Ltd.*, [1947] 2 All E.R. 331; [1948] A.C. 173; [1947] L.J.R. 1422; 177 L.T. 349; 2nd Digest Supp.

(7) *Crediton Gas Co.* v. *Crediton Urban District Council*, [1928] Ch. 447; 97 L.J.Ch. 184; 138 L.T. 723; 92 J.P. 76; Digest Supp.

E (8) *Palmolive Co.* (*of England*) v. *Freedman*, [1928] Ch. 264; 97 L.J.Ch. 40; 138 L.T. 274; 43 Digest 55, *568*.

(9) *Evans* (*Joseph*) *& Co.* v. *Heathcote*, [1918] 1 K.B. 418; 87 L.J.K.B. 593; 118 L.T. 556; 43 Digest 91, *954*.

(10) *McEllistrim* v. *Ballymacelligott Co-operative Agricultural & Dairy Society*, [1919] A.C. 548; 88 L.J.P.C. 59; 120 L.T. 613; 43 Digest 35, *309*.

F (11) *Hilton* v. *Eckersley*, (1855), 6 E. & B. 47; 24 L.J.Q.B. 353; 25 L.T.O.S. 214; 20 J.P. 4; 119 E.R. 781; *affd.* Ex. Ch., (1856), 6 E. & B. 66; 12 Digest (Repl.) 271, *2079*.

(12) *Kores Manufacturing Co., Ltd.* v. *Kolok Manufacturing Co., Ltd.*, [1958] 2 All E.R. 65; [1959] Ch. 108.

(13) *Caledonian Ry. Co.* v. *Turcan*, [1898] A.C. 256; 67 L.J.C.P. 69; 2 Digest (Repl.) 665, *1836*.

G (14) *Elves* v. *Crofts*, (1850), 10 C.B. 241; 19 L.J.C.P. 385; 138 E.R. 98; sub nom. *Crofts* v. *Elves*, 15 L.T.O.S. 383; 43 Digest 36, *322*.

(15) *Bellshill & Mossend Co-op. Society, Ltd.* v. *Dalziel Co-op. Society, Ltd.*, (1958), Unreported.

(16) *Delver* v. *Barnes*, (1807), 1 Taunt. 48; 127 E.R. 748; 2 Digest (Repl.) 655, *1744*.

H (17) *Wohlenberg* v. *Lageman*, (1815), 6 Taunt. 251; 128 E.R. 1031; 2 Digest (Repl.) 615, *1410*.

(18) *Edinburgh Master Plumbers' Assocn.* v. *Munro*, 1928 S.C. 565; [1928] S.L.T. 402; 43 Digest 97, *p*.

(19) *Performing Rights Society, Ltd.* v. *London Theatre of Varieties, Ltd.*, [1924] A.C. 1; 93 L.J.K.B. 33; 130 L.T. 450; 43 Digest 129, *1315*.

I (20) *Davies* v. *Davies*, (1887), 36 Ch.D. 359; 56 L.J.Ch. 962; 58 L.T. 209; 43 Digest 41, *406*.

Action.

The plaintiffs, the Birtley District Co-operative Society, Ltd. claimed, by writ issued on May 5, 1957, a declaration that an arbitration award made by three arbitrators on Sept. 18, 1956, was binding on the defendants, the Windy Nook & District Industrial Co-operative Society, Ltd., and that it precluded them from providing co-operative service contrary to the terms thereof. The

plaintiffs further claimed an injunction and damages. During the hearing the defendants sought leave to amend their defence by adding by way of counterclaim a claim to have the award of the arbitrators set aside on the ground of alleged misconduct. This was refused*.

Both the plaintiffs and defendants were co-operative trading societies. The plaintiffs were established in 1871 with a registered office at Birtley in County Durham; and the defendants were established in 1874 with a registered office at Windy Nook, part of Gateshead, County Durham. Both were registered under the Industrial and Provident Societies Act, 1893. The plaintiffs and defendants were members of the Co-operative Union Ltd. (herein called "the union") which was also a society registered under the Industrial and Provident Societies Act, 1893. By r. 2, the objects of the union were stated to be:

> "to carry on the trades and businesses of accountants, booksellers, commercial and general advisers, publishers, and arbiters in matters of dispute arising between societies which cannot be settled locally, and of propagating co-operative principles and ideas, and the organising of co-operative work in all its branches, whether such work be in connexion with industries, trades, or business, or for the promotion of education and other objects and purposes of a similar character with a view to the ultimate establishment of a co-operative commonwealth."

Rule 10 provided:

> "No society shall be admitted into the union unless the management is of a representative character. No society shall be allowed to remain in membership with the union which does not abide by its rules, conform to its aims, and accept the decisions of the central executive confirmed by congress. Any disagreement that may arise as to overlapping or any other matter which cannot be settled in consultation between the parties shall, in failure of conciliation be submitted to persons appointed by the Co-operative Union Ltd. as arbitrators and their decision shall be final and binding on all parties."

By r. 15 a society was enabled to withdraw from the union on giving notice in writing.

A few miles to the east of Birtley, and south-east of Gateshead, lay what had been, since 1922, the Washington Urban District. Before then it consisted of the parish of Washington and the parish of Usworth, which included Great and Little Usworth and a village called Springwell. Since 1922 these two parishes had become the Washington Station Ward, Washington Ward, Usworth Colliery Ward, Great Usworth Ward and Springwell Ward of the Washington Urban District Council. In 1873 the plaintiffs had opened a general store in Washington parish, and this was followed in 1901 by another branch in Washington parish and in 1929 a further grocery branch in what had then become the Usworth Colliery Ward. In 1891 the defendants opened a general branch in Springwell village, which later became Springwell Ward; and in 1951 they opened a further greengrocery branch also in Springwell. Before 1956 the plaintiffs had the predominance of co-operative trade in the old parish of Washington (later Washington Station Ward and Washington Ward) as well as in that part of the parish of Usworth which became Usworth Colliery Ward. The defendants had the predominance of co-operative trade in Springwell village (later Springwell Ward); but before 1956 neither society had established a store in Great Usworth Ward, though each had customers living there, who would either go to the nearest shop of whichever of the two societies that they preferred or would be served by vans. In 1951-52 this overlapping gave rise to disputes between the two societies. A new building estate was developed in Great Usworth Ward and in 1955 the Washington Urban District Council allotted one grocery

* Reported ante, at p. 43.

A shop each to the two societies. In 1956 each of them opened a grocery shop in Great Usworth Ward within a short distance of one another. The plaintiffs, having been first in the field in the Washington area, and having predominance everywhere except Springwell (with Great Usworth doubtful), claimed that, with the exception of Springwell, they had an exclusive right to afford co-operative service in the area, which their financial resources would undoubtedly permit B them to do.

In 1955, negotiation and conciliation having failed, the dispute was referred to the head office of the union for arbitration under r. 10, and three arbitrators were appointed. The terms of reference were sent to the defendants, who boycotted the arbitration and did not attend the hearing on Oct. 6, 1955. On Nov. 5, 1955, the arbitrators made an award in favour of the plaintiffs, which C was sent to the defendants, who refused to accept or to be bound by the award. The award stated, among other things, that co-operative service in the Washington area should be provided exclusively by the plaintiffs and that the defendants should not canvass for customers nor trade in that area from fixed premises therein nor mobile shops or vans.

The award was wider than the plaintiffs asked or the arbitrators intended D and on Feb. 29, 1956, the plaintiffs took out a summons for time to apply to the High Court to remit the award to the reconsideration of the arbitrators. On Mar. 16, 1956, the defendants took out a summons for time to apply to the High Court to set aside the award in toto. While the hearing of these summonses was pending, the defendants on Mar. 21, 1956, exercised their rights under r. 15 of the union's rules and notified the union of their intention to terminate E their membership. On the same day both parties appeared at the hearing of their summonses. The two motions, for remitting the award for reconsideration and for setting it aside respectively, were heard on July 23, 1956, when part of the award was remitted for the reconsideration of the arbitrators. The defendants refused to attend the hearing of the reconsideration of the award, their committee having resolved that as the defendants had ceased to be members F of the union they claimed that no award could be effective against them. On Sept. 18, 1956, the arbitrators made their amended award, on which this action was brought.

The defendants contended, among other contentions, that, as they were no longer members of the union they could not be bound by the award; that if the rules so bound them, the rules were in restraint of trade and illegal and there- G fore unenforceable; and that the union was a trade union and therefore the court was barred, by s. 4 of the Trade Union Act, 1871, from entertaining these proceedings.

Sir Frank Soskice, Q.C., and *R. A. MacCrindle* for the plaintiffs.
Gerald Gardiner, Q.C., and *A. S. Orr* for the defendants.

Cur. adv. vult.

H

Dec. 16. **STREATFEILD, J.**, read the following judgment in which, after reviewing the facts, he said: On these facts the plaintiffs are seeking to enforce the award, in its amended form, made on Sept. 18, 1956, by which date the defendants had ceased to be members of the Co-operative Union Ltd., albeit, at the date of the submission to arbitration, if effective, the defendants I were still members.

The principal submission on behalf of the plaintiffs may be summarised as follows: Where parties to a dispute have by a valid contract bound themselves to refer the matter to arbitration, and the arbitrators, appointed in accordance with the contract, and acting within their authority, make an award, which is not ex facie turpis, or illegal, or obviously in unreasonable restraint of trade, the parties are bound by such award, subject to their rights to move the court to remit the matter to the arbitrators, or to set the award aside for misconduct of the arbitrators, under s. 22 and s. 23 of the Arbitration Act, 1950. The

successful party can apply to the court to have the award made an order of court, or bring an action on the award. Counsel for the plaintiffs submits that here is an award within the terms of reference and within the authority of the arbitrators, not tainted by misconduct, and clearly not turpis, and it cannot be said that, ex facie, it is in wrongful restraint of trade. To argue otherwise, is to ask the court to act as an appellate court from the arbitrators, which can only be done by Case Stated. The strength of the plaintiffs' case is, he says, that they have an award, which is on its face perfectly legal, and are entitled to the fruits of it. He relies on *Duke of Buccleuch* v. *Metropolitan Board of Works* (1) ((1872), L.R. 5 H.L. 418).

[His Lordship then rejected a submission on behalf of the defendants that r. 10 was too vague to constitute a valid arbitration agreement, and turned to their submission that by their withdrawal from membership of the union they revoked any jurisdiction of the arbitrators. Counsel for the defendants relied on *Marsh* v. *Bulteel* (2) ((1822), 5 B. & Ald. 507) as showing that revocation of authority of an arbitrator before the award was a defence to an action on the award, and, since if the Arbitration Act, 1950, applied the authority of the arbitrators was irrevocable without leave of the court, relied also on *London Sack & Bag Co., Ltd.* v. *Dixon & Lugton, Ltd.* (3) ([1943] 2 All E.R. 763) as showing there was not an effective arbitration agreement within the definition in s. 32 of the Act of 1950. His Lordship distinguished the last mentioned case on the grounds that the member of the union was the co-operative society which had for its object the promotion of co-operative principles and ideas, and that one of the objects of the union was to be arbiters in matters of disputes arising between societies which could not be settled locally; accordingly he decided that r. 10 amounted to a valid arbitration agreement within s. 32 of the Arbitration Act, 1950, and that therefore the authority of the arbitrators was irrevocable in law, so that neither letters written by the defendants purporting to revoke the authority of the arbitrators, nor the defendants' withdrawal from the union, constituted an effective revocation of the authority of the arbitrators. His Lordship continued:] Under para. 6 of the defence the defendants contend that r. 10, on its true construction, does not constitute a submission to arbitration in respect of, nor entitle the arbitrators to make an award affecting, the conduct of a society after it has ceased to be a member of the union, and that there must be an implied term in r. 10 to that effect.

Counsel for the defendants submits that, even though under r. 10 the decision of the arbitrators is expressed to be final and binding on the parties, it was clearly never intended to be binding on them after ceasing membership, any more than an ordinary club member is intended to be bound by the club rules after he has withdrawn from the club. He points out that the rules permit of a member being expelled from the union, as well as resigning, and he submits that it would be very odd if an award were to be binding, for all time, on an ex-member, after his expulsion or resignation. He submits that it is more a question of construction of the rule than of implying a term therein, but that r. 10 should be construed as though it contained a limitation to the time during which a society remains a member. In so far as any onus lies on him of showing that a contract or rule, on the face of it, perpetual, is to be construed as subject to an implied limitation (see *Llanelly Ry. & Dock Co.* v. *London & North Western Ry. Co.* (4) (1875), L.R. 7 H.L. 550 at p. 567 per Lord Selborne), counsel relies on the judgment of McNair, J., in *Martin-Baker Aircraft Co., Ltd.* v. *Canadian Flight Equipment, Ltd.* (5) ([1955] 2 All E.R. 722 at pp. 732-734).

To this submission, counsel for the plaintiffs returns the simple answer that such a construction would just make nonsense of the rule. It cannot have been intended, he says, that a rule, governing the settlement of disputes concerning the trading interests of co-operative societies, is to be so construed as to enable the unsuccessful party to an arbitrator's award to avoid its consequences by simply resigning membership. Still less could an actual injunction granted by

A the court following an award be so frustrated. On the face of it, the rule appears to be perpetual, and counsel points out that when one of these rules is intended to apply only during actual membership it expressly says so, for example r. 12 (2). He submits that where a contract is indeterminate in point of time, the onus lies on those who allege that it is impliedly limited, and that cases such as *Llanelly Ry.* v. *London & North Western Ry. Co.* (4) and *Winter Garden Theatre (London), Ltd.* v. *Millenium Productions, Ltd.* (6) ([1947] 2 All E.R. 331) show that the nature and terms of the contract must be regarded so as to determine whether it was intended to be perpetual or terminable on reasonable notice. In a commercial transaction, as in the *Winter Garden Theatre* case (6), or in a case governed by the law merchant, as in the *Martin-Baker Aircraft Co.* case (5), it may well be that a limiting term was intended, and the contract construed accordingly. Counsel submits, however, that in a contract intended to govern the general trading spheres of two or more co-operative societies there is no room for any such limitation.

In my judgment, counsel for the plaintiffs' submission is correct. I think that this feature of the case falls to be decided on the general principle of construction of the terms and nature of a contract, to give effect to the evident intention of the parties. In dealing with a contract for the sale or supply of a commodity, as in *Crediton Gas Co.* v. *Crediton Urban District Council* (7) ([1928] Ch. 447), or concerning licences for the manufacture and trading in goods (*Martin-Baker Aircraft Co., Ltd.* v. *Canadian Flight Equipment, Ltd.* (5)) or for the occupation of premises (*Winter Garden Theatre (London), Ltd.* v. *Millenium Productions, Ltd.* (6)), the very nature, as well as the terms of the contract, may well justify the view that the contract was not intended to be permanent.

The union, however, consisted of industrial and provident societies (which entails their registration under the Act of 1893), joint stock companies and other bodies which have for their object the promotion of co-operative principles and ideas, and one of the objects of the union of such members is to propagate such principles and ideas and organise co-operative work, with a view to the ultimate establishment of a co-operative commonwealth. Rules 9 and 10 together are intended to regulate and prevent overlapping. Such being the nature of the contract binding on the members, affecting as it does their general relationship towards one another in any area where their trading interests may conflict, it seems to me to be much more closely akin to the nature of the contract in *Llanelly Ry.* v. *London & North Western Ry. Co.* (4), where the agreement not only contained terms indicating perpetuity but also as such conferred rights of a kind contemplated by the railway legislation then in force (see the comments on that case by LORD MACDERMOTT in *Winter Garden Theatre (London), Ltd.* v. *Millenium Productions, Ltd.* (6), [1947] 2 All E.R. at p. 343). It is true that the present case is not concerned with statutory rights. But in my view, a contract concerning the rights of traders, bound together in a union, to trade according to the doctrines of the co-operative movement, and to adjust their differences according to those doctrines, more closely resembles statutory rights than those arising under an ordinary commercial contract. In my judgment, if I were to construe r. 10 so as to allow one party to avoid the consequences of an unfavourable award, by the simple process of backing out of the union during the proceedings, I should not only be allowing them to defeat the award and r. 10, but I should also be giving r. 10 the very opposite construction from the obvious intention (see *Palmolive Co. (of England)* v. *Freedman* (8), [1928] Ch. 264 at p. 285). In my view, therefore, the submission having been made while the defendants were still members and still bound by the rules, r. 10 did entitle the arbitrators to make an award binding on them after they ceased to be members of the union, and it makes no difference that they ceased to be members before the final award.

Counsel for the defendants contended that if r. 10 of the union constituted a valid submission entitling the arbitrators to make an award affecting the

defendants' conduct after ceasing membership, the contract between the parties contained in the rules, in particular r. 10, was an unreasonable restraint of trade, contrary to public policy and illegal to the extent that it imposed on the defendants restrictions after they have ceased membership of the union.

Counsel for the defendants, I think, starts this topic at a disadvantage, because, on the strict wording of the pleading, neither r. 10 nor any other rules, by themselves, can possibly constitute a restraint of trade. The rule which merely enables a dispute to be settled in a particular way does not, of itself, restrain anyone. It is not until the award is made that anyone can be restrained, and possibly neither party may be. If anything restrains anyone it is the award, and not the contract or rule which merely prescribes arbitration as the means of obtaining it. However, since I am informed that in any event this case is likely to go to a higher court, I proceed to consider counsel for the defendants' submissions on the footing that para. 7 of the defence, with its particulars, may be regarded as referring to the award, rather than to r. 10, though for myself I doubt whether they can be so regarded.

Counsel for the defendants submits that a restriction on the trading activities of the defendants after they have ceased to be members of the union is unreasonable from the point of view of the parties, in that it is not reasonably required for the protection of the plaintiffs and other members of the union, and from the point of view of the public in that it prevents or might prevent the defendants or others from trading as they please after ceasing membership of the union, and that as a matter of public policy the courts will take note of it, when asked to enforce an award. He relies in particular on *Joseph Evans & Co.* v. *Heathcote* (9) ([1918] 1 K.B. 418) and *McEllistrim* v. *Ballymacelligott Co-operative Agricultural & Dairy Society* (10) ([1919] A.C. 548), in each of which it was a strong feature of the unreasonableness of the restraint that under the rules of the association the party restrained could not in practice withdraw from the association, and would remain indefinitely subject to a restraint which would or might put him entirely out of business. By analogy counsel for the defendants argues that if, in spite of the right to withdraw from the union, an award is binding on a society after it has ceased membership, it is in the same position as if it had no right to withdraw. He also relies on *Hilton* v. *Eckersley* (11) ((1855), 6 E. & B. 47) and *Kores Manufacturing Co., Ltd.* v. *Kolok Manufacturing Co., Ltd.* (12) ([1958] 2 All E.R. 65), and he finally submits that it is obviously unreasonable, both from the parties' and the public point of view, that the defendants should be precluded for ever from continuing to serve the public in an area where they have served for sixty-five years.

[His Lordship then referred to counsel for the plaintiffs' contention that the award did not curtail trade which the defendants had carried on for many years, but only an extension of it which they did not enjoy until 1956. His Lordship continued:] As regards counsel for the defendants' main submission, counsel for the plaintiffs points out that all of the four cases relied on were actions brought in the courts on or to impeach agreements containing restrictive terms. Whereas this is an action on an award which prima facie the plaintiffs are entitled to enforce. The parties by becoming members of the union agreed to the particular method of settling disputes, and although the defendants were uncooperative in the arbitration, the award was lawfully obtained, and not being ex facie illegal, the courts will not look behind it, and the defendants are bound by it. He relies on *Caledonian Ry. Co.* v. *Turcan* (13) ([1898] A.C. 256), *Elves* v. *Crofts* (14) ((1850), 10 C.B. 241) and on the judgment of Lord Guest in *Bellshill & Mossend Co-op. Society, Ltd.* v. *Dalziel Co-op. Society, Ltd.* (15) ((1958), Unreported): see also *Delver* v. *Barnes* (16) ((1807), 1 Taunt. 48), *Wohlenberg* v. *Lageman* (17) ((1815), 6 Taunt. 251). As regards *McEllistrim* v. *Ballymacelligott Co-operative Society* (10), counsel for the plaintiffs points out that the co-operative society was there seeking to protect itself against competition generally, at the expense of a trader who, by virtue of the restriction, would be put completely

A out of business. Here, he contends, the plaintiffs are not seeking to put the defendants out of business, which they are free to carry on in their own area, as formerly, and they are not seeking to defeat competition generally; indeed they have many other ordinary shopkeepers in the district who compete with them. They are only seeking, within the principles of the co-operative movement, to protect themselves and their customers (the public) from the waste of labour B caused by unregulated competition within the co-operative movement itself, by securing stability in their list of customers in a particular area. They are not seeking to enrich themselves, since any additional profits effected from saving waste are returned to their members by way of dividend. Finally, as regards the question of the absence of a time limit and the award being binding on the defendants after withdrawal from membership, he relies strongly on C *Palmolive Co. (of England)* v. *Freedman* (8) ([1928] Ch. 264), where LAWRENCE, L.J., said (ibid., at pp. 284, 285):

> "I now propose to deal with the defendant's main objections. In support of his first objection—namely, the absence of a time limit and of a power of withdrawal—the defendant relied strongly on the decision of the D Court of Appeal in *Joseph Evans & Co.* v. *Heathcote* (9). That case, however, is clearly distinguishable from the present on the ground that the agreement there (as pointed out by BANKES, L.J., [1918] 1 K.B. at p. 430), provided for a state of things which might result in the shutting down altogether of the plaintiffs' manufacture. The plaintiffs were manufacturers of case tubes, and by the agreement they had purported to bind themselves E not to sell their output except to five named persons, none of whom was under any obligation to buy and all of whom might cease to exist. In these circumstances, it is perhaps not to be wondered at that the court came to the conclusion that the absence both of a time limit and of a power of withdrawal rendered the restraint unreasonable in the interests of the parties. No such considerations enter into the present case, as the agree- F ment here could not by any stretch of imagination lead to any such result. Moreover, the insertion of a time limit or of a power of withdrawal in such an agreement as the present would not only be unusual and unbusinesslike, but would defeat the object in view. In price maintenance agreements such as this the object of the manufacturer or seller is that the prices should be maintained so long as his particular goods are manufactured or sold, and G I know of no case where such an agreement has contained any such limit or power. If a time limit or power of withdrawal were inserted in such an agreement, a manufacturer or seller might find himself ruined after having expended large sums of money in building up a profitable trade."

In my judgment, the argument of counsel for the plaintiffs is correct. There H is nothing on the face of the award to indicate that it is an unreasonable restraint of trade, in the interests of the parties or the public; and, in my view, I am not entitled to look behind the award and become in effect an appellate tribunal from the arbitrators. The defendants have only their own stubborn attitude to blame for not taking the proper steps to oppose the plaintiffs' claim before the arbitrators, if indeed they had any grounds for doing so. In my view the I defendants are not being restricted from carrying on business as they did before 1956, but it is not unreasonable, in the interests of economical co-operative trading and in the interests of the public to prevent their extension to an adjacent area. This is not a case of a mere barrier against competition for its own sake, but a means of confining co-operative trading in a particular area to one society, so that greater benefit may result to the buying public. The plaintiffs are financially able to provide exclusively the co-operative needs of the area, which under the award they are bound to do.

Counsel for the defendants contended that the union is a trade union within

the meaning of the Trade Union Acts, 1871 to 1913, and the defendants rely on s. 4 of the Act of 1871 as a bar to the action. A

Section 4 of the Trade Union Act, 1871, so far as is material, reads:

> " Nothing in this Act shall enable any court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely:— B
> 1. Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed."

Under this section counsel for the defendants first submits that the union is a trade union. The definition of a trade union within the meaning of s. 4 is to be gathered from s. 23 of the Trade Union Act, 1871, s. 16 of the Trade Union Act Amendment Act, 1876, and s. 1 (2) and s. 2 (1) of the Trade Union Act, 1913. The original definition in s. 23 of the Act of 1871 was all repealed by s. 16 of the Act of 1876, except the proviso (which does not arise in this case). By s. 2 (1) of the Act of 1913, a " trade union " means any combination, the principal objects of which are under its constitution " statutory objects ". The latter expression is defined in s. 1 (2) as meaning the objects mentioned in s. 16 of the Act of 1876 (plus one extra not material to this case). Section 16 of the Act of 1876, therefore, defines a " trade union " for the purposes of this case as: C D

> " . . . any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade ", E

with the qualification added by the Act of 1913 that these must be the principal objects of the combination. F

Counsel for the defendants submits that the union is a " trade union " within this definition because it is a combination for regulating the relations between masters and masters, and for imposing restrictive conditions on the conduct of their trade or business, which, he says, is one of their principal objects under r. 2. Secondly, he contends that r. 10 constitutes an agreement between members, as such, concerning conditions on which they as members for the time being should sell or not sell their goods. Here, he says, the conditions " imposed " are that the defendants are not to sell from shops or vans in the Washington area, other than Springwell Ward. Thirdly, he submits that an action on an award in an arbitration under the rules is a proceeding instituted with the object of directly enforcing an agreement contained in such rules. G H

He relies on *Edinburgh Master Plumbers' Assocn.* v. *Munro* (18) (1928 S.C. 565), where under the rules of an association members who successfully tendered for contracts had to pay a percentage into the funds of the association. When a claim was made against a member under the rules, and the claim was disputed, an ad hoc agreement was made between the parties referring the dispute to arbitration. In a subsequent action on the award by the successful association, it being admitted, and not being argued to the contrary, that the association was a trade union, it was held that, although the original claim directly under the rules would have been barred by s. 4 of the Act of 1871, no such restriction affected the claim under the award, based on a new and independent agreement to refer the dispute to arbitration. Counsel for the defendants contends that had the original rule referred any dispute to arbitration the action would likewise have been barred, and was only saved by the specific reference to arbitration. He submits therefore that this action is a proceeding instituted with the object I

A of directly enforcing an agreement between members of a trade union, as such, concerning conditions on which they, as members for the time being, shall or shall not sell their goods.

For the plaintiffs' answers to these submissions, I am greatly indebted to Mr. MacCrindle, who, in the unavoidable absence of his learned leader, argued the plaintiffs' case on this point with conspicuous ability and clarity. As to
B counsel for the defendants' first submission, whether the union is a trade union, counsel for the plaintiffs, by way of introduction, indicated a neat " pointer " (which he did not claim was conclusive), namely that, by s. 5 of the Act of 1871, the Industrial and Provident Societies Act, 1867, and any Act amending it (which includes the Act of 1893) does not apply to any trade union, and the registration of any trade union under, inter alia, the Act of 1893 is void. Of
C course the Registrar of Friendly Societies may make a mistake, but it is at least interesting that the registrar has in fact registered the union as an industrial and provident society under the Act of 1893, which he would be wrong to do if it were a trade union.

Counsel for the plaintiffs' first main point is that the union is not, under the first leg of the definition in s. 16 of the Act of 1876 a " combination for regulating
D the relations between masters and masters ". The fact that it consists of member-societies who can only carry on their business by employees does not make it a combination of masters nor, under s. 4, an agreement between members of a trade union as such. He contends that it is simply a combination of traders.

As to that, in my judgment, he is right.

E Secondly, he also submits that under the second leg of the definition in s. 16 of the Act of 1876, the union is not a " combination for imposing restrictive conditions on the conduct of any trade or business ". The operative word is " imposing ". The union, he contends, does not impose anything. The objects of the union under r. 2 are to carry on the specified activities with a view to propagating co-operative principles and ideas and organising co-operative work,
F with a view to the ultimate establishment of a co-operative commonwealth. Counsel for the plaintiffs emphasises that under r. 6 no society, company or body can be admitted as a member unless it is already one which has for its object the promotion of co-operative principles and ideas. Therefore, he contends, the union does not impose on its members anything which is not there already. Its object is to encourage, not to impose, basic ideals on those who already have
G them, and to assist in their organisation. He relies on LORD SUMNER'S remarks in *Performing Rights Society, Ltd.* v. *London Theatre of Varieties, Ltd.* (19) ([1924] A.C. 1 at p. 25).

In this also, in my judgment, he is correct.

Thirdly, he submits further under this head that, even if r. 10 imposes restrictive conditions, it is not a " principal object " as required by s. 2 (1) of the
H Act of 1913. He contends that arbitration is not a principal object of a federation of societies believing in the same trading ideal, the main aim of which is to distribute profits among its customers. It is purely ancillary to the principal object that in default of local settlement, disputes are to be settled by arbitration. No society joins the union for the purpose of benefiting by arbitration. He asks: " How can mere machinery for achieving an object be a principal object
I in itself ?" Although r. 2 states that acting as arbiters in matters of dispute between societies is one of the objects of the union, I agree with counsel for the plaintiffs that it is not a principal object, as laid down in s. 2 (1)* of the

* Section 2 (1) of the Trade Union Act, 1913, provides:—" The expression ' trade union ' for the purpose of the Trade Union Acts, 1871 to 1906, and this Act, means any combination, whether temporary or permanent, the principal objects of which are under its constitution statutory objects: Provided that any combination which is for the time being registered as a trade union shall be deemed to be a trade union as defined by this Act so long as it continues to be so registered."

Act of 1913. Indeed, I do not think it is an object at all in itself, so much as the mere means of achieving the principal objects of the union. A

On these three grounds therefore, in my judgment, counsel for the plaintiffs is correct in his submissions under the first head, and I do not think that the union is a " trade union " within the meaning of s. 4 of the Trade Union Act, 1871, as amended by the Acts of 1876 and 1913. Therefore counsel for the defendants' submission that the action is barred by s. 4 fails. B

I would add that I was less impressed by counsel for the plaintiffs' submission under counsel for the defendants' second and third points. I incline to think that, if r. 10 does impose restrictions, they are restrictions " concerning the conditions on which members shall or shall not sell their goods or transact business " within s. 4 of the Act of 1871, or " restrictive conditions on the conduct of their trade or business " within s. 16 of the Act of 1876. I think that the C area of their operations, as well as the venue (whether from shops or vans), is as much part of the " conditions " or " conduct " of their business, as the " terms of business ", such as prices or division of profits. Again, if r. 10 does impose restrictions, an action on an award may well amount to a proceeding instituted with the object of directly enforcing an agreement concerning such restrictive conditions, if, as in this case, in addition to seeking a declaration as to D their rights, the plaintiffs pray an injunction to enforce them. Their counsel may be right in his submission that there is a distinction between a declaration as to rights, and enforcing a legal remedy. Here the plaintiffs are seeking both. But in any event, as I have already found, I do not consider that r. 10 contains any restrictive conditions at all, and it is not until the award is made that any question of restriction arises. E

In the result, the plaintiffs succeed in this action, and are entitled to the declaration asked for. With regard to the claim for an injunction, it was argued by counsel for the defendants on the authority of *Davies* v. *Davies* (20) ((1887), 36 Ch.D. 359) that the terms of the award are too vague to be enforced by injunction. The facts of that case were, however, very different, and in my view the words of the award are sufficiently specific to be enforceable by injunction. Accordingly F the claim for an injunction will also be allowed, as prayed, and I shall direct an inquiry as to damages. If asked, I will grant a stay of execution, pending appeal, in respect of the injunction and the inquiry as to damages.

Judgment for the plaintiffs.

Solicitors: *Herbert Reeves & Co.*, agents for *Wm. Mark Pybus & Sons*, Newcastle-upon-Tyne (for the plaintiffs); *Sharpe, Pritchard & Co.*, agents for *Watson, Burton, Booth & Robinson*, Newcastle-upon-Tyne (for the defendants).

[*Reported by* E. Cockburn Millar, *Barrister-at-Law.*]

STEPHENS *v.* CUCKFIELD RURAL DISTRICT COUNCIL.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J.), March 2, 3, 1959.]

Town and Country Planning—Amenity—Notice to abate injury to amenity by condition of garden, vacant site or other open land—Building and surrounding yard used for business of car-breaking—Whether "open land" included land within the curtilage of a building—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6 *c.* 51), *s.* 33 (1).

The plaintiff was the owner of certain land which, from 1939 to 1955, he had used as a sawmill. For the purpose of the sawmill he had erected structures on the land and had used the land which surrounded the structures as a sawmill yard. In 1955 the use of the sawmill was discontinued and the plaintiff then let the land to a company who used the land for breaking up vehicles and adapting the component parts for sale. The vehicles were broken up both in the premises which were formerly the sawmill, and in the surrounding yard. In April, 1957, the local planning authority served on the plaintiff a notice, purporting to be a notice under s. 33 of the Town and Country Planning Act, 1947, which required the plaintiff to remove all cars, car bodies and machinery from the "open land within the curtilage" of the premises. Section 33 provides that if it appears to a local planning authority that the amenity of any part of the area of the authority is seriously injured by the condition of "any garden, vacant site or other open land" in their area, they may serve a notice on the owner of the land requiring him to abate the injury in the way specified in the notice.

Held: the notice was a nullity since, on its true construction, s. 33 of the Act of 1947 must be limited to cases where the "garden, vacant site or other open land" was not within the curtilage of a building.

Per CURIAM: it may be that the curtilage is not the right test, but that the test is whether, as in the Use Classes Order, 1948 (S.I. 1948 No. 955), the land is occupied with and used for the same purposes as the building (see p. 638, letter I, post).

[For the Town and Country Planning Act, 1947, s. 33, see 25 HALSBURY'S STATUTES (2nd Edn.) 541.

For the Town and Country Planning (General) Regulations, 1948 (S.I. 1948 No. 1380), the Town and Country Planning (General Development) Order, 1950 (S.I. 1950 No. 728), and the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948 (S.I. 1948 No. 955), see 21 HALSBURY'S STATUTORY INSTRUMENTS 43, 142, 34.]

Action.

This was an action by Horace John Stephens, the plaintiff, for a declaration that a notice served on him under s. 33 of the Town and Country Planning Act, 1947, by Cuckfield Rural District Council, the defendants (referred to hereinafter as "the local planning authority")*, was invalid. The plaintiff was the owner of certain land at Pease Pottage, in the county of Sussex. The land included a part of Tilgate Forest, situated to the north of Parish Lane, Pease Pottage, which from 1939 to 1955 was used by the plaintiff as a sawmill; for the purpose of the sawmill the plaintiff had erected structures on the land and he used the land which surrounded the structures as a sawmill yard. In about November, 1955, the Tilgate Forest land was let by the plaintiff for use by Sussex Car Breakers, Ltd., who used the land for breaking up vehicles and adapting the component parts for sale. The breaking up of the vehicles was carried out both in the structures themselves and in the yard surrounding them. At the date of this action, the

* The local planning authority was the East Sussex County Council, but the council had delegated functions concerning control of development in the relevant area to the Cuckfield Rural District Council, the defendants, in exercise of power under s. 34 of the Town and Country Planning Act, 1947.

premises and the surrounding yard were still being used for breaking-up vehicles. On Apr. 3, 1957, the local planning authority served on the plaintiff a notice, purporting to be a notice under s. 33 of the Act of 1947, which read: A

> "It appears to [the local planning authority] . . . that the condition of the open land within the curtilage of the premises to the north of Parish Lane, Pease Pottage . . . is causing serious injury to the amenity of part of the area of [the local planning authority]. [The local planning authority] in accordance with s. 33 of the Act . . . require for the purpose of abating the injury to the amenity of the area that within six weeks of the date on which this notice takes effect . . . steps . . . shall be taken . . . to remove from the said land all cars car bodies and machinery." B

The notice was stated to take effect on May 8, 1957. By s. 33 of the Act of 1947 a local planning authority is empowered to serve a notice where the amenity of any part of the area of the authority is injured by the condition "of any garden, vacant site or other open land" in their area. On May 6, 1957, the plaintiff appealed against the notice to the magistrates' court, under s. 23 (4)* of the Act of 1947 (as modified by regulations for the purpose of notices served under s. 33). The appeal was dismissed and on Aug. 24, 1957, the plaintiff appealed from that decision to quarter sessions; from the dismissal of the appeal by quarter sessions, the plaintiff appealed by way of Case Stated to the Divisional Court and that appeal was also dismissed. C D

The plaintiff now sought a declaration that the land within the curtilage of the premises at Tilgate Forest was not a garden, vacant site or other open land within the meaning of s. 33† and, therefore, that the notice served on him by the local planning authority had no effect in law. E

G. G. Baker, Q.C., and *R. M. Bell* for the plaintiff.

D. P. Kerrigan for the local planning authority, the defendants.

LORD PARKER, C.J.: This case raises a point on which, as far as I know, there is no authority, and which is a point of some difficulty. It is a point as to the construction of s. 33 of the Town and Country Planning Act, 1947. The matter has had a rather chequered history in that, as I shall describe in a moment, there have already been proceedings in the magistrates' court, an appeal to quarter sessions and an appeal by way of Case Stated to a Divisional Court. F

[His Lordship, having referred to the facts and to the notice (see letter B, supra) which was served on the plaintiff, continued:] Section 33 (1) of the Act of 1947, under which the notice was given, is in these terms: G

> "If it appears to a local planning authority that the amenity of any part of the area of that authority, or of any adjoining area, is seriously injured by the condition of any garden, vacant site or other open land in their area, then, subject to any directions given by the Minister, the authority may serve on the owner and occupier of the land, in the manner prescribed by regulations under this Act, a notice requiring such steps for abating the injury as may be specified in the notice to be taken within such period as may be so specified." H

By sub-s. (2) of s. 33 it is provided that there may be an appeal in the manner provided with regard to an enforcement notice under s. 23 (4) of the Act of 1947, subject to modifications to be made by regulations. [His Lordship referred to s. 23 (4) of the Town and Country Planning Act, 1947, as modified by the Town and Country Planning (General) Regulations, 1948 (S.I. 1948 No. 1380), and to the previous appeals on the ground that the change from use of the land as a I

* For the material terms of s. 23 (4), as modified, see p. 637, letter F, post.

† Under s. 23 (4), as modified, the magistrates had no jurisdiction to determine this point; see p. 637, letter B, post.

A sawmill to use for car-breaking was a change of use from general industrial user to light industrial user, that there was permission for such a change under the Town and Country Planning General Development Order, 1950 (S.I. 1950 No. 728), Sch. 1. Pt. 1, Class III, and that, therefore, the notice must be quashed as "permission was granted" for the car-breaking use within s. 23 (4). His Lordship, having indicated that the jurisdiction on appeal under s. 23 (4) was B limited and did not extend to deciding the question now raised, continued:] Accordingly, in these proceedings the plaintiff claims a declaration that the original notice was void ab initio for the reason that this was not land to which s. 33 applied.

It is a short point and not an easy one. The words of the section which I have already read seem to me to be very wide. The section applies to any "garden, C vacant site or other open land", and it seems to me that those three phrases taken together are describing in the widest possible terms any land on which there is no building, land which is not built up. The reason, no doubt, for the use of the words "open land" in that way is to make it perfectly clear that the draftsman is departing from the definition of "land" in s. 119 of the Act of 1947, where "land" is described as including buildings. That, of course, is D subject to the provision that the context should not otherwise require, and it seems to me that s. 33 is dealing with any land which has not got a building on it. That, as it seems to me, is the literal interpretation.

The sidenote of s. 33 is in these terms: "Power to require proper maintenance of waste land, etc." It seemed to me at one time that if one was entitled to look at the sidenote, and, indeed, from the very wording of s. 33, it might be E said that Parliament had in mind the case of permissive waste, allowing a garden, for instance, to run to seed, and a vacant site to become unsightly; but I am quite clear, on further consideration, that there is no such limitation in this case. In particular reg. 7 (2) (b) of the Town and Country Planning (General) Regulations, 1948, modifies s. 23 (4) (a) of the Town and Country Planning Act, 1947, to read:

F

> "if satisfied that the condition of the land to which the notice relates is such as results in the ordinary course of events from operations or a use for which permission was granted . . ."

That clearly envisages not permissive waste, not an allowing of the land to run to seed, but active operations and user of the land; and, accordingly, prima G facie it seems to me that this section covers any operations or user of any open land in the sense of any land which is not built on.

Counsel for the plaintiff, however, argues with considerable force that, though that may be the literal interpretation as a matter of construction, reading this section in the scheme of the Act as a whole, a limitation must be put on the words "garden, vacant site or other open land". In particular he says that if H no limitation at all is put on those words, then it would follow that under these additional powers of control, beginning with s. 26 and ending with s. 33, there is power to prevent the continued user of land which is only being used for a legitimate existing use purpose and a purpose in connexion with buildings. He points out that, if that were so, it would enable the local planning authority, if they decided that the amenity of the neighbourhood was being injured, in I effect to force somebody who had been carrying on a business there for some time to close down—for, I suppose, there are many users for general industrial purposes which cannot be carried on solely within the confines of the building, such as a builder's yard, or scrap heap, or something like that, which is vital for the carrying on of the business. Surely, said counsel for the plaintiff, Parliament could not have intended that s. 33 should operate in that way. There is clearly no power in regard to the building itself to prevent the continued existing use user, and if s. 33 were operated it would do in a back-handed way something which under the Act there was no power to do directly.

It is a formidable argument and, as I understand it, counsel for the local planning authority faces that position, but says that it is not quite as bad as it seems, because s. 33 will, in fact, only operate in that back-handed way in a case where the use, though within the class of general industrial use, is a user which will affect amenities. He says that it may be put in this way. Supposing a sawmill had been carried on there; then there would have been originally, or there might be, no loss of amenity, the premises could still be carried on for the sawmill and no objection would be taken. The mere fact, however, that as sawmilling is a general industrial user there can be a change to car-breaking does not, he says, prevent the local planning authority from saying that the new user, though lawful, is an injury to amenity. It follows, therefore, that even in that limited respect s. 33 is being used to do something for which there is no direct power, namely, to prevent a person carrying on an existing use business for which there is no interference short of giving a notice under s. 26 and paying compensation.

It is not an easy point, but I am inclined, on the whole, to accept the contention of counsel for the plaintiff and to say that s. 33 of the Town and Country Planning Act, 1947, properly construed, must be limited to a case where, at any rate, the garden, vacant site or other open land is not within the curtilage of a building and has not, as it were, acquired the user of that building. Counsel points, in support of that contention, to the fact that in many places in this scheme of legislation " building " does include, at any rate, the curtilage, and, as is conceded, s. 33 cannot apply to buildings; so that, if one considers that in the treating of buildings under the Act there is included the curtilage, then there is every reason for construing s. 33 (1), as applying to open land which does not form part of the curtilage. The references that he makes are, first, to s. 12 (2) (d), which is the only occasion where curtilage is specifically referred to. That is a proviso to the necessity for obtaining permission for development, saying that, in effect, permission is not required for the use of any building or other land within the curtilage of a dwelling-house for any purpose incidental to the development of the dwelling-house as such. Counsel also points to the Use Classes Order of 1948*, where in reg. 2, para. 2, there appear these words at the very end:

> ". . . and references to a building may, except where otherwise provided, include references to land occupied therewith and used for the same purposes."

Curtilage is not referred to. It is dealing with the case where the land in question is, as it were, part and parcel of the building occupied and used for the same purpose as the building. In other words, to take the present case, if this had been a change to a light industrial use from a general industrial use, then the permission to do that would cover, not merely the building itself, but would, undoubtedly, cover this yard or area of land round the building.

In order to make sense of this scheme of legislation and to avoid the absurdity to which I have referred, one must limit the words, " garden, vacant site or other open land ", to a garden, vacant site or other open land which is, at any rate, not within the curtilage of a building. I appreciate that that may give rise to questions in some cases as to what is, and what is not, within the curtilage of a building, and indeed it may be that the curtilage is not the right test, but that the test is whether, as in the Use Classes Order, the land is occupied with and used for the same purposes as the building; but so far as the present case is concerned, there is no difficulty, because the notice itself is specifically dealing with the condition of open land within the curtilage of the premises.

Accordingly, on the view which I take of the section, the notice of April, 1957, was a nullity, and I suppose that all the proceedings that have been taken since

* I.e., the Town and Country Planning (Use Classes for Third Schedule Purposes) Order, 1948 (S.I. 1948 No. 955); 21 HALSBURY'S STATUTORY INSTRUMENTS 34.

have all been nullities. I would hold that the plaintiff is entitled to the declaration claimed, which is a declaration that the land in question is not a garden, vacant site or other open land within the meaning of s. 33 of the Act of 1947, and that the notice served by the local planning authority on the plaintiff on Apr. 3, 1957, is of no effect in law.

Declaration accordingly.

Solicitors: *Iliffe, Sweet & Co.* (for the plaintiff); *Sharpe, Pritchard & Co.*, agents for the *Clerk to Cuckfield Rural District Council* (for the local planning authority, the defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

NOTE

LAMBIE *v.* LAMBIE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Lord Merriman, P., and Stevenson, J.), February 16, 1959.]

Divorce—Practice—Re-hearing—Transcript of proceedings in court below should be before Divisional Court—Matrimonial Causes Rules, 1957 (*S.I.* 1957 *No.* 619), *r.* 36.

[As to applications for re-hearing, see 12 HALSBURY'S LAWS (3rd Edn.) 425, para. 954; and for cases on the subject, see 27 DIGEST (Repl.) 595-597, *5571-5580.*

For the Matrimonial Causes Rules, 1957, r. 36, see 10 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 237.]

Case referred to:

(1) *Prince* v. *Prince*, [1950] 2 All E.R. 375; [1951] P. 71; 27 Digest (Repl.) 597, *5580.*

Motion.

This was an application by way of motion to set aside under r. 36 of the Matrimonial Causes Rules, 1957, a decree nisi granted to the wife on the ground of the husband's cruelty by His Honour JUDGE STEEL, sitting as a Special Commissioner of Divorce in Manchester on June 23, 1958. The husband by affidavit stated that he had returned his acknowledgment of service to the wife's solicitors, together with the instructions concerning his entry of appearance in which he intimated he wished to defend the suit, by registered post. This latter document should have been sent to the district registry, in order that the court might know whether the petition was to be defended or not. The wife's solicitors were unable to say what happened to this memorandum of appearance. The case was heard as undefended, and the husband only became aware of this when on Dec. 15, 1958, he attended the Manchester district registry to answer a summons taken out by the wife for maintenance of herself and the children of the marriage. This summons was adjourned, and the husband, who had been acting " in person ", then applied for legal aid which was granted to him on Dec. 29, 1958. No error on the part of the trial judge was alleged. The wife was also legally aided. The case is reported solely on the practice point

that a transcript of the evidence given in the court below should be before the Divisional Court to enable them to determine whether a re-trial should be granted. A

C. T. Reeve for the husband.
R. O. C. Stable for the wife.

LORD MERRIMAN, P.: This is a husband's application to set aside under r. 36 of the Matrimonial Causes Rules, 1957, a decree nisi obtained by the wife on June 23, 1958, before His Honour JUDGE STEEL sitting as a Special Commissioner of Divorce at Manchester. The wife's petition, which was served in April, 1958, was based on a charge of cruelty. B

Before I go further I want to say something about what I think is missing in this case, not through the fault, needless to say, of either counsel. At one time it was the invariable practice, on an application under this rule for a re-trial, to submit a transcript of what had occurred in the court below, and I do not know, for myself, how otherwise this court is to be able to say that it is not a case in which the court went wrong on the material before it, as in *Prince* v. *Prince* (1) ([1950] 2 All E.R. 375), which would be a matter for the Court of Appeal. I have only noticed that it has happened on one other occasion, and I protested then. I am given to understand that it is really in the interests of saving costs in legal aid cases. I do not think that that is a good reason. The transcripts are almost invariably very short, because usually the case is one which has been tried as an undefended case when for some reason or another it was intended to defend it, and the costs involved must be comparatively small. C D

In my opinion, and I think that I may say it is the opinion of STEVENSON, J., also, it is one of the requisites of these applications that we should be provided with a transcript of what actually did occur in the court below, for the reason which I have given. Another reason is that it enables us to get a much better view of what is likely to be the dispute about the merits, and to say whether a sufficient affidavit of merits has been filed before us. E

I therefore say that as a matter of practice (and I intend this to be regarded as a matter of practice) we ought in these cases to be provided with a transcript of what happened in the court below. F

[HIS LORDSHIP went on to find that the husband had been taken by surprise, and, in granting him leave to appeal out of time, stated that the matter turned on the wife's solicitors not having informed the district registrar that they had received from the husband his memorandum of appearance, with the consequence that his appearance had not been entered and he was unable to defend the suit. The motion would, therefore, be granted.] G

STEVENSON, J.: I agree.

Appeal allowed. Decree nisi rescinded.

Solicitors: *Skelton & Co.*, Manchester (for the husband); *Leslie M. Lever & Co.*, Manchester (for the wife).

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

WOODARD *v.* WOODARD AND CURD.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sachs, J.), June 27, 1958, February 2, 3, 4, 1959.]

Divorce—Practice—Proof against co-respondent—Petition alleging adultery with named co-respondent—Confession by wife—Request by husband for decree against wife and for co-respondent to be dismissed from suit on ground of insufficient evidence against him—Duty of court—Whether questions of costs affected by fact that petitioner is legally aided.

So long as a charge of adultery is being pursued before the court by a petitioner for divorce, the position between him and the co-respondent is not merely that of a lis inter partes (where a plaintiff would be free not to tender available evidence), but the court has a duty to inquire into the facts and to pronounce on them according to the evidence, and counsel and solicitors for a petitioner have a duty to present the reasonably available evidence (see p. 645, letter A, post).

Questions of costs are matters inter partes on which, so long as there is no collusion, parties are free to make or refrain from making such applications as they think fit (see p. 646, letter G, post).

The fact that a petitioner is legally aided does not affect the powers or the duties of the court either as regards the granting or the withholding of a decree or as to applications for costs (see p. 647, letter A, post).

A husband, who had obtained a civil aid certificate, presented a petition for divorce on the ground of the wife's adultery with a named co-respondent. The wife had confessed to the adultery and did not defend the suit. The co-respondent entered an appearance but did not file an answer, although he was represented by counsel when the petition came before the court. At the hearing, evidence was given by the husband and by an inquiry agent, but counsel for the husband, while asking for a decree against the wife, invited the court to dismiss the co-respondent from the suit on the ground that there was insufficient evidence to identify him. There was no collusion between the parties, though the husband and the co-respondent each knew that the other would not ask for costs against him. At an adjourned hearing, further evidence against the co-respondent was taken de bene esse, and this was sufficient to identify him.

Held: the question of the wife's adultery with the co-respondent was a single issue, even though two parties were entitled to contest it (dicta of ATKIN, L.J., in *Rutherford* v. *Rutherford*, [1922] P. at p. 158, applied), and it was the duty of the court to ascertain the true facts relating to that issue and not to confine the matter, at the husband's request, to one part only of the issue, even though there was no collusion; effect would accordingly be given to the evidence taken de bene esse, the co-respondent would be found guilty of adultery and his name would be inserted in the decree.

[As to confessions being evidence only against the person who confesses, see 12 HALSBURY'S LAWS (3rd Edn.) 239, para. 448, text and notes (e)-(g); and for cases on the subject, see 27 DIGEST (Repl.) 326-328, *2705-2721*.

As to dismissal of a party from a suit against whom adultery is alleged on insufficient evidence, see 12 HALSBURY'S LAWS (3rd Edn.) 387, para. 852.

As to costs in divorce cases where a party is receiving legal aid, see 12 HALSBURY'S LAWS (3rd Edn.) 331, para. 677.

As to the necessity for an order for taxation of costs where one party is an assisted person, see 12 HALSBURY'S LAWS (3rd Edn.) 464, para. 1038.]

Cases referred to:

(1) *Rutherford* v. *Rutherford*, [1922] P. 144; 91 L.J.P. 129; 126 L.T. 740; *affd.*, H.L., sub nom. *Rutherford* v. *Richardson*, [1923] A.C. 1; 92 L.J.P. 1; 128 L.T. 399; 27 Digest (Repl.) 592, *5536*.

(2) *Edwards* v. *Edwards*, [1958] 2 All E.R. 179; [1958] P. 235.

(3) *Bessela* v. *Stern*, (1877), 2 C.P.D. 265; 46 L.J.C.P. 467; 37 L.T. 88; 42 J.P. 197; 27 Digest (Repl.) 28, *58*.

Petition.

This was a petition by the husband for a decree of divorce on the ground of the wife's adultery with the co-respondent over a period from February to December, 1956. In February, 1957, the wife gave birth to a child which, the husband alleged, could not have been his. In an oral confession to the husband and in a written confession to an inquiry agent, the wife admitted adultery with the co-respondent, and she did not defend the suit. The co-respondent entered an appearance but did not file an answer, although he was represented by counsel when the petition originally came before the court on June 27, 1958. In his opening speech, counsel for the husband said that he was not in a position to offer sufficient evidence against the co-respondent to enable him to ask the court for a finding against the co-respondent. Evidence was then given by witnesses, including the husband and the inquiry agent. The husband said that, towards the end of November, 1956, he had spoken to the co-respondent and accused him of being the father of the child with which the wife was then pregnant, and that the co-respondent had neither denied the accusation nor admitted it, but had seemed very agitated and had said, " It is just one of those things ", and " She was asking me for money ". The inquiry agent said that on Dec. 9, 1956, in the presence of the wife, he had spoken to a man identified to him by the wife as the co-respondent, and that this man admitted having been with the wife but refused to admit anything further. As far as the court could then gather, the inquiry agent had made no further attempt to identify this man as the co-respondent. Counsel for the co-respondent reserved the right to cross-examine the witnesses and to take part in the proceedings. Counsel for the husband then asked for a decree nisi against the wife, and, in effect, invited the court to dismiss the co-respondent from the suit. There was also an understanding between the husband and the co-respondent that neither would ask for costs against the other; but the court was satisfied that there was no collusion in regard to the proceedings.

On June 27, 1958, SACHS, J., granted a decree nisi to the husband and adjourned the case for further argument on the other matters. HIS LORDSHIP invited the assistance of the Queen's Proctor at the adjourned hearing and suggested to the Law Society that they might wish to be represented by counsel acting as amicus curiae to assist the court on any points in regard to costs, in which the society would have an indirect interest. The report is confined to the judgment at the adjourned hearing.

C. Sleeman for the husband.

Colin Duncan for the Queen's Proctor.

A. H. Ormerod for the Law Society.

The co-respondent did not appear and was not represented at the adjourned hearing.

SACHS, J.: In this cause, undefended on trial so far as the wife was concerned, the husband sought a decree of divorce on the grounds of his wife's adultery over a period from February to December, 1956, with a named co-respondent, Bernard Curd. On the original hearing the husband, as against the wife, proved that she had borne a child which, if his evidence was accepted (as it was) could not have been his: and he further established two confessions by the wife, one made orally to himself and one made in writing to an inquiry agent, to the effect that she had in fact during the above-mentioned period committed adultery with the co-respondent.

[HIS LORDSHIP reviewed the evidence given by the husband in regard to his interview with the co-respondent and the evidence of the inquiry agent, and

continued:] As regards the evidence of the inquiry agent, which I accepted as being true, the position at the conclusion of the hearing was, so far as the court could judge, and so far as it was enabled to come to a conclusion without having heard cross-examination of the co-respondent, which was reserved, as follows: first, that the inquiry agent in his evidence only identified the co-respondent by what the wife had told him and by what the man to whom the inquiry agent had spoken had said himself; secondly, that no attempt, so far as the court could then gather, had been made to obtain any better identification by the inquiry agent of the man—as, for instance, by taking the husband with him to say that the man to whom the husband had spoken was the same as the one to whom the inquiry agent had spoken; thirdly, that subject to the question of identification, and again subject to anything that might emerge on cross-examination, the inquiry agent had given evidence which clearly provided a prima facie case against the co-respondent; and, lastly, that, if there was a gap in the chain of identification as regards the man spoken to on Dec. 9, 1956, it could have been easily bridged, and no explanation had been offered to the court why it was not bridged or why it was not proposed to take steps to bridge it.

I now turn to the conduct of the case by counsel for the husband at that original hearing. In the few words of his opening address counsel made it apparent that, while he was asking for a decree, he was in effect inviting the court to accede to any application which might at the end of the evidence be made to dismiss the co-respondent from the suit. After counsel had called his evidence, he did his best to maintain that this was the correct course for the court to follow. There then occurred the passage in which I asked him: "From what you said earlier you are really also inviting me to dismiss the co-respondent from the suit?" Counsel replied: "I am and for these reasons". He then made his submissions: that he had not adduced any sufficient evidence to identify the co-respondent with the man seen by the inquiry agent, and, further, that on that evidence he could not submit that there was sufficient to implicate the co-respondent to enable him to ask that the co-respondent should be found guilty of adultery. Moreover, counsel adopted the position that, if he so invited the court, it was really for the court to act on that invitation without going further into the question, on the basis that such matters, arising as they did between the husband and the co-respondent, were on an inter partes footing. Moreover, counsel for the co-respondent had previously said this:

> "I think I can, without impropriety, tell your Lordship at this stage that such an application [an application by the co-respondent for costs, if he was dismissed from the suit] would not, in the circumstances of this case, be made."

It was thus at that stage plain that, before coming into court, counsel for the husband and counsel for the co-respondent respectively had exchanged information that neither was going to seek an order for costs against the other. I was, however, satisfied, taking the evidence of the husband and of the inquiry agent as a whole, that there was no collusion in this particular cause, and I am glad to say that counsel for the Queen's Proctor has informed me that the Queen's Proctor, after having made all due inquiries, has no reason to doubt the accuracy of that conclusion.

In the above circumstances, it seemed proper there and then to grant the husband a decree but to leave all other matters, including all questions relating to the co-respondent's position, to be dealt with later. In that behalf I asked for the assistance of the Queen's Proctor, and, in addition, I suggested to the Law Society that they might wish to be represented by counsel acting as amicus curiae to help the court on any points in regard to costs which might arise, and in which they would clearly have at any rate an indirect interest. Both the Queen's Proctor and the Law Society were represented at the adjourned hearing by counsel, each of whom has placed me in his debt by his helpful address.

It is in the circumstances which I have mentioned that there has arisen in a particularly acute form the problem which is nowadays not infrequent in undefended cases: that is, where a petitioner seeks a decree against the respondent on account of her adultery with a named co-respondent against whom evidence seems likely to be readily available; where the petitioner by counsel proceeds, however, so to conduct the case that no evidence, or very little evidence, is called which is admissible against the co-respondent; but where there is adduced to the court a confession of adultery by the wife with the co-respondent which has every appearance of being true. The problem is of relatively recent origin, because for a long time the courts were reluctant to grant a decree simply on a respondent's confession. Nowadays, however, many decrees are thus granted on such confessions where it appears that there is difficulty in obtaining other evidence. The problem is thus one of a practical nature of some consequence, because the form of decree varies according to whether evidence admissible against the co-respondent proves adultery with him or not. If it does so prove adultery, the name of the adulterer normally appears in the decree*; if not, the name does not so appear and he is entitled as of right to be dismissed the suit, and, moreover, is usually entitled, if he so claims, to be granted costs. On such a dismissal he emerges, so far as the court record is concerned, without any blemish on his character; and the court produces that set of findings which the layman finds a little incongruous, to the effect that the respondent has committed adultery with the co-respondent, but that the co-respondent has not committed adultery with the respondent.

In the present case the co-respondent wishes to benefit by thus being dismissed from the suit and by his name not appearing in the decree as being an adulterer. What then is the function of the court in the class of case to which I have refererd —assuming that the wife's confession appears to establish convincingly the facts contained in it, that is to say, her own adultery, and where it also appears right to reject any inference of collusion ? In effect, the question is, on the one hand:—Should the court treat the question of the position of the co-respondent as a matter that is simply one inter partes as between him and the husband, and thus one on which the court should in all circumstances unquestionably accede to whatever line the husband adopts when he seeks not to have a finding recorded against the co-respondent ? Or, on the other hand, the question is:—Has the court some function either as regards inquiring into the facts touching the co-respondent or as to recording a proper verdict on the evidence whether the co-respondent has been guilty of the adultery charged ?

If the answer is in the affirmative to the first question and in the negative to the second, so that the court has neither of the functions there posed, two things seem to follow: first, that, providing that a petitioner can avoid attracting a finding of collusion, he may at his unfettered will have the choice of either protecting the co-respondent from being recorded as an adulterer on the files of the court, or of causing him thus to be recorded. That choice would be exercisable however plain and however readily available was the evidence in his possession admissible against the adulterer. Moreover, whatever evidence emerged in the course of the trial, if the matter was purely one inter partes, the petitioner could ask that there be no finding of the court against the co-respondent, and then the latter could be dismissed the suit. One cannot escape observing that such a state of affairs would open the way to undesirable pressures being brought to bear behind the scenes throughout the whole course of proceedings by one party against another; and further, that it might well lead the court to the position of becoming a party to what in certain cases might appear as an attempt to shield the co-respondent. In addition, it would make available yet another door to collusion of rather an undetectable nature.

For my part, I have no doubt as to the answers to the above questions. So

* See *Practice Direction*, ante, at p. 345.

long as a charge of adultery is being pursued before the court by a petitioner, it is wrong to regard any matter affecting the position of a co-respondent as being merely one that is inter partes between those two. It has been made abundantly clear for a very long time that on any charge of adultery that comes before the court there is a duty on the court's part, in the public interest, to inquire into the facts and to pronounce on them according to the evidence. It is clear also that solicitors and counsel appearing for a petitioner have a duty to the court fairly and frankly to present the reasonably available evidence to enable the court to come to a proper decision. By "reasonably available evidence" I refer, as did counsel for the Queen's Proctor in his address, not merely to those matters which actually appear in the proofs of counsel, but I include at any rate those matters which would normally appear in such proofs if a solicitor was using reasonable diligence in relation to the evidence which could readily and without undue expense be obtained to prove the case in the normal way against the co-respondent as well as against the wife. I pause to make it clear that nothing which I have said in relation to the matters before me is intended to affect the conduct of those causes where either the petitioner is obviously unable to gather evidence admissible against the co-respondent, or where some genuine and reasonable explanation is tendered to the court why evidence against the co-respondent is not being presented. I am concerned with the case where proper evidence against the co-respondent was readily available.

I reject the submission as to the existence of certain cramping limitations to the foregoing general rule as to the functions of the court and the duties of those who represent petitioners. The first such suggested limitation was that where the court is investigating a charge of adultery against a wife and a co-respondent there are really two issues, one as between the petitioner and the wife, and one as between the petitioner and the co-respondent, and that the duty of the court to inquire into the facts is limited to the former. As soon as counsel for the Queen's Proctor put forward that point for consideration, it struck me as being an unreal way of looking at the matter; no less unreal than would be a submission that adultery was a unilateral and not a bilateral act. Later, when counsel for the Law Society, as amicus curiae, cited *Rutherford* v. *Rutherford* (1) ([1922] P. 144), my initial view was fortified by that part of the judgment of ATKIN, L.J., which includes a passage seemingly intended to apply generally and not merely to the particular and unusual facts of the case there under consideration. ATKIN, L.J., said (ibid., at p. 158):

> "It is perfectly true that in accordance with our rules of evidence an issue may be proved as against one party and not proved against the other, because evidence may be admissible against the one and not against the other. It appears to me that that difference of proof does not amount to raising two issues, but only to two different degrees of proof of the same issue."

That seems of itself to be authority against any proposition that the court's functions as regards inquiring into the facts is limited to one part only of the single plea, that "the respondent has committed adultery with A.B." To my mind, it is none the less a single plea even though there are two parties entitled to contest it.

The second limitation suggested and rejected was that the functions and duties in question did not apply other than to cases where collusion or some similar matter was under investigation. It is true that in the majority of cases it may well be that the court is first put on inquiry by facts which, as here, appear in the first instance to point towards collusion. But clearly that does not mean that the functions and duties in question relate only to collusion or the like plea. In argument, moreover, it was suggested that there might be a distinction between the position in a case in which the petitioner, having deliberately elected to call

no evidence against the co-respondent, succeeded in so presenting his case that no such evidence emerged, and the position in a case where the evidence in fact adduced implicated the co-respondent but the petitioner still wished him to be dismissed from the suit. In principle, it does not seem to me that there is anything in the Matrimonial Causes Act, 1950, or in the previously mentioned and well-known general rule as to the duties of practitioners, to support such a distinction. The only difference is that, when once the evidence has come out before the court, it becomes the more obviously and completely untenable to argue that the relevant finding by the court is simply a matter inter partes between the petitioner and the co-respondent, and that the court could thus be properly asked to make a pronouncement or an order contrary to its view of the evidence as adduced.

If authority were needed as to the court's duty to act on the evidence as opposed to the mere wishes of a party, it is inherent in VISCOUNT BIRKENHEAD'S speech in *Rutherford* v. *Richardson* (1) ([1923] A.C. 1), when the Court of Appeal's decision in *Rutherford* v. *Rutherford* (1) was affirmed in the House of Lords. As regards the duty of the Court of Appeal, VISCOUNT BIRKENHEAD said (ibid., at p. 8):

> "... its duty must be to pronounce the right decree in the whole matrimonial cause, and not merely to limit its conclusion to the issue raised between the parties who have been served with notice of the appeal or have chosen to appear before it."

The suggested limitations on the functions and duties of the court and practitioners respectively, having been thus rejected, it follows that those functions and duties relate, as I have already indicated, at all relevant stages of a matrimonial cause to every aspect of a charge of adultery. The court is concerned with ascertaining the true facts relating to the single issue as a whole and does not lend itself to any device intended to confine it without good reason to one part only of an issue. As a corollary, the court can, of course, use its power to make such inquiry as seems fit in any particular case, such as the present one.

Next to be dealt with comes the question of applications for costs by the husband and the co-respondent, respectively. In the present case it was a clear inference from the way in which it was conducted, and it has now been confirmed by counsel for the husband, that the husband and the co-respondent had, before coming into court, exchanged information that neither would ask for costs against the other. As regards costs, I agree with the submission made on behalf of the Queen's Proctor that matters of costs are strictly questions which arise inter partes and on which the court is not called on to interfere. It is true that, when one finds the position to be the one which has occurred in this case, the court may be the more inclined to investigate questions of collusion; but, so long as there is no collusion, parties are free to make or to refrain from making such applications for costs as they may desire. It has long been the practice of the court not to interfere in the matter; and, moreover, r. 4 (4) of the Matrimonial Causes Rules, 1957*, in so far as it provides for giving notice of any claim for costs, appears to postulate that the petitioner has an option in the matter. But, just as a co-respondent's right to contest the charges in a petition is not limited to causes where costs are being sought against him, so the court's function in relation to an inquiry into the facts of the charges is not affected by any question whether costs are or are not being asked for.

I now turn to the question whether any of the points so far under consideration are affected by the fact that the husband was legally aided. On this question I have had the assistance of submissions both by counsel for the Queen's Proctor and by counsel for the Law Society. I agree with their submissions. This is, indeed, another case in which, as in *Edwards* v. *Edwards* (2) ([1958] 2 All E.R.

* S.I. 1957 No. 619; see 10 HALSBURY'S STATUTORY INSTRUMENTS (First Re-issue) 221.

179 at p. 187), the fact that legal aid has been granted does not affect the powers or the duties of the court either as regards the granting or the withholding of a decree or as to applications for costs. On the other hand, it throws into prominence some of the special factors which in practice arise in this class of case. Thus, where a husband is legally aided, he is less inclined to ask for an order for costs against the co-respondent, and may also be less inclined to present the facts which would entitle him to such an order. This, however, is not a matter on which it is for the court to intervene as between party and party otherwise than in accordance with what is general practice in this class of case. On the other hand, it may be a matter for the Law Society to consider in relation to what directives they may choose to issue. For, as falls to be mentioned later in this judgment, their position has in practice been adversely affected by the course taken in these particular proceedings. I should for safety add, although perhaps it is unnecessary, that, when I said that the court's powers and duties as regards costs are unaffected by the incidence of legal aid, I am not referring to those various matters which may limit, or indeed eliminate, an order by reason of the actual provisions of the Legal Aid and Advice Act, 1949.

In the light of these conclusions, I now turn back to the present case as it stood at the end of the original hearing. So far as the inquiry agent's evidence as to the interview on Dec. 9, 1956, is concerned, I do not consider that the man with whom the inquiry agent spoke had been sufficiently identified as being the co-respondent. The proof in such matters is of the same degree as is required in a criminal trial. As regards the evidence given by the husband, it seems to me that the co-respondent was sufficiently identified, and that both his silence and his statements in reply to the accusations levelled against him provided some evidence of his guilt. The principle as laid down in *Bessela* v. *Stern* (3) ((1877), 2 C.P.D. 265) applies. Whether, however, the evidence was of sufficient weight, in all the circumstances of this particular case, to enable a court to hold against the co-respondent that his adultery was proved to the requisite degree is not a question which it is necessary for me to decide, in view of what has now transpired.

Yesterday, after the addresses of counsel for the Queen's Proctor and counsel for the Law Society had been completed, this cause took a somewhat unexpected turn. Counsel for the husband made it clear to me that he had advised at an early stage in the litigation that the man who spoke to the inquiry agent on Dec. 9, 1956, should at trial be identified by appropriate evidence as being the co-respondent. He further stated, with the frankness that one always expects from a member of the Bar, that at the date of the original hearing evidence was, unknown to him, available in court for completing the chain of identification. The inquiry agent had, in fact, served the petition on the co-respondent and could by so stating in court have made it plain that it was the co-respondent to whom he had spoken on Dec. 9, 1956. In those circumstances, counsel for the husband tendered the inquiry agent for the purpose of giving further evidence. This was taken de bene esse so that effect could be given to it if I came to the conclusion that the court's function of inquiring into facts was not limited in one or the other of the ways to which I have referred. Having held that the court's functions are not so limited, I have now decided to treat this further evidence as having been properly received by the court in pursuance of its functions to inquire into the facts as a whole.

It remains only to consider the weight of that evidence. Counsel for the husband is not prepared to argue that, once the identification was complete, the inquiry agent's evidence did other than provide a prima facie case against the co-respondent. To my mind, that testimony, taken in conjunction with that of the husband, raised a strong case against him, and one on which the court ought to act. It follows that the finding must now be made against the co-respondent that he has committed adultery. I direct accordingly that his name be inserted in the appropriate place in the order granting the decree nisi. I need hardly

add that, had I come to the conclusion that the evidence of the husband had of itself sufficiently established the guilt of the co-respondent, it would, in my view, have been for the court, without recourse to the further evidence of the inquiry agent, at the original hearing, to make the appropriate finding against the co-respondent, despite any submission to the contrary. A

I now turn to the question of costs. When the further evidence of the inquiry agent had been given yesterday, and it had been conceded that it raised a good prima facie case against the co-respondent, counsel for the husband applied for costs to be awarded against the co-respondent. In my view, however, once the application for costs as made in the petition had in effect been abandoned in open court on the occasion of the first hearing, it would not be proper to condemn the co-respondent in costs without his having first been given notice that such an application was going to be made at the adjourned hearing. No such notice has, in fact, been given to him. The co-respondent has, perhaps wisely, chosen not to appear at this adjourned hearing, although he had the benefit of solicitors being on the record until Jan. 13, 1959, and despite the fact that the usual proper steps were taken to acquaint him of the date of the adjourned hearing. That, however, does not enable a once abandoned application for costs to be renewed without notice. It is, accordingly, for the court to reject that application, which would naturally have been acceded to but for it having been previously abandoned. The fact that the Legal Aid Fund may thus be put at a disadvantage cannot, to my mind, affect the court's decision on that point. B C D

That leaves only one further matter to mention, and that is the question of the costs of this adjourned hearing. Neither the Queen's Proctor nor the Law Society ask for costs; indeed, they are not in a position to do so. On the other hand, in view of the fact that this adjourned hearing appears, on the information now before the court, to have been due, at any rate in part, to the circumstance that readily available evidence was not placed within the knowledge of counsel, I cannot see how the petitioner's solicitors can properly expect to be paid their profit costs of the adjourned hearing. It follows that, under the court's inherent jurisdiction, I must, in the usual order for a taxation under Sch. 3 to the Legal Aid and Advice Act, 1949, make that clear. I do not, however, think that this is a case where it is necessary to make any other exceptional order in relation to costs, as in my view there has been no intentional disregard of the duties of the legal practitioners. E F

Decree nisi.

Solicitors: *Bernard W. Main*, agent for *Bailey & Goff*, Dartford (for the husband); *Treasury Solicitor* (for the Queen's Proctor); *The Secretary of the Law Society.*

[*Reported by* N. P. METCALFE, ESQ., *Barrister-at-Law.*]

LONDON COUNTY COUNCIL *v.* TOBIN.

[COURT OF APPEAL (Morris and Sellers, L.JJ., and Wynn-Parry, J.), January 13, 14, March 2, 1959.]

Compulsory Purchase—Compensation—Costs incurred in formulating claim—Legal and accountancy fees—Whether costs or compensation—Lands Tribunal Act, 1949 (12, 13 & 14 *Geo.* 6 *c.* 42), *s.* 3 (5), *Sch.* 1, *Part* 2, *para.* 5 (1), (2), (3)—*Lands Tribunal Rules*, 1956 (*S.I.* 1956 *No.* 1734), *r.* 49 (1), (2).

Legal and accountancy fees reasonably and properly incurred by a claimant in preparing his claim for compensation on the compulsory acquisition of his land should be included in the compensation awarded.

Skinners' Co. v. *Knight* ([1891] 2 Q.B. 542) distinguished.

Appeal dismissed.

[As to the measure of compensation for the compulsory acquisition of land, see 10 HALSBURY'S LAWS (3rd Edn.) 91 et seq., paras. 152 et seq.; and for cases on the subject, see 11 DIGEST (Repl.) 126 et seq., *164* et seq.

For the Lands Tribunal Act, 1949, s. 3 (5), Sch. 1, Part 2, para. 5 (1), (2), (3), see 28 HALSBURY'S STATUTES (2nd Edn.) 322, 330.

For the Lands Tribunal Rules, 1956, r. 49, see 12 HALSBURY'S STATUTORY INSTRUMENTS (1st Re-issue) 205.]

Cases referred to:

(1) *Bwllfa & Merthyr Dare Steam Collieries (1891) Ltd.* v. *Pontypridd Waterworks Co.*, [1903] A.C. 426; 72 L.J.K.B. 805; 89 L.T. 280; 11 Digest (Repl.) 136, *199*.

(2) *Pécheries Ostendaises Soc. Anon.* v. *Merchants' Marine Insurance Co.*, [1928] 1 K.B. 750; 97 L.J.K.B. 445; 138 L.T. 532; Digest (Practice) 905, *4457*.

(3) *Skinners' Co.* v. *Knight*, [1891] 2 Q.B. 542; 60 L.J.Q.B. 629; 65 L.T. 240; 56 J.P. 36; 31 Digest (Repl.) 547, *6685*.

Case Stated.

This was a Case Stated by the Lands Tribunal for the decision of the Court of Appeal pursuant to s. 3 (4) of the Lands Tribunal Act, 1949, and R.S.C., Ord. 58A, on a claim for compensation by Bertram Tobin in respect of the compulsory acquisition of the freehold premises owned and occupied by him for the purposes of his business as an optician at 382, Mile End Road, London.

The claimant, who had been born on the premises in 1890, had carried on business there as an optician since 1912, and at all material times had no intention of selling his business. The notice to treat was dated Jan. 14, 1952, and was served on the claimant, but he did not vacate the premises until June 6, 1955, when he moved his business to new premises at 129, Whitechapel Road. Between these dates the claimant, with the assistance of the acquiring authority, had vainly attempted to obtain an alternative site near 382, Mile End Road. Eventually, he took an eighteen-year lease of 129, Whitechapel Road, which is just over a mile away, at a rent of £400 p.a., but he had to spend £3,000, comprising a premium of £600 for the lease and a sum of £500 on necessary repairs and the remainder on fitting out and equipping the new premises, which had up till then been a warehouse. The new premises provided slightly more accommodation and at them, the claimant, who had been advised by his doctor to take care and go easily after an illness in 1951, employed a better paid qualified assistant instead of an apprentice. Notice of reference to the Lands Tribunal was given on Dec. 30, 1955, but the hearing before the tribunal did not take place until February, 1957, and the tribunal's decision was dated June 14, 1957. By the time when the tribunal heard the reference, the claimant had been in his new premises for eighteen months. The tribunal found that the claimant was doing more business in his new premises than he had in the old, that his business was increasing and was substantially more profitable; that the claimant had retained

a considerable part, but not all, of his goodwill; that the goodwill of a business increases its value the longer the business is carried on at the same premises or near thereto; and that the business carried on at the new premises differed from that formerly carried on by the claimant in regard not only to the premises and their situation but also in that the claimant employed at the new premises a fully qualified assistant, which, although it enabled the claimant to act on his doctor's advice, was necessary if the increased business was to be done. In assessing compensation for loss of goodwill the tribunal compared the capital value of the old business in the premises compulsorily acquired with the capital value of the new business in the new premises, ascertaining the loss of goodwill by deducting the latter from the former. Taking all the foregoing factors into consideration the tribunal ascertained the capital value of the goodwill of the old business by multiplying by three the average annual net profit for the last two years (viz. 1953/54 and 1954/55), and ascertained the capital value of the goodwill of the new business by multiplying by one and a half the average annual net profit for the two years 1955/56 and 1956/57, that for the latter year being an estimated profit. The difference ascertained by deducting the latter value from the former was £750, which the tribunal awarded to the claimant as compensation for loss of goodwill.

The claimant had incurred expenses of twenty guineas for legal advice and five guineas accountancy fees in connexion with the preparation of his claim for compensation after receipt of the notice to treat. It was agreed between the parties, and the Lands Tribunal found, that these expenses were a reasonable expenditure and reasonably incurred. The tribunal held that the costs incurred by a claimant in formulating his claim are proper subjects of compensation, and, accordingly, awarded the claimant twenty-five guineas compensation in respect of these items.

The acquiring authority now appealed by way of Case Stated from these decisions of the tribunal as to compensation for loss of goodwill and as to legal and accountancy fees. The questions for the Court of Appeal were whether on its findings of fact the tribunal came to a correct decision in law in determining (i) that the legal expenses and accountants' fees incurred by the claimant in preparing a claim in response to the notice to treat formed a proper subject of compensation and were correctly included in the tribunal's award; (ii) that the claimant was entitled to the sum of £750 in respect of his claim for damage to the goodwill of his business consequent on the compulsory acquisition of his business premises. On the question of compensation for loss of goodwill the Court of Appeal held that the principle applied by the Lands Tribunal in assessing compensation was a proper one to apply and, relying on *Bwllfa & Merthyr Dare Steam Collieries (1891) Ltd.* v. *Pontypridd Waterworks Co.* (1) ([1903] A.C. 426), that it was proper for the tribunal to take into its calculation the fact that the business had been continued at the new premises and the facts concerning its performance and achievement there; accordingly the court would not interfere with the tribunal's award of compensation for loss of goodwill. MORRIS, L.J., held also that the multiplier for ascertaining the capital value of the goodwill in the new premises was essentially a question of fact for the tribunal, and, the tribunal not having erred in principle, it was not for the court to say that its decision was wrong in law.

The case is substantively reported only on the question whether the legal and accountancy expenses incurred by the claimant were rightly included in the tribunal's award.

R. D. Stewart-Brown, Q.C., and *K. F. Goodfellow* for the acquiring authority.
W. Scrivens for the claimant.

Cur. adv. vult.

Mar. 2. The following judgments were read.

MORRIS, L.J., summarised the facts and, after considering and affirming the tribunal's decision as to the compensation for loss of goodwill, continued: The other item which is now in question is one of £26 5s. which, as to £21, related to the expense of taking legal advice in connexion with the preparation of the claim for compensation after the receipt of the notice to treat, and as to £5 5s. accountancy expenses similarly incurred. This matter was dealt with by the Lands Tribunal as follows:

> "It was contended by counsel for the acquiring authority that these expenses should be dealt with as part of the costs of the reference in the same way as instructions for writ in an action for damages. This argument appears to us to be based on a false analogy. The defendant in an action does not invite the plaintiff to institute proceedings, while the acquiring authority in their notice to treat demand '. . . from you and each and every of you the particulars of your respective estates and interests in the lands so required as aforesaid together with all charges and interests to which the same are subject and of the claims made by you and each of you in respect thereof which several particulars should be stated in one of the accompanying forms of claim and delivered to the solicitor of the council'. Nothing could be more reasonable on receipt of such a demand than to obtain professional advice and so incur expense which is the direct result of the service of notice to treat. Those expenses are incurred quite irrespective of whether the question of compensation is ever referred at all. Moreover, the claimant may on a reference not be awarded costs, or indeed be ordered to pay the costs of an acquiring authority if the amount awarded is less than the sealed offer, but no sealed offer would have been made unless a claim were first formulated. We are satisfied, therefore, that the costs incurred by a claimant in formulating his claim are proper subjects of compensation. It was admitted by counsel for the claimant that the sums mentioned in the claim included charges in respect of matters subsequent to the reference, and it was agreed between the parties that the appropriate fees would be, legal £21, accountants £5 5s. and surveyors the appropriate scale fee on £800, the agreed value of the freehold, plus the amount awarded by the tribunal in respect of item 2 (d)."

It was submitted by counsel for the acquiring authority that it was undesirable that legal costs incurred in preparing a claim should be regarded as forming part of the compensation to be awarded. He submitted that such costs could be recoverable as part of the costs of a reference, and as a matter of practical convenience he submitted that the Lands Tribunal was not a suitable tribunal to decide what costs had been properly incurred or what allowances should be made. He submitted that these questions could better be dealt with on a taxation of costs, and, further, that legal costs incurred in making a claim for compensation should not be regarded as capable of being a part of the compensation being claimed. He submitted that any costs properly incurred could be regarded as being costs of a reference, in the same way as costs incurred before an action is brought may be allowed if the taxing master in his discretion considers that they were necessary or proper for the attainment of justice (see *Pêcheries Ostendaises Soc. Anon.* v. *Merchants' Marine Insurance Co.* (2) ([1928] 1 K.B. 750).

It is provided by s. 3 (5) of the Lands Tribunal Act, 1949, as follows:

> "Subject to the following provisions of this section, the Lands Tribunal may order that the costs of any proceedings before it incurred by any party shall be paid by any other party and may tax or settle the amount of any costs to be paid under any such order or direct in what manner they are to be taxed".

In Part 2 of Sch. 1 to the Act para. 5 reads as follows:

" (1) Where the acquiring authority has made an unconditional offer in writing of any sum as compensation to any claimant and the sum awarded by the Lands Tribunal to that claimant does not exceed the sum offered, the Lands Tribunal shall, unless for special reasons the Lands Tribunal thinks proper not to do so, order the claimant to bear his own costs and to pay the costs of the acquiring authority so far as such costs were incurred after the offer was made. A B

" (2) If the Lands Tribunal is satisfied that a claimant has failed to deliver to the aquiring authority a notice in writing of the amount claimed by him giving sufficient particulars and in sufficient time to enable the acquiring authority to make a proper offer, the foregoing provisions of this section shall apply as if an unconditional offer had been made by the acquiring authority at the time when in the opinion of the Lands Tribunal sufficient particulars should have been furnished and the claimant had been awarded a sum not exceeding the amount of such offer. C

" The notice of claim shall state the exact nature of the interest in respect of which compensation is claimed, and give details of the compensation claimed, distinguishing the amounts under separate heads and showing how the amount claimed under each head is calculated, and when such a notice of claim has been delivered the acquiring authority may, at any time within six weeks after the delivery thereof, withdraw any notice to treat which has been served on the claimant or on any other person interested in the land authorised to be acquired, but shall be liable to pay compensation to any such claimant or other person for any loss or expenses occasioned by the notice to treat having been given to him and withdrawn and the amount of such compensation shall, in default of agreement, be determined by the Lands Tribunal. D E

" (3) Where a claimant has made an unconditional offer in writing to accept any sum as compensation and has complied with the provisions of the last preceding sub-section, and the sum awarded is equal to or exceeds that sum, the Lands Tribunal shall, unless for special reasons the Lands Tribunal thinks proper not to do so, order the acquiring authority to bear their own costs and to pay the costs of the claimant so far as such costs were incurred after the offer was made." F

I need not read sub-paras. (4), (6) and (7).

The question, therefore, arises whether, when compensation is being claimed, an amount to cover the legal costs of preparing the claim can be included. Whether in a particular case it is necessary to have legal assistance in preparing a claim or the services of an accountant will be a matter for decision having regard to the circumstances of the particular case. But if such assistance and such services have properly and reasonably been obtained, then I see no reason why the expense incurred should not be included as part of the compensation claimed. After a notice to treat is served the acquiring authority wish to know what claims are made on them. If they deem the claims to be reasonable they will meet such claims and no reference will be necessary. If legal or other assistance is necessary, and if, in consequence, expense is properly incurred, then, in my judgment, it is appropriate to include the expense as one item in the claim for compensation. If all items of a claim were agreed except an item for such expense, and if the acquiring authority disputed both the necessity for incurring it and also the amount of it, then it seems to me that the dispute could only be resolved by a reference to the Lands Tribunal. So also if the acquiring authority after receiving a notice of claim decided (see para. 5 (2), which I have just read, of Part 2 of Sch. 1 to the Lands Tribunal Act, 1949) to withdraw the notice to treat which it had served, the acquiring authority would be liable to pay compensation for any loss or expenses occasioned by the notice to treat having been given and withdrawn. Such loss or expense might in some cases include expense G H I

properly incurred in seeking professional advice. In default of agreement there would have to be a reference to the Lands Tribunal.

It is provided in r. 49 of the Lands Tribunal Rules, 1956, as follows:

> " (1) Except in cases to which the provisions of sub-ss. (1), (2) or (3) of s. 5 of the Act of 1919 apply, the costs of and incidental to any proceedings shall be in the discretion of the tribunal.
>
> " (2) If the tribunal directs that the costs of a party to the proceedings shall be paid by any other party thereto, the tribunal may settle the amount of the costs by fixing a lump sum, or it may direct that the costs shall be taxed by the registrar on a specified scale of the scales of costs prescribed by the Rules of the Supreme Court or by the County Court Rules, as the case may be."

It is said that the costs incurred in preparing a claim could be regarded as costs of and incidental to any proceedings. But when a claim is presented following on the request contained in a notice to treat, it may be the hope of both parties that there never will be " proceedings " before the Lands Tribunal. The reason why the acquiring authority ask for a claim to be presented is so that if possible they can amicably agree as to the amount of compensation and so settle all outstanding matters.

Counsel for the acquiring authority referred to *Skinners' Co.* v. *Knight* (3) ([1891] 2 Q.B. 542) where it was decided that under the wording which was used in s. 14 of the Conveyancing and Law of Property Act, 1881, the " compensation " for breach of covenant, which a lessee was liable to pay, did not include the cost incurred by the lessor in consulting and employing a solicitor and surveyor in respect of the preparation of the notice required by s. 14. FRY, L.J., said (ibid., at p. 545):

> " With regard to the word ' compensation ', we incline to the view that the word ' damages ' was not used because that is most appropriate to the compensation for a breach when ascertained by the verdict of a jury or the judgment of a court; but that compensation under the section in question is to be measured by the same rule as damages in an action for the breach. But whether this be so or no, we are clearly of opinion that the expenses in question are not payable as compensation for the breach of the covenant. They arise, not from the breach of the covenant, but solely from the fetter which the wisdom of the legislature has imposed on the enforcement of the cause of action arising from that breach."

In the present case the position is quite different. The acquiring authority wished to know what sums were claimed so that if they agreed to pay such sums there would be no outstanding claims. If a claimant could show that he had incurred expense in obtaining professional help, and that it was reasonable for him to have incurred it, and that the figure of his expense was reasonable, then the time for him to ask to be reimbursed was when he responded to the invitation contained in the notice to treat. The incurring of the expense would be a direct consequence of being dispossessed and of being asked to state the amount of the compensation claimed on account of such dispossession. It is to be observed that no question is raised in regard to the fees of a valuer or surveyor. But if such fees, which include fees for assessing the loss of goodwill, are to be regarded as claimable as compensation, it seems difficult to understand why legal or accountancy fees (always provided they are deemed necessary and are properly incurred) should not similarly be regarded as items claimable as compensation.

In my judgment, the Lands Tribunal were in law entitled to hold that the legal expenses and accountants' fees incurred by the claimant formed a proper subject of compensation; accordingly, such fees were correctly included in their award.

WYNN-PARRY, J.: Two questions arise for consideration. The first is whether, and, if so, to what extent, the claimant suffered damage to the goodwill

of his business by reason of his having to move his business from 382, Mile End Road, as a result of the compulsory acquisition of those premises by the acquiring authority. The second question is whether the legal costs incurred by the claimant in putting forward his claim following the notice to treat should be treated as part of the compensation payable to him in respect of the compulsory acquisition of the old premises or should be treated as part of the costs of the reference to the Lands Tribunal.

As regards the first question, the Lands Tribunal found that, as a result of moving from 382, Mile End Road, the claimant lost part of the goodwill of his business. That is a finding of fact which we cannot disturb. I would add that, in my view, it is a conclusion which was virtually inevitable. The tribunal have quantified the loss at £750. They have set out in their decision the method by which they have arrived at this figure, and the real question is whether, in adopting this method, they have misdirected themselves. Only if they have done so can this court interfere with their finding. [His Lordship considered this point, stated his conclusion that the finding of the tribunal on the first point should not be disturbed, and continued:] The second question is posed by the tribunal in effect in this way: whether on the findings of fact they came to a correct decision in law in determining that the legal expenses and accountants' fees incurred by the claimant in preparing his claim in response to the notice to treat formed a proper subject of compensation and were correctly included in their award? In my view, the tribunal were right. It can be said, of course, and it was said, that it is unsatisfactory that the legal costs of compiling the claim, and the legal costs incurred in prosecuting a reference, if there should be a reference, should be assessed, to use a mutual phrase, by different persons; the first set of legal expenses by the tribunal in investigating the claim, and the second set by the registrar of the tribunal or a taxing master. I have some sympathy for this view, but I do not see how it could prevail, short of some statutory modification of the Lands Tribunal Act, 1949, providing that legal costs incurred in compiling a claim should be subject to taxation whether or not the claim was followed by a reference. As matters stand at present, on notice to treat the claimant and his advisers compile a claim. Let me assume a case in respect of which there is no subsequent reference. In compiling the claim the claimant has to incur legal costs. In order to arrive at a true figure of the loss which he has incurred, he is forced to include the amount of such legal costs, otherwise his claim is for less than the loss which he has suffered. On what principle can it be said that, if there should be a reference, the amount of his loss is to be reduced for the purposes of the reference by the whole of the amount of the legal costs which he has incurred? The Lands Tribunal Act, 1949, s. 3 (5), only deals with the costs of a reference; the Lands Tribunal Rules, 1956, made pursuant to the Act are wider in form, because r. 49 refers to costs of and incidental to the reference, but, assuming without deciding that r. 49 is intra vires, I cannot see how the words " incidental to " can take the costs out of the only place where they can find room prior to a reference, namely, the claim itself, and make them any part of the costs of the reference.

In the result, I would dismiss this appeal.

SELLERS, L.J., (read by Morris, L.J.): I have read the judgments of both Morris, L.J., and Wynn-Parry, J. I agree with them and have nothing I wish to add to them.

Appeal dismissed. Leave to appeal to the House of Lords granted on terms.

Solicitors: *Solicitor, London County Council* (for the acquiring authority); *Silkin & Silkin* (for the claimant).

[*Reported by* Henry Summerfield, Esq., *Barrister-at-Law.*]

A

MACE *v.* R. & H. GREEN & SILLEY WEIR, LTD. AND ANOTHER.

[QUEEN'S BENCH DIVISION (Lord Parker, C.J.), February 25, 26, 27, 1959.]

Dock—Loading and unloading—Unloading—Safe means of access from deck to B *hold—Whether process of "unloading" ended when bagged cargo discharged from hold but spillage remained to be cleared—Docks Regulations,* 1934 (*S. R. & O.* 1934 *No.* 279), *reg.* 11 (1).

Safe System of Working—Inspection of means of access—Ladder between hold and deck of ship—Ship owned and occupied by third party—Ship unloading in dock—Injury caused by rope wound round or near ladder rendering ladder C *an unsafe means of access—Whether master's duty to inspect ladder.*

The plaintiff was employed by a firm of ship repairers, the first defendants, on repairing a ship which was owned and occupied by the second defendants. The ship was in wet dock where, in the course of turning round, she was unloading her cargo. The plaintiff was instructed by the chargehand to open up the manholes in the floor of No. 1 hold. Having done this work, the plain- D tiff was ascending a ladder, which led from the bottom of No. 1 hold to the deck, when he caught his foot in a rope wound round the rungs of the ladder, and, as a result of that, slipped and fell to the floor of the hold and was injured. The rope in the position in which it was was a danger and prevented the ladder from being a safe means of access to and from the hold. At the time when the accident occurred the cargo in No. 1 hold had been E discharged except for spillage, but unloading was still proceeding in all the other holds of the ship. The plaintiff brought an action against his employers for negligence and against the shipowners for breach of statutory duty under reg. 11 (1) of the Docks Regulations, 1934. The Docks Regulations, 1934, state that they were made in respect of "the processes of . . . unloading . . . any ship in any dock", and impose on shipowners the duty of complying F with the requirement of reg. 11 (1) that "there shall be maintained safe means of access from the deck to the hold in which work is being carried on".

Held: (i) the employers were not negligent since their duty to take reasonable care did not require them, in the circumstances of the present case, to inspect the ladder, and they were entitled to assume that the premises were safe for their employees and that the men who were working G there had done nothing to make them unsafe (see p. 658, letter A, post).

(ii) although the words in reg. 11 (1), "in which work is being carried on", meant work on the processes to which the Docks Regulations, 1934, applied, yet unloading did not end when the bagged cargo had been discharged from the hold but included the clearing up of spillage, which was ancillary to the process of unloading (*Manchester Ship Canal Co.* v. *Director* H *of Public Prosecutions* ([1930] 1 K.B. 547) and *Hawkins* v. *Thames Stevedore Co., Ltd. & Union Cold Storage Co., Ltd.* ([1936] 2 All E.R. 472) applied); accordingly, reg. 11 (1) applied and as, on the facts, the shipowners had not provided a safe means of access to the hold, they were in breach of statutory duty to the plaintiff (see p. 659, letter F, post).

[As to the master's duty to provide his servant with a safe place of work, I see 25 HALSBURY'S LAWS (3rd Edn.) 514, para. 981.

For the Docks Regulations, 1934, reg. 11, see 8 HALSBURY'S STATUTORY INSTRUMENTS 166.]

Cases referred to:

(1) *Davie* v. *New Merton Board Mills, Ltd.*, [1958] 1 All E.R. 67; [1958] 1 Q.B. 210; *affd.* H.L., ante, p. 346.

(2) *Wilson* v. *Tyneside Window Cleaning Co.*, [1958] 2 All E.R. 265; [1958] 2 Q.B. 110.

(3) *Smith* v. *Austin Lifts, Ltd.*, ante, p. 81.

(4) *Canadian Pacific Steamships, Ltd.* v. *Bryers*, [1957] 3 All E.R. 572; 3rd Digest Supp.

(5) *Manchester Ship Canal Co.* v. *Director of Public Prosecutions*, [1930] 1 K.B. 547; 99 L.J.K.B. 230; 143 L.T. 113; Digest Supp.

(6) *Hawkins* v. *Thames Stevedore Co., Ltd. & Union Cold Storage Co., Ltd.*, [1936] 2 All E.R. 472; Digest Supp.

(7) *London Graving Dock Co., Ltd.* v. *Horton*, [1951] 2 All E.R. 1; [1951] A.C. 737; 36 Digest (Repl.) 54, *296*.

Action.

This was an action by Henry Edward Mace, the plaintiff, for damages for personal injuries sustained by him on May 30, 1953, on the ship s.s. Kenya. At all material times the plaintiff was employed as a boilermaker by R. &. H Green & Silley Weir, Ltd., the first defendants (referred to hereinafter as " the employers "), who were ship repairers, and was employed on work on the ship, s.s. Kenya, which was owned by the British India Steam Navigation Co., Ltd., the second defendants (referred to hereinafter as " the shipowners "). At the time of the accident, the s.s. Kenya was lying in wet dock at the Royal Albert Docks; she had discharged her passengers and was in the course of unloading her cargo. The employers' servants were already on various parts of the ship doing minor repairs and maintenance work. The cargo in bags having been discharged from No. 1 hold, except for spillage, the plaintiff and his mate were sent by their chargehand to open up the manhole doors of the tank forming the floor of No. 1 hold. One of the ways down to the floor of the hold was by sloping ladders, the last of which, leading from the second 'tween deck down to the tank top, was constructed of stringers made of angle iron, with rungs of thin, half-inch steel, flat bars. The plaintiff and his mate having done their work on the manhole doors, began to ascend the sloping ladder when the plaintiff slipped and fell to the floor of the hold. At the time of the accident, unloading was proceeding in all the holds except in No. 1 hold. The plaintiff alleged that he slipped from the ladder because of a rope wound round one or two rungs of the ladder on which he caught his foot. He contended against his employers that they were in breach of the common law duty owed by master to servant to take reasonable care to see that the premises and equipment where the plaintiff was to work were safe and to see that the lighting was adequate for the plaintiff's work. As against the shipowners, the plaintiff contended that they were in breach of their statutory obligation under reg. 11 (1) of the Docks Regulations, 1934, to maintain a safe means of access from the deck to the hold " in which work is being carried on ". Alternatively, the plaintiff contended that the shipowners were in breach of the common law duty owed by an invitor to an invitee.

C. J. A. Doughty, Q.C., and *J. G. K. Sheldon* for the plaintiff.

Marven Everett, Q.C., and *Tudor Evans* for the employers, the first defendants.

Montague Berryman, Q.C., and *W. G. Wingate* for the shipowners, the second defendants.

LORD PARKER, C.J.: On May 30, 1953, the plaintiff, who was a boilermaker employed by the first defendants, the well-known company of R. & H. Green & Silley Weir, Ltd., met with an accident when he fell off a ladder in the lower hold of a ship owned by the second defendants, the British India Steam Navigation Co., Ltd. He suffered serious injury and for that injury he seeks to recover damages from one or other, or both, of the defendants.

The matter arises nearly six years after the event. I am not saying that anybody is particularly to blame in this case, but it certainly makes the task of witnesses and of the court extremely difficult. Memories are liable to fail at any time and after six years they are almost bound to fail. Moreover, one is bound to be suspicious of a plaintiff's claim in those circumstances; one

A approaches the matter on the basis that it may be something that he has conjured up in the course of time, and one is bound to look at his evidence with great suspicion. Again, from the point of view of the court it is often impossible in these circumstances to accept the whole of the evidence of any one witness, however honest he may be and however much he may be trying to tell the truth. Six years after the event a witness may with the best will in the world
B be at fault.

[HIS LORDSHIP then stated the facts on which the plaintiff relied and, having referred to the plaintiff's allegations against both the defendants and to the defendants' allegations of contributory negligence against the plaintiff, made the following findings of fact. There was a rope, wrapped round a stringer of the ladder from which the plaintiff fell with ends of the rope hanging down, in
C the position indicated on a plan tendered in evidence which was a position about where the plaintiff fell. The rope caused the plaintiff to fall; further, it constituted a danger and prevented the ladder from being a safe means of access from the hold. The lighting in the hold was adequate for the plaintiff to use the ladder. HIS LORDSHIP then continued:]

I will now consider the respective cases against the defendants and I will
D deal first with the employers, the first defendants. They say that this lower hold was not in their control: it was in the control of the shipowners; the shipowners were the occupiers. True, the duty to take reasonable care remains, but in all the circumstances reasonable care did not, they claim, call for an inspection by them, the employers, of this ladder. Now at one time it was often thought that where a master sent his servant to work on somebody else's
E premises he owed no duty to the servant in regard to those premises. I think that that was a misunderstanding as to the true position and that, as has been indicated (and I do not desire to refer to the cases again) by the Court of Appeal in *Davie* v. *New Merton Board Mills, Ltd.* (1) ([1958] 1 All E.R. 67) and in *Wilson* v. *Tyneside Window Cleaning Co.* (2) ([1958] 2 All E.R. 265), a duty to take reasonable care is always there, but what will be a performance of it will vary according
F to all the circumstances, including whether the premises are the premises in the occupation and control of somebody else. I should add that if my reading of *Smith* v. *Austin Lifts, Ltd.* (3) (ante, p. 81) is right, what was said in *Wilson* v. *Tyneside Window Cleaning Co.* (2) has in effect been approved in the House of Lords. That being so, I conceive that I have to ask myself as a jury, whether reasonable care in these circumstances demanded some inspection by the employ-
G ers. It is clear that if the cause of the fall had been some defect in the ladder itself it could not be suggested that the employers were at fault in not seeing that the ladder was structurally sound. They would have no reason to suspect that it was not sound. The ship was a modern ship. The shipowners were shipowners well known and reputable and there would be nothing to suggest that a reasonable employer should have to go and inspect the ladder. Nor do
H I think that this was a case where the nature of the work demanded an inspection and a laying out, as it were, for the safety of the workmen. For these experienced men, who, I have no doubt, had done the same sort of job hundreds of times, it required nothing more than being told to go and do it. The only way as it seems to me that it can be put by the plaintiff here is to say " Well, there were a lot of men working there; the stevedores had just finished unload-
I ing the bags; some of the ship's crew were there cleaning up; there were potential dangers all the time; and in those circumstances either Mr. Thorp, the foreman boilermaker, or the chargehand, Mr. Tate, should have gone down to the hold." It is said that it would have been easy for them to go down with the men to see that everything was all right for them to work. It seems to me that this is a jury question and, sitting as a jury and considering the matter as best I can, I cannot think that reasonable care demanded any such course of action. In these circumstances ship repairers on a ship doing one hundred and one jobs

during the course of the turn round of the ship must be perfectly entitled to assume, in the absence of notice of some kind—and when I say " in the absence of notice of some kind ", I am thinking, in particular, of *Smith* v. *Austin Lifts, Ltd.* (3)—that the premises where the men are going to be sent to work are safe and those who have been and are working there have not done anything to make them unsafe. I feel constrained to hold that there has been no breach by the employers, the first defendants, of the duty of reasonable care.

I now come to the case against the second defendants. I will deal first with reg. 11 (1)* of the Docks Regulations, 1934. Those regulations were made pursuant to powers contained in what was then the Factory and Workshop Act, 1901, in respect of certain processes, the processes being of

> " loading, unloading, moving and handling goods in, on, or at any dock, wharf, or quay, and the processes of loading, unloading and coaling any ship in any dock, harbour, or canal . . . ",

and it is directed " that [the Docks Regulation, 1934] shall apply to all docks, wharves, quays and ships as aforesaid ". The duty under reg. 11 (which is in Part 2 of the regulations) is a duty of the owner, master, or officer in charge of the ship†. Accordingly, the regulations are dealing with these particular processes, and are under the umbrella, as it were, of the processes. That is the first thing to observe. The second thing to observe is that reg. 11 is perfectly general: it does not apply merely, as many of the regulations do, to persons employed, namely, persons employed in the processes. It is perfectly general, and, following the recent House of Lords decision in *Canadian Pacific Steamships, Ltd.* v. *Bryers* (4) ([1957] 3 All E.R. 572) the plaintiff qualifies, if one may put it that way, for protection under reg. 11. The real question, however, is whether reg. 11 (1) applies at all in the circumstances of this case where, though unloading was being done in other parts of the ship, the actual unloading of the bags and cargo had been completed in No. 1 hold on the Friday evening and the hatch covers on the main deck had been put on.

Counsel for the shipowners relies very strongly on the last few words of that regulation, namely: " in which work is being carried on ". By that he says that those words must mean " in which work on the processes is being carried on ". Counsel for the plaintiff, on the other hand, contends that although the whole of this regulation is under the umbrella of processes, yet so long as the ship looked at as a whole is still being unloaded it matters not that the actual work in the hold in question is not of the character of unloading. He points to other regulations such as reg. 12 of the Regulations of 1934, where when the reference is to processes it says so—" When the processes are being carried on "—and he contrasts that with the expression (in reg. 11 (1)) " in which work is being carried on ". I confess that for my part it seems to me that as a matter of construction the words " in which work is being carried on " must mean work on the processes, and I accept the contention of counsel for the shipowners on that point.

The matter does not end there because counsel for the plaintiff goes on to contend that, even if that is so, work was still going on in this hold which was work at any rate in connexion with the processes and ancillary to the processes. He says that, true, the bagged cargo had been unloaded but it is wrong to speak

* Regulation 11 (1) of the Docks Regulations, 1934, provides: " If the depth from the level of the deck to the bottom of the hold exceeds five feet, there shall be maintained safe means of access from the deck to the hold in which work is being carried on "; in the present case, the depth from the deck to No. 1 hold exceeded five feet.

† See the introduction to the Docks Regulations, 1934, under the heading " Duties ", para. (b).

A of the unloading having been completed then when there are still "goods", as he puts it, in the hold, namely, spillage which has to be swept up and has to be taken up to the decks above and disposed of. He submits that the process of unloading and of handling goods has not been completed until the spillage has been cleared up and, he would add, the dunnage also.

B As far as I know there is no authority on this point. Reference has been made to two cases, namely, *Manchester Ship Canal Co.* v. *Director of Public Prosecutions* (5) ([1930] 1 K.B. 547) and *Hawkins* v. *Thames Stevedore Co., Ltd., & Union Cold Storage Co., Ltd.* (6) ([1936] 2 All E.R. 472). I need not refer, I think, to those cases. It is enough to say that it was held in the one case that the closing of the hatch covers, at any rate on the main deck, was part of the C process of unloading, and, in the other case, of loading, albeit ancillary to it. As it was put in those cases, the process of unloading or loading, as the case may be, is not completed until the hatch covers are put on. I myself do not read those cases as saying that if the hatch covers are put on that is of itself conclusive evidence that the unloading or the loading has been completed. I do treat those cases as authority for the fact that the process of unloading is D something which one may look on as a wide description of a process which involves matters that have to be judged in connexion therewith and ancillary thereto such as closing hatch covers, and if I am right in approaching it in that way then it seems to me that the clearing up of the spillage—and I need not go further than that and deal with dunnage—is ancillary to the process of E unloading and if not ancillary to the process of unloading it would be ancillary to the process of loading. It is certainly something which has to be done in connexion with the unloading and the loading, and I think it would be wrong to say that the moment the bagged or cased cargo has been removed the process has ended and that thereupon there is an interval during which some other process is carried on, namely, sweeping up and preparing. It seems to me that F the sweeping up of the spillage is really to be looked at as ancillary to and part of the process of unloading. Accordingly, in my judgment, at the time when this accident occurred the Docks Regulations, 1934, applied and on the findings that I have already made there was not then a safe means of access from the lower hold to the lower 'tween deck.

G [HIS LORDSHIP said that having regard to his decision on the Docks Regulations, 1934, it was unnecessary for him to deal with the plaintiff's second allegation against the shipowners, based on the duty owed by an invitor to an invitee; he would, however, state his views briefly on this point. The allegation fell to be decided under the law existing prior to the Occupiers' Liability Act, 1957, i.e., the law as laid down in *London Graving Dock Co., Ltd.* v. *Horton* (7) ([1951] 2 H All E.R. 1*). In the present case, the ladder was an unusual danger, and the sole question therefore was whether the plaintiff had a full appreciation of the danger. In deciding that question, HIS LORDSHIP was content to adopt for the purposes of this case what LORD DENNING said in *Smith* v. *Austin Lifts, Ltd.* (3) (ante, at p. 93, letters C-F), and on the facts, HIS LORDSHIP was not satisfied that the plaintiff had a full appreciation of the danger in the way that that matter I was dealt with by LORD DENNING; accordingly, if he were wrong in holding the shipowners liable under the Docks Regulations, 1934, HIS LORDSHIP would have held them liable to the plaintiff as invitors.

HIS LORDSHIP then considered the question of contributory negligence and held that the responsibility lay as to one-third on the plaintiff and as to two-thirds on the shipowners, the second defendants, and that damages recoverable

* The Occupiers' Liability Act, 1957, s. 2 (4) (a), alters the law laid down in *London Graving Dock Co., Ltd.* v. *Horton* (7). The Act came into force on Jan. 1, 1958.

by the plaintiff would be reduced by one-third accordingly. HIS LORDSHIP then went on to assess damages.]

Judgment for the plaintiff against the shipowners, the second defendants; judgment for the employers, the first defendants, against the plaintiff.

Solicitors: *Shaen, Roscoe & Co.* (for the plaintiff); *Barlow, Lyde & Gilbert* (for the employers, the first defendants); *Botterell & Roche* (for the shipowners, the second defendants).

[*Reported by* WENDY SHOCKETT, *Barrister-at-Law.*]

THOMSON (INSPECTOR OF TAXES) *v.* MOYSE.

[COURT OF APPEAL (Jenkins, Romer and Pearce, L.JJ.), January 16, 19, 20, March 9, 1959.]

Income Tax—Foreign possessions—Income arising from possessions out of United Kingdom—Income arising from securities out of United Kingdom—Taxpayer's life interest in American estates—Income credited in New York bank account—Cheques drawn by taxpayer in dollars on account—Cheques purchased by English banks—Proceeds credited to taxpayer's English bank account—Whether sums received by taxpayer in the United Kingdom—Income Tax Act, 1918 (8 *& 9 Geo.* 5 *c.* 40), *Sch. D, Case IV, r.* 2, *Case V, r.* 2.

The taxpayer, a British subject resident in the United Kingdom but domiciled in the United States of America, was entitled to income from the estate of his mother (which during part of the relevant period was in course of administration) and from the estate of his father, both estates being in the United States. The income was credited to his account in the Bank of New York. He drew cheques on that account for specified sums in United States dollars in favour of one or other of his two English banks, and requested them to purchase the cheques for the sterling equivalent of their amounts in dollars at the current rate of exchange. The English bank acceded to the request, sold a like amount of dollars to the Bank of England or some other permitted purchaser and credited the taxpayer's account in London with the sterling equivalent at the rate ruling on the day following its confirmation of the purchase. It sent the cheque to its New York correspondents, who cleared the cheque on the taxpayer's New York bank account, credited the English bank's New York bank account with the resulting dollars and paid out of that account the dollars sold to the Bank of England into its account at the Federal Reserve Bank of the United States. The English banks were found by the Special Commissioners to have acted as principals and not as the taxpayer's agents for clearing the cheques in their transactions with the Bank of England and the Bank of New York. The taxpayer was assessed to income tax in respect of the sums with which he was credited as being sums received in the United Kingdom (a) within Case IV, r. 2 of Sch. D to the Income Tax Act, 1918 (income from his mother's estate during administration), and (b) within Case V, r. 2 of Sch. D (other income). On appeal,

Held (PEARCE, L.J., dissenting): the assessments could not be supported for the following reasons—

(i) if the American income from the taxpayer's interests in the estates of his mother and his father was to be chargeable to United Kingdom income

tax, it must be shown to have been brought to the United Kingdom and received there by him; but the transaction must be taken for tax purposes as it in fact was (see p. 674, letter I, to p. 675, letter A, post) and, as the taxpayer's cheques on his New York bank, which were sold in England, were paid in New York to the order of the purchaser of the cheques acting as a principal, no part of the taxpayer's American income was received in the United Kingdom by him (see p. 667, letter E, and p. 677, letter B, post).

Dicta of ROMER, L.J., in *Hall* v. *Marians* ((1935), 19 Tax Cas. at p. 602), of LORD MACNAGHTEN and LORD BRAMPTON in *Gresham Life Assurance Society, Ltd.* v. *Bishop* ((1902), 4 Tax Cas. at pp. 473, 475) of the Lord President (LORD ROBERTSON), in *Forbes* v. *Scottish Provident Institution* ((1895), 3 Tax Cas. at p. 456) and of LORD COHEN in *Inland Revenue Comrs.* v. *Gordon* ([1952] 1 All E.R. at p. 870) applied.

Scottish Provident Institution v. *Farmer* ((1912), 6 Tax Cas. 34) and *Timpson's Executors* v. *Yerbury* ([1936] 1 All E.R. 186) distinguished.

(ii) the sums received by the taxpayer in sterling in England arose in the United Kingdom and were not brought into the United Kingdom from abroad; they were not, therefore, income arising from "money or value arising from property not imported" within r. 2 of Case V of Sch. D and were not taxable as income from foreign possessions (see p. 673, letters G and H, and p. 678, letters A and B, post).

Dicta of LORD CAVE, L.C., in *Pickles* v. *Foulsham* ((1925), 9 Tax Cas. at p. 288), and of LORD COHEN in *Inland Revenue Comrs.* v. *Gordon* ([1952] 1 All E.R. at p. 870) applied.

SEMBLE (PEARCE, L.J., and JENKINS, L.J.): the sums paid in sterling by the English banks for the taxpayer's cheques on his bank in New York were not each a payment for a capital asset (see p. 680, letter G, p. 685, letter I, and p. 672, letter I, to p. 673, letter B, post).

Paget v. *Inland Revenue Comrs.* ([1938] 1 All E.R. 392) considered.

Decision of WYNN-PARRY, J. ([1958] 3 All E.R. 225) affirmed except on the point at "Semble" above.

[As to what constitutes a remittance for the purposes of Case IV and Case V of Sch. D, s. 123 of the Income Tax Act, 1952 (replacing corresponding provisions in the Income Tax Act, 1918), see 20 HALSBURY'S LAWS (3rd Edn.) 269, 270, para. 489; and for cases on the subject, see 28 DIGEST 77-81, *422-450*.

For the Income Tax Act, 1918, Sch. D, Case IV, r. 2, and Case V, r. 2, see 12 HALSBURY'S STATUTES (2nd Edn.) 171, 172; and for the corresponding provisions in the Income Tax Act, 1952, s. 132 (2), (3), see 31 HALSBURY'S STATUTES (2nd Edn.) 128, 129.]

Cases referred to:

(1) *Inland Revenue Comrs.* v. *Gordon*, [1952] 1 All E.R. 866; [1952] A.C. 552; 33 Tax Cas. 226; 3rd Digest Supp.

(2) *Timpson's Executors* v. *Yerbury*, [1936] 1 All E.R. 186; [1936] 1 K.B. 645; 105 L.J.K.B. 749; 154 L.T. 283; 20 Tax Cas. 155; Digest Supp.

(3) *Carter* v. *Sharon*, [1936] 1 All E.R. 720; 20 Tax Cas. 229; Digest Supp.

(4) *Scottish Mortgage Co. of New Mexico* v. *McKelvie*, (1886), 2 Tax Cas. 165; 28 Digest 77, *422i*.

(5) *Gresham Life Assurance Society, Ltd.* v. *Bishop*, [1902] A.C. 287; 71 L.J.K.B. 618; 86 L.T. 693; 66 J.P. 755; 4 Tax Cas. 464; 28 Digest 77, *422*.

(6) *Forbes (Surveyor of Taxes)* v. *Scottish Provident Institution, Forbes (Surveyor of Taxes)* v. *Scottish Widows Fund & Life Assurance Society*, (1895), 3 Tax Cas. 443; 28 Digest 60, *303i.*

(7) *Scottish Provident Institution* v. *Farmer*, (1912), 6 Tax Cas. 34.

(8) *Kneen* v. *Martin*, [1934] All E.R. Rep. 595; [1935] 1 K.B. 499; 104 L.J.K.B. 361; 152 L.T. 337; 19 Tax Cas. 33; Digest Supp.

(9) *Hall* v. *Marians*, (1935), 19 Tax Cas. 582; Digest Supp.

(10) *Paget* v. *Inland Revenue Comrs.*, [1938] 1 All E.R. 392; [1938] 2 K.B. 25; 107 L.J.K.B. 657; 158 L.T. 187; 21 Tax Cas. 677; Digest Supp.

(11) *Foulsham* v. *Pickles*, [1925] A.C. 458; 94 L.J.K.B. 418; 133 L.T. 5; sub nom. *Pickles* v. *Foulsham*, 9 Tax Cas. 261; 28 Digest 25, *131.*

(12) *St. Aubyn* v. *A.-G.*, [1951] 2 All E.R. 473; [1952] A.C. 15; 3rd Digest Supp.

Appeal.

The taxpayer appealed to the Special Commissioners of Income Tax against assessments to income tax made on him in the sums of £2,335 for 1949-50, £2,500 for 1950-51 and £2,500 for 1951-52 under Case IV and of £3,457 for 1949-50, £3,500 for 1950-51 and £3,500 for 1951-52 under Case V of Sch. D to the Income Tax Act, 1918. The question for determination was whether the taxpayer was liable to assessment to income tax under Case IV in respect of income from securities in the United States of America and under Case V in respect of income from possessions in that country.

The taxpayer was born an American citizen and remained domiciled in the United States. At all material times he was a British subject resident in the United Kingdom. He was entitled to a life interest in a trust in the United States under the will of his father, and to a life interest in the residuary estate of his mother, also in the United States, and in course of administration from Aug. 19, 1943, to Apr. 18, 1951. The income from these two life interests was paid in dollars by the executors and trustees into the taxpayer's account at the Wall Street, New York, branch of the Bank of New York. It was common ground that this income, in so far as it arose in the course of the administration of the mother's estate, was income arising from securities out of the United Kingdom and that, in so far as it arose from that estate after the completion of the administration and from the trust under the father's will, it was income arising from possessions out of the United Kingdom.

The taxpayer drew cheques in dollars on his New York bank in favour of one or other of his two English banks and requested them to purchase them for the equivalent amount in stirling. The English banks sold the dollars specified in the cheques to the Bank of England and credited the taxpayer's account with the sterling equivalent of the dollars specified in the cheques. They then presented the cheques to the Bank of New York, which honoured them and transferred the dollars to the account of the Bank of England with the Federal Reserve Bank of the United States.

[The full facts of the case appear in the report of the hearing in the Chancery Division, [1958] 3 All E.R. 225 at pp. 226, 227.]

The taxpayer contended: (i) that the sums received by the taxpayer in the United Kingdom arose from contracts concluded in the United Kingdom between the taxpayer and the respective banks and were not remittances of United States income; (ii) that the taxpayer's United States income was not property received by him in the United Kingdom within the meaning of Case IV and r. 2 of Case V; (iii) that the source of the sterling credited to the taxpayer's London bank accounts was the sale and purchase as between the taxpayer and the particular

bank; and (iv) that the provisions of the Finance Act, 1953, had no bearing on the years under appeal. The Crown contended: (i) that the amounts of sterling credited to the taxpayer as a result of the cheque transactions in so far as attributable to the estate of his mother during the period of administration were sums received in the United Kingdom within the meaning of Case IV, r. 2 of Sch. D; and (ii) that the amounts of sterling credited to the taxpayer as a result of the cheque transactions in so far as attributable to the income from the estate of his mother after the period of administration or to the income from the estate of his father were sums received in the United Kingdom within the meaning of Case V, r. 2 of Sch. D. The commissioners found that the taxpayer gave no instructions to his New York bank to remit sums of money to him in the United Kingdom, and that, in dealing with the cheques which the taxpayer asked them to purchase, neither Seligman Bros. nor Midland Bank, Ltd. were acting as a collecting agent on the taxpayer's behalf but in every case acted as a principal. Having regard to the transactions between these banks, the Bank of England and the correspondents in the United States, they held that no remittances of American income had been brought into the United Kingdom and they did not accept the view that there had been a constructive remittance. This decision applied equally to the Case IV and Case V assessments. They therefore held that the appeal succeeded and discharged the assessments except for the Case IV assessment for 1949-50 which they reduced to £263. The Crown appealed by way of Case Stated. On July 22, 1958, WYNN-PARRY, J., dismissed the appeal, holding that the proceeds of the transactions either were not income or were not income " arising from securities out of the United Kingdom " and therefore were not taxable under Case IV of Sch. D, and, no dollars being brought into the United Kingdom or dollars being brought in if at all not by the taxpayer, also were not taxable under Case V of Sch. D as the taxpayer's income arising from foreign investments ([1958] 3 All E.R. 225). The Crown appealed to the Court of Appeal.

J. G. Foster, Q.C., and *A. S. Orr* for the Crown.

F. N. Bucher, Q.C., and *P. J. Brennan* for the taxpayer.

Cur. adv. vult.

Mar. 9. The following judgments were read.

JENKINS, L.J.: This is an appeal by the Crown from a judgment of WYNN-PARRY, J., dated July 22, 1958, affirming a determination of the Special Commissioners in favour of the respondent taxpayer, Mr. Stephen Dickson Moyse, on his appeal against assessments to income tax made on him under Cases IV and V of Sch. D to the Income Tax Act, 1918, for the years 1949-50, 1950-51 and 1951-52. The assessments under Case IV were made in respect of income from securities in the United States of America and those under Case V were made in respect of income from possessions in the United States of America.

The taxpayer was born an American citizen and remains domiciled in the United States of America, though he has at all material times been a naturalised British subject and resident in the United Kingdom. He was at all material times entitled to a life interest in a trust in the United States of America under the will of his father, the late Leon Moyse, and also to a life interest in the residuary estate of his mother, the late Mrs. A. D. Schmucker, in the United States of America. The mother's estate was in course of administration from Aug. 19, 1943, to Apr. 18, 1951, and it is agreed that under the Finance Act, 1938, s. 30, the income arising from this estate in the course of administration was for income tax purposes to be deemed to be income from securities out of the United Kingdom and as such assessable under Case IV of Sch. D to the limited extent

prescribed by r. 2 of the rules applicable to that case. It is also agreed that the income arising from the taxpayer's life interest under his father's will and the income arising from his mother's estate after completion of the administration was income arising from possessions out of the United Kingdom and as such assessable under Case V of Sch. D but only to the limited extent prescribed by r. 2 of the rules applicable to that case. A B

I should next refer to the relevant provisions of the Rules applicable to Cases IV and V of Sch. D. Rules applicable to Case IV:

> " 1. The tax in respect of income arising from securities in any place out of the United Kingdom shall be computed on the full amount thereof arising in the year of assessment, whether the income has been or will be received in the United Kingdom or not . . ." C

That, I think, is all that I need read of r. 1. Then r. 2 provides:

> " The foregoing rule shall not apply—(a) to any person who satisfies the Commissioners of Inland Revenue that he is not domiciled in the United Kingdom, or that, being a British subject, he is not ordinarily resident in the United Kingdom . . . The tax in any such case shall be computed on the full amount, so far as the same can be computed, of the sums which have been, or will be, received in the United Kingdom in the year of assessment without any deduction or abatement." D

Then the Rules applicable to Case V are, so far as is relevant: E

> " 1. The tax in respect of income arising from possessions out of the United Kingdom [with certain exceptions] shall be computed on the full amount thereof on an average of the three preceding years, as directed in Case I whether the income has been or will be received in the United Kingdom or not . . .
>
> " 2. The tax in respect of income arising from possessions out of the United Kingdom, other than income to which r. 1 applies, shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom, or from property imported, or from money or value arising from property not imported, or from money or value so received on credit or on account in respect of any such remittances, property, money, or value brought or to be brought into the United Kingdom, on an average of the three preceding years as directed in Case I, without any deduction or abatement other than is therein allowed. F G
>
> " 3. Rule 1 of the foregoing rules shall not apply—(a) to a person who satisfies the Commissioners of Inland Revenue that he is not domiciled in the United Kingdom, or that, being a British subject, he is not ordinarily resident in the United Kingdom . . . and in such cases the computation shall be made in accordance with r. 2." H

The income from the taxpayer's two life interests was during the period relevant to the present appeal paid in dollars by the executors and trustees into the taxpayer's account at the Wall Street Branch of the Bank of New York. With one exception (to which I will later refer) nothing except the taxpayer's income from the two life interests was paid into his New York Bank account. I

Under s. 1 (1) and s. 2 (1) of the Exchange Control Act, 1947, the taxpayer was prohibited, save with Treasury permission which he did not have at any material time, from selling the dollars credited to his New York account to any person other than an authorised dealer as defined by s. 42 of the Act and also

from retaining them, and was bound to offer them for sale to an authorised dealer. In these circumstances the taxpayer effected in London at first with Seligman Bros., Ltd., and later with Midland Bank, Ltd. (both being English banks and authorised dealers under the Exchange Control Act, 1947) the transactions giving rise to the disputed assessments. These transactions are described in great detail in the Case Stated by the Special Commissioners, who received oral evidence and considered a large number of documents, and I need not repeat the facts at length. The essential features common to all the transactions in question appear to have been these:—

(i) The taxpayer drew a cheque on his New York bank account for a specified sum in United States dollars in favour of the English bank (i.e., Seligman Bros. or the Midland Bank, Ltd.)

(ii) The taxpayer delivered this cheque to the English bank with a request that they should purchase it for the sterling equivalent of its amount in dollars at the current rate of exchange.

(iii) The English bank acceded to this request, sold a like amount of dollars to the Bank of England or some other permitted purchaser, and credited the taxpayer's account with them in London with the sterling equivalent of the amount of the cheque in dollars at the rate of exchange ruling on the day following their confirmation of the purchase, which would normally be the date of their sale to the Bank of England, or on the permitted market, of the like amount of dollars.

(iv) The English bank sent the cheque by registered mail to their correspondents in New York with instructions (a) to have the cheque cleared on the taxpayer's New York bank account, (b) to credit the English bank's New York bank account with the resulting dollars, and (c) to pay out of the last-mentioned bank account the amount of dollars which had been sold to the Bank of England to the Federal Reserve Bank in New York for the credit of the account of the Bank of England.

The Special Commissioners' findings, to a great extent findings of fact, in regard to the character and effect of these transactions are summarised in para. 7 of the Case Stated, from which I quote the following:

> " We, the commissioners who heard the appeal, gave our decision in the following terms. The question we had to answer was whether on the facts of the present case—and we had heard evidence not only from the [taxpayer] but also from eminent bankers—the [taxpayer] was liable to tax under Case IV and Case V of Sch. D in respect of income from foreign securities and foreign possessions. The [taxpayer] had a bank account in New York and into that bank account there was credited the whole of his American income. The [taxpayer] gave no instructions to his New York bank to remit sums of money to him in the United Kingdom. From time to time the [taxpayer] drew cheques in dollars on his New York bank account in favour of Seligman Bros. or Midland Bank, Ltd., which he asked those banks to purchase from him. At the time of each such request the [taxpayer] instructed the purchasing bank to place the proceeds in sterling to the credit of his United Kingdom account. The [taxpayer's] requests and instructions were in every case duly complied with. It seems clear to us that neither Seligman Bros. nor the Midland Bank, Ltd., were acting as a collecting agent on the [taxpayer's] behalf but in every case acted as a principal, and we so found.
>
> " Evidence had also been given of the transactions which took place between the purchasing banks and the Bank of England and the correspondents in the United States. Having regard to that evidence (which we

accepted) and the arguments that had been addressed to us, we held that no remittances of American income had been brought into the United Kingdom. Furthermore, on the reasoning employed by LORD COHEN in the case of *Inland Revenue Comrs.* v. *Gordon* (1) ([1952] 1 All E.R. 866), we did not accept the view that there had been a constructive remittance."

As to the sums sought to be assessed under Case IV of Sch. D as income received in this country from the mother's estate, the taxpayer's assessable income from this source is limited to

"the full amount . . . of the sums which have been or will be received in the United Kingdom in the year of assessment . . ."

I take it to be plain beyond argument that, in order to fall within this description, the sum sought to be assessed must not only be received in the United Kingdom but must also be income, and furthermore must be "income arising from securities . . . out of the United Kingdom" within the meaning of Case IV of Sch. D. This means, I think, that the income in question must originate abroad as the product of securities outside the United Kingdom and be received in the United Kingdom from abroad. Here there is no doubt that income arose to the taxpayer from his mother's residuary estate under the New York trust to which it was subject, and was received by the taxpayer as and when it was paid into his New York bank account by the executors or trustees. But it was received by him in New York and not in the United Kingdom and consequently did not attract tax. To make it taxable under Case IV, it must be shown to have been in some way brought into the United Kingdom and to have been there received by, or to the order of, the taxpayer.

Similar considerations apply to the sums sought to be assessed under Case V as income received in this country from the mother's estate since the completion of the administration, and from the father's estate, or, in other words, as income from possessions of the taxpayer out of the United Kingdom, though the language of r. 2 of the Rules applicable to Case V differs from that of r. 2 of the Rules applicable to Case IV, in that it describes the assessable income as the full amount of the actual sums annually received in the United Kingdom from a number of specified sources of which the first, and the only one I need consider at this stage, is "from remittances payable in the United Kingdom".

That expression appears to me to be directed to any sum belonging to the taxpayer and being income from some foreign possession of his which is brought to the United Kingdom from a place outside the United Kingdom by means of a remittance entitling the taxpayer (or some other person to his order) to receive payment in the United Kingdom of the sum in question.

In each of the transactions under review the only sum received by the taxpayer was the purchase price in sterling of the cheque sold to the English bank, which purchase price was paid to the taxpayer in London, pursuant to a contract made in London, by the English bank. The commissioners held, and there was in my view ample evidence on which they could hold, that in each case the English bank acted as a principal and not as a collecting agent, and in my view it would be wrong for us to disturb that finding.

The question with respect to each transaction must then be whether, by drawing the dollar cheque on his New York account in favour of the English bank and selling it to the English bank for sterling in London, the English bank acting as principal and not as collecting agent, the taxpayer received in the United Kingdom out of his bank account in New York the sum of dollars specified in the cheque, converted into sterling at the appropriate rate of exchange.

A Unless constrained by authority to hold otherwise I would answer that question in the negative.

It is clear that in actual fact none of these transactions involved the transfer of any sum from the taxpayer's bank account in New York to, or to the order of, the taxpayer in the United Kingdom. The price in sterling received by the taxpayer for the cheque from the English bank in London clearly did not come B from the taxpayer's bank account in New York. The amount in dollars received by the English bank on presenting the cheque for payment at the taxpayer's bank in New York did, of course, come from his account with that bank. But it was received at that bank in New York by the English bank and not by or to the order of the taxpayer in the United Kingdom. It was no part of the C bargain that the amount so received by the English bank should be brought into the United Kingdom and there is no evidence that it was so brought. If it was, it came to this country as money in which the taxpayer had no interest whatever, and which accordingly could not be his income for tax purposes.

Counsel for the Crown submitted that in each transaction the taxpayer, by drawing the dollar cheque on his account in New York in favour of the D English bank, and selling it to the English bank for the equivalent in sterling of its amount in dollars, brought to and received in the United Kingdom from his bank account in New York the sum in dollars specified in the cheque or the equivalent of that sum in sterling.

If my analysis of the facts is correct it seems to me, unless I am compelled E by authority to hold otherwise, that this view cannot be supported. I would say that the amount received by the taxpayer in each case, though no doubt received by him in the United Kingdom, lacked the essential character of a sum brought to the United Kingdom from New York, and neither the sterling sum in question nor the cheque for which it was paid would appear to me to have constituted a remittance from New York payable in the United Kingdom.

F Counsel for the Crown referred us to a number of authorities. In *Timpson's Executors* v. *Yerbury* (2) ([1936] 1 All E.R. 186) payments by way of gift were made by the taxpayer to her children by means of bills of exchange drawn on London and paid for out of the income standing to her credit in her account with the trustees of a New York trust under which she had a life interest, and G it was held in the Court of Appeal that the amounts so remitted remained her income up to the date of the encashment of the bills of exchange in the United Kingdom, on the ground that the amounts of the bills represented incomplete gifts which she could have revoked at any time before the bills were cashed, and consequently that she was taxable in those amounts as income to which she was entitled when it reached the United Kingdom. I do not see how this case H advances the Crown's argument. It is plain that there were actual remittances of income from New York to the United Kingdom, payable in the United Kingdom, the only question being to whom the income so remitted belonged. Conversely, in *Carter* v. *Sharon* (3) ([1936] 1 All E.R. 720), the foreign trust in question was governed by Californian law, under which the property in a sum remitted to the taxpayer's daughter became the absolute property of the I daughter on the posting of the draft in California, with the result that the income brought to the United Kingdom was not income to which the taxpayer was entitled when it reached the United Kingdom. This decision appears to me to assist the taxpayer on the hypothesis that the proceeds of the cheques in the present case ultimately reached the United Kingdom, but to afford no support to the Crown's argument. As in *Timpson's Executors* v. *Yerbury* (2), there was clearly an actual remittance from the place abroad to the United Kingdom of the amount of the draft, which was payable in the United Kingdom.

Some reliance was placed by counsel for the Crown on *Scottish Mortgage Co. of New Mexico* v. *McKelvie* (4) ((1886), 2 Tax Cas. 165), where a company formed for the purpose of borrowing money in this country and investing it abroad at higher rates of interest was treated for the purposes of Case IV of Sch. D as having received in this country from America sums which, though in fact raised in this country by the issue of shares and debentures and from depositors, it dealt with in its books here as profits from its American investments and applied as such. That case, now of doubtful authority, was used by counsel for the purpose of extending to mere book entries the proposition which (within due limits) I fully accept, that funds can for tax purposes be considered as having been remitted to this country from abroad where the transaction is carried out by debiting a foreign account and crediting an account here by means of a cheque, bill or draft in accordance with ordinary banking procedure, without any actual or physical transfer of currency to this country from abroad. For the same purpose counsel for the Crown referred us to the case in the House of Lords of *Gresham Life Assurance Society, Ltd.* v. *Bishop* (5) ((1902), 4 Tax Cas. 464), where an assurance society included in its yearly statement of accounts in this country interest received abroad but not in fact remitted to this country and such interest was held not to have been received in the United Kingdom within the meaning of Case IV. In particular counsel relied on the following passage from the speech of LORD LINDLEY (ibid., at p. 476):

> " My Lords, I agree with the Court of Appeal that a sum of money may be received in more ways than one, e.g., by the transfer of a coin or a negotiable instrument or other document which represents and produces coin, and is treated as such by business men. Even a settlement in account may be equivalent to a receipt of a sum of money, although no money may pass; and I am not myself prepared to say that what amongst business men is equivalent to a receipt of a sum of money is not a receipt within the meaning of the statute which your Lordships have to interpret."

Those observations are, however, subject to this important qualification, conveyed by LORD LINDLEY in the immediately following words (ibid.):

> " But to constitute a receipt of anything there must be a person to receive and a person from whom he receives and something received by the former from the latter, and in this case that something must be a sum of money. A mere entry in an account which does not represent such a transaction does not prove any receipt, whatever else it may be worth."

I would also refer to this passage from the speech of the EARL OF HALSBURY, L.C. (4 Tax Cas. at p. 472):

> " Now, here the money has not actually been received in this country. It is to be observed that the legislature has assumed by the distinction which it has made between the mode of ascertaining the amount payable generally upon the balance of gains and profits and the amount taxable in respect of the interest payable upon foreign investments, that it had earmarked that sum and made it subject to distinct and peculiar incidents. The difficulty of identifying the actual sum is no limit on the enactment. The legislature must be supposed to have contemplated the possibility of drawing a distinction between money received in this country and money accounted for or credited in account. If it were not for the difficulty of earmarking money I should think no one would have any doubt that the money must be received in this country to bring it within the words of the statute. If it were not money but some commodity, say tobacco, which a trader carrying on business in London and Paris was accounting for to his London house, no one would say that though the Paris tobacco was credited in account as a set-off against some expense or something that the supposed

London firm had to set-off against the same claim, and that as the London firm was paid by the Paris tobacco, therefore, the tobacco was liable to the import duty on tobacco because it was taken into account in the books of the London firm.

"In no way that I can give any reasonable interpretation to has the money reached this country or been received in this country. It, like the tobacco in the case suggested, has not been imported, and if the legislature had intended that bringing it into account was to be equivalent to its being received, it would have been easy to say so. It cannot be said that the use of artificial meaning to be attached to ordinary language is either unknown or unusual in legislation; and if it was intended to make this a special subject of taxation, to be taxed whenever and wherever an equivalent amount was credited or booked or in any other way recognised as having come under the dominion of the owner in this country, nothing could have been easier than to enact it in plain terms."

LORD MACNAGHTEN said (ibid., at p. 473):

"I do not understand what is meant by constructive receipt in such a case as this, or how any sums can be said to have been received in the United Kingdom unless they have been brought to the United Kingdom, or unless there has been a remittance 'payable in the United Kingdom', to borrow the language of the rule applicable to the fifth case . . . As my noble and learned friend LORD ROBERTSON, when Lord President, observed in the case of *Forbes* v. *Scottish Provident Institution* (6) ((1895), 3 Tax Cas. 443 at p. 456): 'Every man and every company having foreign or colonial investments of course knows of the interest arising from them, takes note of it, and enters it in any statement of affairs which may require to be made up'. But that, as I think, and as the Lord President thought, is a very different thing from bringing the interest home—a very different thing from the receipt of the money here, either in specie or as represented by a remittance payable in this country."

LORD MACNAGHTEN went on to distinguish the *New Mexico* case (4) as a very special case. LORD SHAND said this (4 Tax Cas. at p. 474):

"It is true that the appellants received the interest on their foreign securities by the hands of their agents abroad. But I think it is equally true that, as they left that interest where it was gained, it was never received in this country. When it was entered in the company's balance sheet in order to the ascertainment of the profits of the year, it was so entered as estate which had not been received in England, but as property belonging to the company which they acquired abroad, which had not been brought home or received here, but which was part of their foreign assets. Money or securities in that position was properly taken into account in the ascertainment of the year's profits, not because it had been received in England, but because although not so received it was part of assets of value which the company had acquired and held abroad. In the Scottish case of the *Scottish Mortgage Co. of New Mexico* v. *McKelvie* (4), the species facti was different, for there the company treated the money as received in this country, and merely saved themselves the expense of cross-remittances. It appeared there that the company was not entitled to divide the money earned abroad unless it was received as profits in this country. It was treated as so received merely to avoid the expense and inconvenience of cross-remittances, money sent home and the same amount sent back by cross-cheques or drafts. That was a material point in the decision of the case as showing that the money had been really received in this country."

LORD BRAMPTON said this (4 Tax Cas. at p. 475):

> " My Lords, it is conceded that no part of the money in question was ever received in the United Kingdom in specie, or in any form known to the commercial world for the transmission of money from one country or place to another. But it was argued that if not actually it was ' constructively ' so received in the accounts of the society. I confess I do not like that expression, nor do I quite understand what it means. If a ' constructive ' receipt is the same thing as an actual receipt, I see no reason for the use of the word ' constructive ' at all. If it means something differing from or short of an actual receipt, then it seems to me that a constructive receipt is not recognised by the statute, which in using the word ' received ' alone, must be taken to have used it having regard to its ordinary acceptation."

At the end of his speech LORD BRAMPTON doubted the correctness of the *New Mexico* case (4), and expressed the view that if sound it was distinguishable.

A somewhat similar case was that of *Forbes* v. *Scottish Provident Institution* (6), referred to with approval by LORD MACNAGHTEN in the *Gresham Life Assurance Society's* case (5). I quote from the headnote (3 Tax Cas. 443):

> " A Scottish mutual life assurance society lends out sums of money in Australia on interest. The interest accruing is not remitted to the United Kingdom in forma specifica, but is retained abroad and invested. It is, however, entered in the revenue account of the society as received. Held, that interest not received in the United Kingdom is not assessable to income tax, and that the facts in these cases do not amount to constructive remittance."

The Lord President said (ibid., at p. 456):

> " The phrase ' constructive remittance ' in the second query in these cases is one which, if used at all, requires to be carefully guarded. As employed in the present argument, it would practically obliterate the limitation in the rule of Case IV."

Then, immediately after the passage quoted by LORD MACNAGHTEN, the Lord President said this (ibid.):

> " But this will never make interest ' received in the United Kingdom '. The *New Mexico* case (4) . . . was totally different. The money there could only be said not to have been received, if money sent home by bill is not received in this country, or if no colonial interests are received in the United Kingdom which do not reach it in specific form."

In *Scottish Provident Institution* v. *Farmer* (7) ((1912), 6 Tax Cas. 34), a life assurance society invested abroad in bearer bonds income arising from foreign and colonial securities in America, sent the bonds to this country and in due course sold them, the proceeds of sale being received by the society at its head office in this country, and it was held that the bonds were chargeable under Case IV of Sch. D in the year in which they were realised.

Counsel for the Crown invited us to hold that the cheques drawn by the taxpayer on his New York bank in favour of the English banks in the present case were equivalent to the bearer bonds in the case just cited and that the proceeds of sale of the cheques received by the taxpayer from the English banks in the present case were equivalent to the proceeds of sale of the bonds in that case. I cannot agree. The bonds in *Scottish Provident Institution* v. *Farmer* (7) were investments made out of the American income and accordingly in the most direct sense represented that income. They were physically remitted from America to this country, and actually realised here. On the other hand the cheque in each of the transactions with which this case is concerned was an

A order on the taxpayer's bank in New York to pay dollars to the English bank in New York out of the funds standing to the credit of the taxpayer's New York bank account, and the sum in sterling paid by the English bank for the cheque was paid for the right to receive the dollars in New York from the taxpayer's bank there on presentation of the cheque to that bank. In *Scottish Provident Institution* v. *Farmer* (7) the income was brought to this country from America. B In the present case it was not so brought.

In *Kneen* v. *Martin* (8) ([1934] All E.R. Rep. 595) it was unsuccessfully sought to charge a person resident but not domiciled in this country with tax on sums remitted to this country. FINLAY, J., said this (19 Tax Cas. at p. 45):

> " The Attorney-General pointed out, and pointed out most forcibly, that C you might have cases where income was received and then the income was remitted, not, of course, in the actual cash or cheque received, but remitted by the purchase of a bond or some such method as that. I do not for a moment doubt that if one can see in any particular case that the sum remitted is income, even though it has, for purposes of being remitted, changed its form, then in that event it would remain income and would D attract tax. Having said that and having indicated, as I do desire to indicate, that this case to my mind proceeds, as indeed the Special Commissioners thought, very largely upon its own facts, upon those facts I agree, on the whole, with the conclusion at which they arrived, and therefore this appeal is dismissed."

E In the Court of Appeal, ROMER, L.J., said this ([1934] All E.R. Rep. at p. 604):

> " I agree. Considering, first of all, r. 2 of the Rules applicable to Case V, the point that has to be determined is whether, when the rule refers to the ' actual sums annually received in the United Kingdom ', it means sums representing income or whether it means sums whether representing income or representing capital. It is to be observed that whether we construe the F word ' sums ' in the one way or in the other, those sums are equally capable of being sent to this country in any one of the methods that are referred to in the rule. They can be sent in the form of remittances payable in the United Kingdom, or in the form of property imported, or in the form of money or value arising from property not imported. Those words, therefore, throw no light whatsoever on the question what the meaning of the word G ' sums ' may be."

Later he said (ibid., at p. 605):

> " . . . I am clearly of opinion, that the word ' sums ' in both rules means, and means only, sums representing income."

H In *Hall* v. *Marians* (9) ((1935), 19 Tax Cas. 582), the facts were complicated, but very briefly they appear to have been of this nature. The taxpayer's wife had an overdraft at the head office of the National Bank of India. She also had an account with the Colombo branch of the bank and that branch held for her certain Indian bonds in which income derived by her from a business carried on in Colombo was invested. The overdraft at the head office of the I bank was made on the security of these bonds which, however, remained in Colombo. On her instructions the head office " transferred " the overdraft to Colombo (i.e., the amount was credited to her account in London and debited to her account in Colombo) and shortly afterwards the Indian bonds were sold in Colombo and the proceeds applied in paying off her overdraft at the Colombo branch. It was contended for the Crown that this transaction involved the remittance to this country from Colombo of income in the shape of the proceeds of sale of the bonds, such remittance having been made by the combined effect of the crediting to the lady's account in London of the amount of the overdraft,

the debiting to her account in Colombo of the like amount, and the discharge of the resulting overdraft at the Colombo branch by the sale of the Indian bonds. The Court of Appeal, reversing FINLAY, J.'s judgment, rejected this contention. LORD HANWORTH, M.R., said this (19 Tax Cas. at p. 597):

> "To suggest that to attract liability to tax there must be an actual remittance seems quite to overlook the ordinary transactions of commercial men. The probability is that if and so far as either goods or bullion pass from one country to another it is only upon the totality being reached that it can be shown in favour of which country the account lies. If a good illustration is wanted of money which was treated as a remittance although no money had actually passed, an illustration is found in *Scottish Mortgage Co. of New Mexico* v. *McKelvie* (4)."

Then, after a citation from that case, he said this (ibid.):

> "That is a very excellent illustration that it is not necessary that there should be a remittance. If you are able to treat what is in your hands as if it were a receipt of income, and if it is used as such, then it is impossible to prevent the incidence of the tax by saying that in fact it had not been remitted."

I think that the learned Master of the Rolls, in view of what he had just previously said, must be taken as meaning here "an actual remittance". Then after referring to the facts and to LORD LINDLEY's speech in *Gresham Life Assurance Society, Ltd.* v. *Bishop* (5) the Master of the Rolls continued (19 Tax Cas. at p. 598):

> "Upon those facts, is it right to say that there has been a remittance of a value or a credit in respect of that debt? Is that the way in which this £2,912 was dealt with; was it liquidated by a remittance in any form or in any value or not? The commissioners obviously thought not, and I for my part cannot find that there was a remittance to or a receipt of something in the United Kingdom from what, of course, obviously is a position outside it. FINLAY, J., came to the conclusion that this money was used to extinguish a debt which was here. That puzzles me rather. What money? It is quite true that the money which was derived from the bonds when they were sold in May was used to liquidate the debt which at that time had gone out to Colombo, but I find no materials on which I can say that Mrs. Marians has, in the financial year ending Apr. 5, 1930, enjoyed the benefit of a remittance within the many-headed categories which are to be found in r. 2 of Case V. I find myself unable on any question of law to upset the decision of the commissioners, which I think they had abundant material for reaching. I think the right course, therefore, is to restore their finding and conclusion as one which they have come to on the questions of fact and were entitled so to do, and in respect of which I do not find that they have in any way misdirected themselves on a point of law."

ROMER, L.J., said this (ibid., at p. 602):

> "In other words, it appears to me that, if she deliberately adopts a form like this, then she is entitled to all the benefits that flow from the adoption of such a form and that we are not entitled to say, 'Oh yes, but in substance it is precisely the same thing as though she had adopted the other form and had had income remitted to this country'."

I fear my citations are becoming unduly long, and I will not refer at length to *Paget* v. *Inland Revenue Comrs.* (10) ([1938] 1 All E.R. 392) which is fully cited in the judgment of WYNN-PARRY, J. I confess to some doubt whether it can be said in this case as in *Paget's* case (10) that the price paid for the

A cheque in each of the transactions now under review was a payment made to the taxpayer by the English bank for the purchase of a capital asset in the shape of the right to receive part of the income arising from the trusts in the United States. From the English bank's point of view, the asset bought was simply the right to receive in New York the amount of the cheque in dollars out of the funds standing to the credit of the taxpayer's New York bank account. B From the taxpayer's point of view, the income paid into that account had already been paid by the persons liable to pay it, namely, the trustees of the United States trusts, and was lying in the bank in New York simply as an accumulation of income already received. I therefore prefer to decide this case simply on the issue whether the amount of the cheque in each transaction was ever brought into this country, or in other words remitted to this country from C New York.

In a passage from his speech in *Pickles* v. *Foulsham* (11) ((1925), 9 Tax Cas. 261), cited by the learned judge, but I think worth repeating, LORD CAVE, L.C., after reading r. 2 of the Rules applicable to Case V, continued (ibid., at p. 288):

> " From this rule it follows that, in order to be taxable under Case V, an D income arising from possessions out of the United Kingdom must be received in the United Kingdom either (a) from remittances payable in the United Kingdom, or (b) from property imported into the United Kingdom, or (c) from money or value arising from property not imported, or (d) from money or value received on credit or on account of remittances, property, money, or value brought or to be brought into the United Kingdom. The word E ' remittances ' (which recalls the expression ' remittances from thence ' in the corresponding rule contained in the Act of 1842) clearly refers to money remitted into the United Kingdom from outside. The other branches of the rule all refer to property, money or value imported or brought into the United Kingdom, and there are no words in the rule which can comprise money arising and payable here. If so, the inference is that money so arising and F payable is outside the rule, and so is not taxable under Case V at all."

This passage is of assistance, not only as emphasising the general requirement that in order to be taxable under this Case the item sought to be taxed must have been brought into the United Kingdom from abroad, but also as indicating that the third of the sources referred to, viz., "from money or value arising from property not imported ", is not excepted from this general requirement. G If that is so, it follows that counsel for the Crown must fail in a subsidiary argument raised by him to the effect that, in each of the present transactions (so far as the claim in respect of it is based on r. 2 of the Rules applicable to Case V), the sterling payment made by the English bank in London for the dollar cheque was income arising from possessions out of the United Kingdom in the shape H of a sum received in the United Kingdom from " money or value arising from property not imported " within the meaning of the rule. Clearly the sterling payment was received by the taxpayer in the United Kingdom, but clearly also it arose in the United Kingdom and was not brought into the United Kingdom from abroad.

This last point was adverted to by LORD COHEN in *Inland Revenue Comrs.* v. I *Gordon* (1), where the House of Lords on broadly similar facts came to the same conclusion as had been reached by the Court of Appeal in *Hall* v. *Marians* (9). I respectfully adopt the view tentatively expressed by LORD COHEN in *Inland Revenue Comrs.* v. *Gordon* (1) ([1952] 1 All E.R. at p. 870). It is fully set out in the judgment of the learned judge, and I need only cite the concluding sentence (ibid.):

> " I incline, therefore, to the view that to succeed under the rule in respect of sums received from the third source the Crown must establish that the

money or value had been brought or was to be brought into the United Kingdom." A

I am fortified in my adoption of LORD COHEN'S view by the consideration that it appears to me to accord with LORD CAVE'S analysis of r. 2 of Case V in *Pickles* v. *Foulsham* (11).

Counsel for the Crown referred to the Financial Powers (United States of America) Securities Act, 1941, and the United States of America Securities (Income Tax Relief) Regulations made thereunder (S.R. & O. 1941 No. 1563) as throwing light on the construction and effect of the Rules applicable to Cases IV and V of Sch. D. Speaking for myself, I have been unable to derive any assistance from this later legislation for the purposes of the matter in hand. B

It appears to me that the fallacy underlying the main argument of counsel for the Crown is this. He said that money can be remitted or brought to the United Kingdom from abroad by creating a credit here and a debit abroad. He said that in each of the present transactions what was done resulted in the taxpayer being credited by the English bank in London with a sum representing the purchase price in sterling of the dollar cheque and in the taxpayer's account with his bank in New York being subsequently debited with the amount of the dollar cheque when presented. He would therefore have us conclude that there was a remittance or transfer of the dollars or their sterling equivalent from New York to London. But I fail to see how the transaction, merely because it was carried out by means of a credit in London and a later debit in New York, could amount to a remittance or transfer of the dollars or their sterling equivalent from New York to London, unless it would have done so if carried out by physical means as opposed to book entries. Suppose A, proposing to visit the United States, wants to have dollars available to him there and suppose his friend B wants sterling to spend in London, and is possessed of dollars lying in the form of currency in a safe deposit rented to him in New York, both parties being resident here. A and B agree that A shall pay B in London the sterling equivalent of $1,000 and in consideration of such payment B shall give A the key of his safe deposit box in New York with an authority to take from the box $1,000 in currency for his own use and benefit. The transaction is duly carried out, so that A collects from the safe deposit the $1,000, the whole of which he proceeds to spend in the United States. As a result of this transaction, have the dollars been remitted or brought into this country? I should say clearly not. A would have bought from B in London under a contract entered into, and for a payment made, in this country dollars lying in New York, and would have received and spent those dollars in America. Conversely, B would have sold those dollars to A in London under the contract and for the payment so made, the payment arising wholly in this country. The transaction I have supposed appears to me to be as nearly as possible the equivalent of any one of the transactions now in question, carried out by physical means as opposed to book entries, and I do not see why the difference in the machinery adopted should affect the result. C D E F G H

It is no doubt true of each of the transactions with which we are here concerned that substantially the same result was produced as if the English bank had collected the amount of the dollar cheque in New York as agent for the taxpayer and had then as such agent paid or credited to the taxpayer in this country the sterling equivalent of the dollars so received, and that, if the transaction had taken that form, the consequences in point of liability to tax under Case IV or Case V might well have been different. But this appears to me to be irrelevant. The transaction must for tax purposes be taken as it is. I repeat what was said by ROMER, L.J., in *Hall* v. *Marians* (9) (19 Tax Cas. at p. 602): I

> " In other words, it appears to me that, if she deliberately adopts a form like this, then she is entitled to all the benefits that flow from the adoption

of such a form and that we are not entitled to say, ' Oh yes, but in substance it is precisely the same thing as though she had adopted the other form and had had income remitted to this country '."

The contention that these transactions involved in each case a constructive receipt by the taxpayer in this country from his bank account in New York of the sterling equivalent of the amount of the cheque in dollars in my view cannot be supported. On this branch of the argument I would respectfully adopt the observations quoted above of LORD MACNAGHTEN and LORD BRAMPTON in *Gresham Life Assurance Society, Ltd.* v. *Bishop* (5) (4 Tax Cas. at pp. 473 and 475) and of the Lord President in *Forbes* v. *Scottish Provident Institution* (6) (3 Tax Cas. at p. 456), and also those of LORD COHEN in *Inland Revenue Comrs.* v. *Gordon* (1) ([1952] 1 All E.R. at p. 870).

One minor transaction of a different kind from those so far described requires brief consideration. It appears that in December, 1948, the taxpayer received in this country through the post from the United States Treasury a cheque in his favour for $908.19 representing a refund of United States Federal Tax and forwarded it to Seligman Bros. with instructions " to convert this into sterling ", which instructions Seligman Bros. carried out by purchasing the cheque and crediting the taxpayer with the sterling equivalent. It was not seriously disputed that this transaction, which was of a wholly different character from the others, did involve a remittance to this country from the United States of the amount of the cheque sent through the post from the United States Treasury to the taxpayer in this country.

For the reasons I have endeavoured to state, I am of opinion that on the facts found the Special Commissioners came to a correct conclusion in law which was rightly upheld by the learned judge. Accordingly I would dismiss this appeal.

ROMER, L.J.: In *Pickles* v. *Foulsham* (11) ((1925), 9 Tax Cas. 261) LORD CAVE, L.C., classified the ways in which income can be " received " for the purposes of Case V of Sch. D to the Income Tax Act, 1918. Having referred to r. 2 he said (ibid., at p. 288):

> " From this rule it follows that, in order to be taxable under Case V, an income arising from possessions out of the United Kingdom must be received in the United Kingdom either (a) from remittances payable in the United Kingdom, or (b) from property imported into the United Kingdom, or (c) from money or value arising from property not imported, or (d) from money or value received on credit or on account of remittances, property, money, or value brought or to be brought into the United Kingdom."

Whatever, then, the position may be under head (c), the taxpayer in the present case is not chargeable in respect of his American income except to the extent that it is brought or is to be brought into the United Kingdom in one of the three other ways which LORD CAVE specified. This element of importation was referred to by LORD MACNAGHTEN in *Gresham Life Assurance Society, Ltd.* v. *Bishop* (5) ((1902), 4 Tax Cas. 464 at p. 474), as " bringing the interest home " and was clearly recognised by LORD COHEN in *Inland Revenue Comrs.* v. *Gordon* (1) ([1952] 1 All E.R. at p. 870) when he said:

> " It is plain from the wording of the rule that sums cannot be said to be received in the United Kingdom from the first, second or fourth sources unless the source was itself payable in, imported into, or brought or to be brought into the United Kingdom."

A further principle which it is necessary to bear in mind in the present case was enunciated by ROMER, L.J., in *Hall* v. *Marians* (9) ((1935), 19 Tax Cas. 582 at p. 602):

" If, by having capital remitted to this country, she [the taxpayer] escapes payment of income tax, she is entitled to do so, although in the end she is in precisely the same financial position as though she had had income remitted. In other words, it appears to me that, if she deliberately adopts a form like this, then she is entitled to all the benefits that flow from the adoption of such a form and that we are not entitled to say, ' Oh yes, but in substance it is precisely the same thing as though she had adopted the other form and had had income remitted to this country '."

Allied to this principle, it is well settled that r. 2 only applies where there has been actual receipt of foreign income here; there is no such thing as " constructive receipt " under the rule. LORD COHEN said in *Gordon's* case (1) ([1952] 1 All E.R. at p. 874):

" In these circumstances, to hold that there was a remittance to London in the present case would, I think, be to disregard the warnings given by the EARL OF HALSBURY, L.C., and LORD MACNAGHTEN in *Gresham Life Assurance Society, Ltd.* v. *Bishop* (5) . . . not to be led astray by an equivalent to a remittance or receipt or a constructive receipt."

It cannot, I think, be fairly suggested that the sterling credits which the taxpayer received from the London banks to whom he sold his American cheques during the relevant years were within heads (b) or (d) of LORD CAVE'S four categories, but the Crown contends that the sums were taxable as remittances payable in the United Kingdom (head (a)) or as money or value arising from property not imported (head (c)). In the light of the principles to which I have already referred the taxpayer is not taxable under head (a) unless on an analysis of the actual transactions into which he entered with the London banks he is shown to have received, actually and not constructively, American income of his which was brought, or which was to be brought, into the United Kingdom. Unless this is shown he is not taxable on " remittances "; nor is he so taxable if what he received was no more than the equivalent of a remittance. It accordingly becomes necessary to examine the form which the relevant transactions took on the facts as found by the Special Commissioners. The taxpayer had at all material times dollars standing to his credit at his New York bank, and these dollars represented income which had been paid into his account at that bank by the trustees of certain American trusts under which he was a beneficiary. The New York bank were accordingly debtors to the taxpayer in an amount represented by the dollars which from time to time stood to his credit in their books. The taxpayer, though domiciled in the United States of America, was resident in this country. Subject to the Exchange Control Regulations, he could at any time and in various ways have had his dollars remitted to him or to his order here; and, had he done so, there can be no doubt but that the dollars so remitted would have been chargeable to tax under Case V. Instead of doing that, however, he drew cheques on his dollar account in the New York bank and sold those cheques to the London banks who paid him for them here in sterling. The Special Commissioners found that these transactions between the taxpayer and the London banks were transactions as between principal and principal and not as between principal and agent; in other words they found (and the finding has not been challenged by the Crown and could not very well be) that the taxpayer was the seller of the cheques and the London banks were the buyers. What changes were effected in the position of the various parties concerned as a result of these transactions of sale and purchase? They would appear to be as follows:—

(i) Sums of sterling, formerly the property of the London banks, became the property of the taxpayer.

(ii) The London banks became entitled to call on the New York bank to pay them the amount of dollars for which the cheques were drawn.

(iii) The New York bank could and must, on presentation of the cheques, pay those dollars to the London banks instead of paying them to the taxpayer.

(iv) So far as the taxpayer was concerned, each transaction was entirely closed on payment to him of the sterling consideration except in the very improbable event of his cheques being dishonoured in New York.

In these circumstances, can it be said that the receipt by the taxpayer in London of the sterling sums constituted a receipt by him of American income brought or to be brought into the United Kingdom? The question is not an easy one but for myself I think it must be answered in the negative. The taxpayer never directed the New York bank to remit any money to him here either as dollars or in the form of sterling. Nor did he direct the bank to remit the dollars to the London banks in this country as his agents. Had he done so he would no doubt have been taxable on the amounts so remitted (*Timpson's Executors* v. *Yerbury* (2), [1936] 1 All E.R. 186). The London banks, however, could (and in fact did) receive payment of the dollars in the United States of America. Eventually no doubt, and via the Bank of England, they received sterling in this country which represented the dollars which they or their agents in the United States of America acquired from the New York bank on presentation of the taxpayer's cheques; but by that time the transaction, as I have already said, had been closed so far as the taxpayer was concerned and he had no interest whatever in the sterling which was paid by the Bank of England to the London banks, even assuming that the sterling was remitted to this country in one form or another from America. He had in effect assigned his legal right to the dollars to the London banks before any sterling or credit which represented them was brought into this country (cf. *Carter* v. *Sharon* (3), [1936] 1 All E.R. 720). Accordingly, having regard to the form which the transactions between the taxpayer and the London banks took, it does not seem to me that it can be said of the sterling sums which the taxpayer received that they were remittances of his American income payable in this country.

It has been suggested, however, that these sums are taxable on a view which was adumbrated in *Hall* v. *Marians* (9) by ROMER, L.J., where he said (19 Tax Cas. at p. 600):

> "Had the bank in this country allowed her [the taxpayer] to draw the £440 on account or in advance or in respect of sums of money that they were expecting to receive in the future from the bank in Colombo, representing income from her foreign possessions, the matter would have been different, but, as I understand it, this money, the money that she was allowed to draw from the bank, was a loan from the bank in its strict sense, and that is found as a fact by the commissioners . . . "

I respectfully agree with LORD COHEN in *Gordon's* case (1) ([1952] 1 All E.R. at p. 872) in thinking that, if the stated hypothesis had been actual fact, the late LORD ROMER would have decided *Marian's* case (9) the opposite way. I do not, however, think that the observations which I have quoted are applicable to the facts of the present case. There is no reason to suppose that the taxpayer ever intended that his American income should be transmitted to him in this country at any time and he never, so far as I am aware, gave any instructions to the New York bank to that effect. So far as the London banks were concerned, the commissioners state that these banks knew nothing about the taxpayer's American income and were quite unaware that the dollars which they purchased from him represented income of his in the United States of America. In these circumstances, it is difficult to see how they were allowing the taxpayer to draw sterling sums on account or in advance in the manner indicated by LORD ROMER. In my judgment, therefore, the commissioners and the learned judge were right in thinking that the taxpayer is not taxable under the first head of Case V, namely, on remittances payable in the United Kingdom.

It only remains to consider whether the sterling sums which he received from the London banks were " money or value arising from property not imported ", and taxable as such. As to this, LORD CAVE expressed the view in *Pickles* v. *Foulsham* (11) that the " money or value " under this head of charge is confined to money or value which is brought into this country, even though the property from which it arises is not. This view was also taken by LORD COHEN in *Gordon's* case (1) and his Lordship gave cogent reasons to support it in his speech, which had the concurrence of LORD NORMAND. In these circumstances it would not, I think, be right for this court to put a different construction on the relevant language, even though we are not in strictness bound by the views which LORD CAVE, L.C., LORD COHEN, and LORD NORMAND have expressed, having regard to the fact that they were obiter. Accordingly, applying these views, the taxpayer is not chargeable under the third head of Case V; and as he is not, in my opinion, chargeable under the first head I would dismiss the appeal.

PEARCE, L.J.: It is with the greatest diffidence that I express a view contrary to that of JENKINS, L.J., and ROMER, L.J. I take some comfort from the thought that the solution of the problem can hardly be said to be obvious. For, if the view which the taxpayer puts forward is correct, it seems that for over a century many persons have without protest paid tax for which they were not liable; and during that period the fact that tax liability under Cases IV and V can be avoided by a simple, normal and legitimate transaction has escaped the observation of the eagle-eyed.

The transactions in debate are those by which the taxpayer used for the purposes of living in England the income which was paid in dollars into his New York bank. He had many such dealings both with the Midland Bank in London and Seligman Bros. who are merchant bankers in the City of London. For convenience I will refer to them as " the English bank ". The taxpayer sent or presented to the English bank a cheque for dollars drawn on his New York bank account. The English bank bought the taxpayer's cheque, viewing the transaction as a purchase of dollars, and credited the taxpayer's account on the same or following day with the sterling equivalent of the dollars at the prevailing rate of exchange. Had the English bank been clearing the cheque by collecting it on the taxpayer's account, the credit would not have been made until some days later. It is conceded that in that case the taxpayer would have been liable to tax. In this case the bank was not acting as a collecting agent but dealing as principal with principal in a purchase of dollars. The Case finds that this practice of buying and selling cheques drawn in foreign currencies is a very old established one in the City of London and is part of the normal banking business of the English bank. The taxpayer was prohibited by the Exchange Control Act, 1947, from selling dollars to any person other than an authorised dealer such as was the English bank. Having sold his cheque, the taxpayer was no longer concerned with it, save in so far as he would have been liable had it been dishonoured. The English bank who had thus become holders for value sent the cheque to their New York correspondents, who had it cleared on the taxpayer's New York bank, credited the dollars so received to the English bank's account with them, and paid the dollars out of that account to the Federal Bank in New York for the credit of the Bank of England, to whom the dollars had been sold. The Case is silent as to how, when or where the Bank of England paid to the English bank the sterling proceeds of the dollars.

Thus the transaction consisted in the taxpayer selling for sterling in England dollar cheques drawn on his American income lying in a bank in New York. If that simple description is adequate, it would at first sight appear that he had to that extent received his American income in the United Kingdom, when one gives to the word " receive " its ordinary meaning. But one has to investigate the transaction more narrowly and consider the meaning of the word " receive "

as defined by the cases. Without disregarding the substance of a commercial transaction, one has to consider its technical and exact form. LORD SIMONDS observed in *St. Aubyn* v. *A.-G.* (12) ([1951] 2 All E.R. 473 at p. 485):

> " The question is not at what transaction the section is according to some alleged general purpose aimed, but what transaction its language according to its natural meaning fairly and squarely hits."

The English bank bought the cheque on the basis that the dollars would be paid out of the taxpayer's account at the New York bank on which the cheque was drawn by him. It can in my view hardly be said (as counsel for the taxpayer argued) that there was no nexus between the taxpayer's dollars in his New York account and his sterling in England. He bought the latter with the former. In *Gresham Life Assurance Society, Ltd.* v. *Bishop* (5) ((1902), 4 Tax Cas. 464) LORD BRAMPTON said (ibid., at p. 475):

> " . . . it is conceded that no part of the money in question was ever received in the United Kingdom in specie, or in any form known to the commercial world for the transmission of money from one country or place to another."

It seems clear that in his view money transmitted in any form known to the commercial world to the United Kingdom from another country would have been " received " in the United Kingdom. Here the taxpayer wished to have for use in the United Kingdom in sterling the income which was lying in dollars in the United States. That necessitated some form of transmission. He achieved it by a normal and old established commercial method.

But counsel for the taxpayer argues that, to constitute a receipt in the United Kingdom within Cases IV and V:—(a) there must be importation of something of value; and (b) that importation must be income or represent income (for both those points he relies on *Hall* v. *Marians* (9) (1935), 19 Tax Cas. 582 and *Inland Revenue Comrs.* v. *Gordon* (1), [1952] 1 All E.R. 866); and (c) the thing imported must belong to the taxpayer at the time of importation (for this point he relies on *Timpson's Executors* v. *Yerbury* (2), [1936] 1 All E.R. 186 and *Carter* v. *Sharon* (3), [1936] 1 All E.R. 720). In this case, so he argues, the blank cheque which the taxpayer brought to this country was itself worthless, the dollars never were imported into this country and the fruit of his cheque, if it came back at all to this country, certainly did not belong to the taxpayer when it did so, since the taxpayer had already sold it. He also argues that the dollar income of which the taxpayer sold part ceased to be income when it was sold and became capital (*Paget* v. *Inland Revenue Comrs.* (10), [1938] 1 All E.R. 392).

It is convenient to deal first with the question whether the American income of the taxpayer remained income after it was sold, so that the proceeds of the sale were income. Undoubtedly the dollars in the American bank were income. But the proceeds of a sale of income may in certain cases constitute capital as, e.g., on the sale of an annuity. The mere fact, however, that the income may alter in form does not prevent its retaining the quality of income; see *Scottish Provident Institution* v. *Farmer* (7) ((1912), 6 Tax Cas. 34), where bearer bonds were bought abroad out of income and, when they were brought to this country and sold, the proceeds of sale were held to be income.

In *Paget* v. *Inland Revenue Comrs.* (10) Miss Paget held Hungarian bearer bonds, the interest coupons of which were payable in London in sterling and in certain other countries in the respective currencies of those countries. By a decree, the Hungarian government directed that the interest on the bonds should not be paid direct to creditors, but that its equivalent in pengos should be deposited with the Hungarian National Bank and placed in a foreign creditors' fund, out of which bond-holders might obtain payment of interest coupons in pengos, but only for use for certain purposes in Hungary. Miss Paget did not

obtain payment in this way, but sold coupons, after they had fallen due, through coupon dealers in London, who deducted income tax on payment to her of the proceeds of such sales. Miss Paget also held bearer bonds of the Kingdom of Jugoslavia, the coupons of which were payable in American dollars in New York. The Jugoslav government gave notice of its inability to pay the interest in full and offered a composition either by payment in " blocked " dinars in Belgrade or by payment of ten per cent. of their face value in dollars and by the issuing of funding bonds for the balance. Miss Paget did not accept this scheme but sold the interest coupons as in the case of the Hungarian bonds.

The Court of Appeal held that neither in the case of the Hungarian nor the Jugoslav bonds did the proceeds of the sale of coupons received by Miss Paget constitute income. In neither case had the income passed to Miss Paget's hands, nor was it at her disposal. On the Jugoslav bonds she was offered a choice between two methods of composition. In respect of the Hungarian bonds a sum of pengos representing interest of bond-holders (but only for use in Hungary) had been deposited in the Hungarian bank. That bank was not her agent to accept the deposit of such pengos on her account, and, though she could have got them if the Hungarian bank had sanctioned it, the income in the form to which she was entitled on the original terms of the bonds was not available to her.

SIR WILFRID GREENE, M.R., said ([1938] 1 All E.R. at p. 398):

> " The purchase price received by Miss Paget was not income arising from the bonds at all. It arose from contracts of sale and purchase, whereby Miss Paget sold whatever right she had to receive such income in the future, as well as her right to take what was offered by the defaulting debtors."

MACKINNON, L.J., said (ibid., at p. 406):

> " In both these cases the foreign debtors had defaulted, and had refused to pay the interest promised by their bonds. Budapest offered to pay instead a certain amount of pengos which could be enjoyed as currency only within the limits of Hungary. Jugoslavia offered instead to pay in dinars, or partly in dinars and partly in funding bonds. What Miss Paget sold was the possibility of making some money abroad upon the acceptance of these offers."

The coupons sold by Miss Paget did not represent income lying at her disposal. In my view the sale of rights to future interest and compositions offered by defaulting debtors is wholly different from the sale in our case of the taxpayer's income lying at his disposal in the bank. No other case was cited to us on this point. I think that that case is clearly distinguishable. Here the dollars constituted income before they were sold for sterling and the sterling proceeds were also income. It is interesting to note that, if the taxpayer's contention on the major point in the case before us is correct, the sums realised by Miss Paget could not in any event have been received by her in the United Kingdom within the meaning of Case IV, since the foreign income in that case could not itself be brought into this country. But the case was not dealt with on those lines.

In dealing with the main point, namely whether there was a receipt of his income by the taxpayer in this country, both sides relied on *Timpson's Executors* v. *Yerbury* (2) ([1936] 1 All E.R. 186). In that case the taxpayer, who was resident in the United Kingdom, was a life tenant of income in New York. She directed the trustees in New York to pay allowances to her children living in the United Kingdom out of her interest in the income of the trust. They accordingly sent bills of exchange drawn on London either to the children or their bankers in the United Kingdom and debited the taxpayer's account with

A the equivalent in dollars of the sterling value of the bills. It was held by the Court of Appeal that the amounts so remitted remained income of the taxpayer up to the date of the encashment of the bills of exchange in the United Kingdom and were therefore received by her there. LORD WRIGHT, M.R., said (ibid., at p. 192):

B "In fact, it came in equity and in the way I have stated as her income, however she chose to apply it; whether to payment of debts or in purchase of valuable things or of service or as a voluntary allowance, it was income of hers to which she was entitled. Actual receipt by her would, I think, be too narrow a condition of chargeability; no one would doubt that she should in fairness be charged where the income was applied in the country to the C discharge of debts or the acquirement of valuable things or interests, but I find it difficult to bring such payments any more than gratuitous payments like the payments in question within the charging rule, if that rule is limited to cases where there is actual receipt in this country by the taxpayer personally. But the test that the taxpayer should be entitled to the income (provided as I here assume that it comes as her income) whether she actually D receives it or not, appears to me to be in accordance both with the language and the intent of the rules. Miscellaneous Rules, r. 1, applies to all cases under Sch. D and is aptly framed, and is, I think, effective, to charge all income of the taxpayer though the taxpayer never handles it himself, because he applies the income before it reaches him, so that he never actually receives it, though he disposes of it. What r. 2 of the Rules applE cable to Case V, read with r. 1 of the Miscellaneous Rules, requires is that the actual sums of the taxpayer's income should at least come to this country, under such circumstances that the taxpayer, if he does not actually receive them, is entitled to them, and these conditions were fulfilled in the present case. I reserve for further consideration in case the question should ever arise, the question whether if income accrues abroad either qua legal estate or qua equitable estate to a taxpayer resident in this country, F r. 2 of the Rules applicable to Case V and r. 1 of the Miscellaneous Rules, would make the taxpayer liable to charge in that event, even though the taxpayer disposed of his interest in that income before it was received in the United Kingdom so long as the actual sums of that income were in fact received by the alienee in this country."

G ROMER, L.J., said (ibid., at p. 193):

"In computing the tax, therefore, sums paid to third parties for the benefit, or at the request of, the party so entitled have to be taken into account; and this is only what one would expect."

GREENE, L.J., said (ibid., at p. 197):

H "If this view be correct, the fact that the actual hands to receive in this country the money derived from the remittances were those of the children appears to me to be irrelevant since provided the income in respect of which the assessment is made is income to which the person assessed is entitled, it is, in my judgment, immaterial whether the sum I 'received in the United Kingdom' is received by him or by some third party upon his instructions."

In *Carter* v. *Sharon* (3) the question reserved by the Master of the Rolls arose for decision. The facts were similar to those in *Timpson's Executors* v. *Yerbury* (2) save that the gifts were made by banker's drafts which by Californian law passed irrevocably to the donee at the latest when the drafts were posted in California. LAWRENCE, J., distinguished the case from *Timpson's Executors* v. *Yerbury* (2) on the ground that in the latter case the Court of Appeal decided that the

allowances to the deceased's children only became complete on the receipt and encashment of the bills of exchange by the children, and that therefore at the time the income or the money came into the United Kingdom it was income to which Mrs. Timpson was entitled; whereas in the case before him the money had ceased to belong to the donor at the time when it came into the United Kingdom and therefore she did not receive it in the United Kingdom. A

The principle in those two cases is clear in so far as it applies to transactions of the kind that were there being considered; but the bearing of those cases on the transaction which we have to consider is not so clear. Counsel for the taxpayer relies on them as showing that the money must belong to the taxpayer when it actually crosses the Atlantic. Counsel for the Crown contends that, as in *Timpson's* case (2) there was a complete gift completed when the donee cashed the bill of exchange, so in the case before us the dollars in the cheque were brought into the country when the taxpayer signed the cheque and were the property of the taxpayer until the bank actually cashed (or paid for) the cheque. If the taxpayer in *Timpson's Executors* v. *Yerbury* (2) received a bill of exchange when her child received and cashed it, a fortiori he argues, when the taxpayer cashed (i.e., received cash for) the cheque for himself he must have received it. B C D

In *Gresham Life Assurance Society, Ltd.* v. *Bishop* (5) the House of Lords held that interest on an investment abroad could not be held to be remitted to this country merely because it was included in an English insurance company's yearly accounts for the purpose of the triennial valuation on which profits were estimated. The EARL OF HALSBURY, L.C., said (4 Tax Cas. at p. 473): E

> " I do not think any amount of book-keeping or treatment of these assets, wherever they may be, will be equivalent to or the same thing as receiving the amount in this country. The words are simple, intelligible, and represent an ordinary and simple thing. I cannot think we ought to go beyond the words themselves . . ." F

And LORD MACNAGHTEN said (ibid.):

> " I do not understand what is meant by constructive receipt in such a case as this, or how any sums can be said to have been received in the United Kingdom unless they have been brought to the United Kingdom, or unless there has been a remittance ' payable in the United Kingdom ', to borrow the language of the rule applicable to the fifth case." G

It is true that in *Scottish Mortgage Co. of New Mexico* v. *McKelvie* (4) ((1886), 2 Tax Cas. 165), book entries had been held to constitute a receipt when they were made to obviate the necessity of cross-remittances. LORD MACNAGHTEN explained the case in this way (4 Tax Cas. at p. 474): H

> " In that case, as it seems to me, in the transmission to this country of money which the company . . . was bound to reinvest, the company acted as their own bankers, and did for themselves, by an entry in their books, what might have been done less conveniently and less economically by an ordinary bank or financial agent on their behalf."

LORD LINDLEY (ibid., at p. 478) described the case as— I

> " . . . very peculiar. Money received by the company's agents abroad was clearly and unmistakably treated by the company as remitted to and received by it here, and money here was treated by the company as remitted abroad in exchange for it. The exchange was effected by a book entry, but that entry was the business mode of carrying out cross-remittances which it would have been unbusinesslike and really childish to have effected in any other way. But thinking, as I do, that McKelvie's case may be

A properly upheld, I am not prepared to adopt it as a new starting point for further inferences."

In *Hall* v. *Marians* (9) the facts were far removed from the facts of the case before us. The respondent's wife living in London was entitled to a share of profits of a business at Colombo. Those profits were paid to her account with B the Colombo branch of a bank whose head office was in London and were invested in Indian bonds. From time to time she had borrowed moneys from the London branch on the security of the bonds. The amount of her loan account was debited to the Colombo branch which was instructed to realise securities to pay it off. The transfer was effected by cross-entries in the books of the two offices. A few weeks later the overdraft was discharged in Colombo out of C the proceeds of the Indian bonds. Assessments under r. 2 of Case V were made on the ground that the extinction of the debt due to the bank by crediting the proceeds of the bonds constituted a receipt by the wife of a taxable remittance either when the advances were made or when her loan was transferred to Colombo. The Court of Appeal held that there had been no remittance to this country. LORD HANWORTH, M.R., said (19 Tax Cas. at p. 596):

D "As I read r. 2 of Case V it clearly indicates that there must have been, in one form or another, something which amounted to a sum received in the country."

After reading the rule, he continued (ibid. at p. 597):

E "To suggest that to attract liability to tax there must be an actual remittance seems quite to overlook the ordinary transactions of commercial men. The probability is that if and so far as either goods or bullion pass from one country to another it is only upon the totality being reached that it can be shown in favour of which country the account lies. If a good illustration is wanted of money which was treated as a remittance although no money had actually passed, an illustration is found in *Scottish Mortgage* F *Co. of New Mexico* v. *McKelvie* (4) (2 Tax Cas. 165). There there was a sum lying outside this country of £500; there was a sum lying over here of £500. The sum which was lying in this country was treated as being income received, and the transaction was wisely carried out without any remission of money, or, indeed, drafts from one side to the other."

G After quoting some observations of the Lord President, he continued (ibid.):

"That is a very excellent illustration that it is not necessary that there should be a remittance. If you are able to treat what is in your hands as if it were a receipt of income, and if it is used as such, then it is impossible to prevent the incidence of the tax by saying that in fact it had not been H remitted."

He later quoted from LORD LINDLEY'S words in *Gresham Life Assurance Society, Ltd.* v. *Bishop* (5) (4 Tax Cas. at p. 476):

"... a sum of money may be received in more ways than one, e.g., by the transfer of a coin or a negotiable instrument or other document which I represents and produces coin, and is treated as such by business men. Even a settlement in account may be equivalent to a receipt of a sum of money, although no money may pass; and I am not myself prepared to say that what amongst business men is equivalent to a receipt of a sum of money is not a receipt within the meaning of the statute which your Lordships have to interpret. But to constitute a receipt of anything there must be a person to receive and a person from whom he receives and something received by the former from the latter, and in this case that something must be a sum of money."

ROMER, L.J., said (19 Tax Cas. at p. 600): A

> " It was suggested, I think, by Mr. Hills in his argument that, having so borrowed it on the security of sums representing her income in India, that was a sum which must be deemed to have been or which was received by her in the United Kingdom ' on credit or on account in respect of any such remittances ', and so on, as mentioned in the rule; in other words, that the sum so borrowed was a sum received in this country within the meaning of r. 2. I do not myself take that view. Had the bank in this country allowed her to draw the £440 on account or in advance or in respect of sums of money that they were expecting to receive in the future from the bank in Colombo, representing income from her foreign possessions, the matter would have been different, but, as I understand it, this money, the money that she was allowed to draw from the bank, was a loan from the bank in its strict sense . . ." B C

It appears that ROMER, L.J., in the words I have read held the view that it was immaterial that the English resident received the money in advance and that the remittance came into the country at a later date. It seems to me with respect that that view is correct. If one applies ROMER, L.J.'s hypothesis D to the case before us, the taxpayer would have been taxable if he had borrowed the sterling from the English bank " on account or in advance or in respect of sums of money that they were expecting to receive in the future in London from the bank " in New York, representing income from his foreign possessions. If that be so, it would be a strange proposition to hold that, because instead of borrowing he bought the sterling by giving to the English bank the certainty E (instead of the expectation) that they would receive the price from his New York income, he is *not* taxable—always provided that the English bank in fact ultimately received the proceeds of the cheque here. MAUGHAM, L.J., said (19 Tax Cas. at p. 602):

> " Liability to tax, therefore, depends on the locality of the receipt; in other words, the liability in respect of the sums received, whether they are from remittances or from property imported, or money or value from property not imported, or from the credits mentioned in the fourth possible method of remittance, depends on the place in which, in a reasonable business sense, the sums are received." F

Those words of MAUGHAM, L.J., are in my view important. The divergence G of view in this case comes largely from differing views as to " the place in which in a reasonable business sense the sums are received."

In a subsequent case, *Inland Revenue Comrs.* v. *Gordon* (1) ([1952] 1 All E.R. 866) a similar transaction with regard to the transfer of overdrafts was considered. The House of Lords, like the lower courts, held that it was difficult H to distinguish the case in any material respect from *Hall* v. *Marians* (9) and held that the transaction did not come within Case V. LORD COHEN specifically dealt with the hypothesis of ROMER, L.J., to which I have referred and says (ibid., at p. 872):

> " Counsel [for the Crown] read this passage as meaning that, if the stated hypothesis had been actual fact, ROMER, L.J., would have decided the I case in the opposite way. ROMER, L.J., does not express a concluded opinion, but I think it is a fair inference that he would have done so. Even so, I do not think his observations help the appellants, since in the present case I am unable to trace any finding of fact that the bank in England ever made the loan on account of or in advance or in respect of money of the respondent representing income which the bank were expecting to receive in England from the branch in Colombo."

A It will be seen that none of the cases deals with a transaction of precisely this nature. The principles which as it seems to me can be deduced from the cases to which I have referred are these. First, to bring a transaction within Case IV as received in the United Kingdom or Case V as received in the United Kingdom from remittances payable in the United Kingdom, income from abroad must have come to this country. Secondly, that income must have been received in B this country by the taxpayer. It must therefore at some time in this country be in the possession of or at the disposal of the taxpayer. If he can direct its disposal, he receives it in the person of the alienee. Thirdly, that money may have come to this country in one of the ways in which money does come to a country in a commercial sense. It need not of course come in specie. It may, I think, start as dollars and arrive as pounds sterling. It may come by the transfer of a C credit from a foreign bank or branch to an English bank or branch. But there must be such a transfer. Fourthly, the fact that the taxpayer receives the fruit of the income before its arrival is immaterial provided the income does in fact arrive (see ROMER, L.J.'s hypothesis). In such a case it need not, as it seems to me, be his property when it arrives, since he has received the proceeds of it and directed the transfer.

D It is true that *Timpson's Executors* v. *Yerbury* (2) and *Carter* v. *Sharon* (3) would at first sight appear to be authority for saying that the remittance must belong to the taxpayer when it actually comes into this country. On the facts of that case, there would not otherwise have been any receipt at all in this country, since there had been no receipt in advance by the taxpayer. But, in a case where the taxpayer receives the proceeds in advance on condition E that the income itself arrives to reimburse the person who has lent such proceeds to the taxpayer or paid them as purchase price, I cannot see that principle demands that the remittance should actually be the property of the taxpayer at the time of transit. So to hold would be departing very far from the ordinary sense of the words "received in the United Kingdom", and I would be loth to do so unless compelled by authority. In my view no authority so compels me.

F Applying these principles to the case before us, I think that the taxpayer, by selling for sterling in London a cheque drawn on his foreign income, received it in the United Kingdom, if it be shown that the foreign income later arrived in the United Kingdom. It need not arrive in dollars; it may arrive in pounds. It may arrive in any manner in which money is transmitted by banks. Nor need it be identified among a mass of banking transactions if the reasonable G business inference is that it did so arrive. See the words of LORD HANWORTH, M.R., in *Hall* v. *Marians* (9) (19 Tax Cas. at p. 597):

> "The probability is that if and so far as either goods or bullion pass from one country to another it is only upon the totality being reached that it can be shown in favour of which country the account lies."

H The Bank of England bought the dollars. The proceeds of them must, I think, have been a sterling credit to the English bank standing in the books of the Bank of England. I have felt some doubt whether that is an inference one may rightly draw, but any other inference seems quite impracticable. As I understand the case, the whole transaction was based on the known fact that the I English bank would have to sell the dollars to the Bank of England, and out of the proceeds of that sale would recoup itself for the price paid for the cheque.

Thus the circle was complete. The English bank had in the United Kingdom from the taxpayer's dollars the sterling equivalent which (with a small profit to them) represented the sterling that they had already paid to the taxpayer. In my view the taxpayer has received the relevant income in the United Kingdom within the meaning of Case IV. He has also in my view received the income from remittances payable within the United Kingdom within the meaning of Case V.

It was common ground to both counsel that the effect of Case IV and Case V on the transaction which we have before us is identical and that they can find no case where it has been held that the effect of the two Cases differs. While Case IV gives no particulars as to what is meant by " received ", Case V gives particulars. Rule 2 of Case V, which has been already read by my Lord, provides that the tax shall be computed on the full amount of the actual sums annually received in the United Kingdom under four heads—(a) from remittances payable in the United Kingdom, or (b) from property imported, or (c) from money or value arising from property not imported, or (d) from money or value so received on credit or on account in respect of any such remittances, property, money, or value brought or to be brought into the United Kingdom. (I have inserted the letters for convenience of reference.)

Counsel for the Crown claims that in any event the relevant transactions must in the last resort come within the terms of (c) above, namely, the taxpayer's transaction must constitute a receipt in the United Kingdom of money or value arising from property not imported. He contends that the words mean that the money or value can arise in this country and need never have been brought into it at all. Counsel for the taxpayer argues that one should read into the words the condition that the money or value must itself have been imported. The words are not easy to construe.

Historically these two heads of charge originated in Mr. Pitt's Income Tax Act, 1799. They figure in that Act as:

> " 17th Case. *1st From foreign possessions.* The full amount of the actual annual net income received in Great Britain . . ."

There follow directions as to periods of assessment.

> " 18th Case. *2nd Money arising from foreign securities.* The annual income of such securities, if the same were existing in the preceding year, to be estimated . . ."

In the Income Tax Act, 1803, the Cases became Sch. D., Cases IV and V.

> " 4th Case. The duty to be charged in respect of interest arising from securities in Ireland, or in the British plantations in America, or in any other of His Majesty's dominions out of Great Britain, and foreign securities.
>
> " The duty to be charged in respect thereof shall be computed on a sum not less than the whole and just sum and sums (so far as the same can be computed) which have been or will be received in Great Britain, in the current year, without any deduction or abatement.
>
> " 5th Case. The duty to be charged in respect of possessions in Ireland, or in the British plantations in America, or in any other of His Majesty's dominions out of Great Britain, and foreign possessions.
>
> " The duty to be charged in respect thereof shall be computed at not less than the full amount of the actual sums annually received in Great Britain, either for remittances from thence payable in Great Britain, or from property imported from thence into Great Britain, or from money or value received in Great Britain, and arising from property of any person or persons, which shall not have been imported into Great Britain, computing the same on an average of the three preceding years, as directed in the first case, without deduction or abatement."

The Income Tax Act, 1842, made no alterations material to the argument before us, save that in that Act in Case V there appear for the first time the concluding words (viz., (d)):

> " or from money or value so received on credit or on account in respect of such remittances property money or value brought or to be brought into Great Britain."

The Income Tax Act, 1918, re-enacted words similar in material respects save that in r. 2 of Case V the words "from thence" are omitted in two places (namely in (a) and (b)).

If the matter were free from authority, I should incline to the view that money or value under (c) need not be imported for the following reasons. First, in the Act of 1803 the words in (c), namely, "arising from property of any person or persons which shall not have been imported", do not contain the words "from thence" after the word "arising", whereas (a) and (b) do contain the words "from thence". This seems to show that the legislature, while intending that in (a) and (b) importation should be connoted, did not so intend in (c). Secondly, in the Act of 1803 and thereafter the use of the word "arising" is far more apt to indicate something whose origin was in this country than something brought into it. It is the antithesis, as it seems to me, of "imported" in this context. Thirdly, having dealt under (a) with remittances and under (b) with property imported, it would be natural to go on to deal with the case of the person who did not have the proceeds from the sale of his crop of sugar in the plantations remitted to him here and who did not import his crop of sugar and sell it here, but who sold it in this country to some purchaser who would dispose of it abroad or import it at some later date. He would thus be receiving income arising from property not imported. Receipt of the money in this country, not its importation into it, would be the test of (c). The tax would then have a coherent framework instead of having an obvious and illogical loophole. Fourthly, if (c) only deals with money or value which has itself been imported, it adds nothing to (a) and (b) which cover money imported and property imported. Moreover, if the money or value referred to in (c) is only that which has been imported, there cannot be any relevance in considering whether it came from property not imported or any other income source. Fifthly, the Act does not say that the money or value has to be imported. I do, however, appreciate that the words of (d) as a matter of construction definitely point in a contrary direction. But it is hard to believe that they were inserted in the Act of 1842 (and thereafter in the Act of 1918) with a view to altering the meaning of (c), so as to impose the connotation that the money or value must be imported and create the loophole to which I have referred. Had this been intended it could have been clearly expressed in two or three words.

For the foregoing reasons I do not myself see the need or justification for reading into (c) words which it does not contain. But opinions have been given obiter on the words of (c). LORD CAVE, L.C., after setting out the words of the rule, said in *Pickles* v. *Foulsham* (11) ((1925), 9 Tax Cas. at p. 288):

> "The word 'remittances' (which recalls the expression 'remittances from thence' in the corresponding rule contained in the Act of 1842) clearly refers to money remitted into the United Kingdom from outside. The other branches of the rule all refer to property, money or value imported or brought into the United Kingdom, and there are no words in the rule which can comprise money arising and payable here. If so, the inference is that money so arising and payable is outside the rule, and so is not taxable under Case V at all."

This view was expressed obiter and was not part of the ratio decidendi of the case, since r. 2 was held on other grounds clearly inappropriate to the facts which were there considered.

LORD COHEN, in *Inland Revenue Comrs.* v. *Gordon* (1) ([1952] 1 All E.R. at p. 870) said:

"At one time counsel for the appellants suggested that it might be said that there were sums received in the United Kingdom from ' money or value arising from property not imported ', but I think that he ultimately recognised that it was impossible to bring this case within the third source without grossly distorting the language used and, in particular, without placing on the word ' from ' a meaning which it could not properly bear. There might have been another difficulty in counsel's way had he persisted in this argument. To succeed on it, it would have been necessary for him to satisfy us that the ' money or value arising from property not imported ' need not itself be brought into the United Kingdom. It is plain from the wording of the rule that sums cannot be said to be received in the United Kingdom from the first, second or fourth sources unless the source was itself payable in, imported into, or brought or to be brought into the United Kingdom. It would be strange if the sums received in the United Kingdom from the third source were within the rule although the money or value was not imported or to be imported into the United Kingdom. It would be all the more strange since sums received in the United Kingdom from the fourth source—i.e. ' money or value so received on credit or on account in respect of . . . *such* money, or value ' (i.e., the third source)—could not bring the rule into operation unless *such* money or value had been brought or was to be brought into the United Kingdom. I incline, therefore, to the view that to succeed under the rule in respect of sums received from the third source the Crown must establish that the money or value had been brought or was to be brought into the United Kingdom."

A B C D E

But apparently this particular point was not the subject of detailed argument. LORD NORMAND said that he agreed with LORD COHEN'S opinion " in omnibus ", but LORD MORTON OF HENRYTON and LORD TUCKER, while agreeing with LORD COHEN'S opinion in other respects, expressly reserved the question whether the money or value arising from property not imported must itself be brought into the United Kingdom. F

In view of the weighty sources from which those expressions of opinion (though obiter) emanate, I should not feel it proper to hold otherwise. But for the other reasons I have given I would be in favour of allowing the appeal.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue; Vandercom, Stanton & Co.* (for the taxpayer).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

RYAN *v.* PILKINGTON AND ANOTHER.

[COURT OF APPEAL (Hodson, Morris and Willmer, L.JJ.), February 27, March 3, 4, 1959.]

Estate Agent—Authority—Deposit—Whether estate agent has ostensible authority to take a deposit as agent for the vendor.

An estate agent was instructed by an owner to find a purchaser of property and introduced a prospective purchaser who arranged to buy the property "subject to contract". The prospective purchaser, after he had visited the vendor and discussed the prospective sale, went back to the estate agent and paid him £100 as deposit; the prospective purchaser visited the premises a second time and, after discussing the price, returned to the estate agent and paid him a second £100. The estate agent gave receipts for these sums, signing the first "as agent for" the vendor and the second, on the same piece of paper, "as agent". Subsequently the prospective purchaser visited the vendor a third time, when the vendor told him that the sale was off and, being told of the deposits which had been paid, advised the purchaser to get the £200 back from the estate agent. The prospective purchaser brought an action for the return of both deposits against the estate agent and the vendor.

Held: (by HODSON, L.J.) an estate agent instructed to find a purchaser had ostensible authority to take a deposit as agent for the vendor and (by MORRIS and WILLMER, L.JJ.) on the facts of this case the estate agent had ostensible authority to take the deposits as agent for the vendor; (by the court) the vendor was, therefore, liable to repay the £200 deposit received by the estate agent as the vendor's agent.

Appeal dismissed.

[Editorial Note. For the right to recover a deposit paid subject to contract, see *Chillingworth* v. *Esche* ([1924] 1 Ch. 97).

As to the implied authority of estate agents, see 1 HALSBURY'S LAWS (3rd Edn.) 166, para. 390; and for cases on the subject, see 1 DIGEST 377-379, *830-836*.**]**

Cases referred to:

(1) *Navarro* v. *Moregrand, Ltd.*, [1951] W.N. 335; [1951] 2 T.L.R. 674; 2nd Digest Supp.

(2) *Luxor (Eastbourne), Ltd.* v. *Cooper*, [1941] 1 All E.R. 33; [1941] A.C. 108; 110 L.J.K.B. 131; 164 L.T. 313; 2nd Digest Supp.

(3) *Brodard* v. *Pilkington*, [1953] C.P.L. 275; 159 E.G. 436.

(4) *Wragg* v. *Lovett*, [1948] 2 All E.R. 968; 2nd Digest Supp.

(5) *Keen* v. *Mear*, [1920] 2 Ch. 574; 89 L.J.Ch. 513; 124 L.T. 19; Digest Supp.

(6) *Hamer* v. *Sharp*, (1874), L.R. 19 Eq. 108; 44 L.J.Ch. 53; 31 L.T. 643; 1 Digest 378, *833*.

Appeal.

The second defendant in the action, the intended vendor of property, "Ferndale", Queen's Drive, Finsbury Park, London, appealed against an order of His Honour JUDGE BLOCK made in the Mayor's and City of London Court on Oct. 24, 1958, giving judgment for the plaintiff, a prospective purchaser of the property, in an action for the recovery of two sums of £100 each paid by him to the vendor's estate agent, the first defendant, in respect of his proposed purchase of the property. The vendor contended that the sums had been paid to the estate agent as stake-holder, i.e., as agent for both the vendor and purchaser, and not as agent for the vendor, and that they were therefore recoverable only from the estate agent.

A. G. de Montmorency for the defendant vendor.

R. N. Bibby-Trevor for the plaintiff, prospective purchaser.

HODSON, L.J.: This is an appeal by the second defendant from an order of His Honour JUDGE BLOCK at the Mayor's and City of London Court, dated Oct. 24, 1958. The proceedings relate to events which took place in 1956. In June, 1957, the plaintiff, who was the prospective purchaser from the second defendant, the vendor of a property called " Ferndale ", Queen's Drive, Finsbury Park, issued a writ against the first defendant, Mr. Pilkington, who is an estate agent, claiming the return of £200 deposited with him, as it was said, as stake-holder. The estate agent, originally the only defendant, was refused leave to defend by the learned master, but subsequently the learned judge at chambers gave him leave to defend on his affidavit that he was employed as agent of the vendor. His contention was that he received the money deposited as the agent of the vendor.

The action was remitted to the county court and, after a study of the documents, the prospective purchaser became aware that when the two payments of £100 each were made, the first in October, 1956, the second on Nov. 1, 1956, a receipt had been given in these terms by the estate agent:

> " Received of P. F. Ryan £100 cash deposit on the private hotel business and lease of Mr. and Mrs. Gem, 157, Queen's Drive, Finsbury Park, N.4. Lease of approx. 964 years at £10 per annum and furniture, etc. Sale price £9,000 all at. Subject to contract."

That is signed by the estate agent " as agent for Mr. and Mrs. Gem ", Mr. Gem being the vendor. The subsequent payment is acknowledged on the same piece of paper:

> " Received further payment of £100 (by cheque) 1.11.56, L. Pilkington as agent."

Then " P.T.O.", and on the back is written: " Purchase price reduced to £8,800. L. Pilkington. 1.11.56 ".

The learned judge took a note of the evidence which he received from the prospective purchaser, the estate agent and the vendor. He dismissed the claim against the estate agent, finding that he did not hold the £200 as claimed in the writ as stake-holder; there was no claim against him for breach of warranty of authority. The position of the estate agent is not very clear, but it was stated in the evidence that he had been convicted of the fraudulent conversion of deposits and we were told that he was a bankrupt. In this court the prospective purchaser has not sought to pursue his claim further against him.

The learned judge found in favour of the prospective purchaser against the vendor, finding the £200 had been received by the estate agent as agent for his principal, the vendor. The vendor has appealed against that finding. I think the finding of fact that the estate agent had purported to receive this sum of money as agent is unassailable. That is exactly what he did. But that does not conclude the matter, because, in order to make a principal liable, the agent must have been acting within the scope of his ostensible authority.

The rule is stated in para. 82 of BOWSTEAD ON AGENCY (9th and 10th Edns.) as quoted by SOMERVELL, L.J., in *Navarro* v. *Moregrand, Ltd.* (1) ([1951] W.N. 335) and reads in this way (ibid., at p. 336):

> " Every act done by an agent professedly on the principal's behalf, and within the scope of his actual authority, is binding on the principal with respect to persons dealing with the agent in good faith, even if the act be done fraudulently in furtherance of the agent's own interests, and not in the interests of the principal. Every act done by an agent in the course of his employment on behalf of the principal, and within the apparent scope of his authority, binds the principal, unless the agent is in fact unauthorised to do the particular act, and the person dealing with him has notice that in doing such act he is exceeding his authority."

The vendor as legal owner of the property had instructed the estate agent to find a purchaser. That is the extent of the vendor's evidence as to the arrangement which he made with the estate agent. No doubt it would follow from that arrangement that, if a purchaser were found and the necessary work was done by the estate agent so that he fulfilled the terms of his employment, he would be entitled to commission on the usual scale. In *Luxor (Eastbourne), Ltd.* v. *Cooper* (2) ([1941] 1 All E.R. 33), LORD RUSSELL OF KILLOWEN said (ibid., at p. 43):

> " A few preliminary observations occur to me. (1) Commission contracts are subject to no peculiar rules or principles of their own. The law which governs them is the law which governs all contracts and all questions of agency. (2) No general rule can be laid down by which the rights of the agent or the liability of the principal under commission contracts are to be determined. In each case, these must depend upon the exact terms of the contract in question, and upon the true construction of those terms. (3) Contracts by which owners of property, desiring to dispose of it, put it in the hands of agents on commission terms are not (in default of specific provisions) contracts of employment in the ordinary meaning of those words. No obligation is imposed on the agent to do anything. The contracts are merely promises binding on the principal to pay a sum of money upon the happening of a specified event, which involves the rendering of some service by the agent. There is no real analogy between such contracts and contracts of employment by which one party binds himself to do certain work and the other binds himself to pay remuneration for the doing of it."

The estate agent was under no obligation to do anything, but, as I see it, once he set about finding a purchaser, as he did, he would do so as agent for his principal, the vendor. The vital question is whether he was acting within the scope of his apparent authority. The difficulty in this case has arisen because, as I read the judgment of the learned judge, he did not make any sort of finding on that. He contented himself by making reference to the document which I have read which contains the receipt for the two sums of £100, making £200, and relying on the fact that the estate agent was indeed acting as agent. He did not go on to say that he found as a fact that he was acting as an agent within the apparent scope of his authority.

Since there are no specific findings as to this matter, and the defendant vendor is the appellant here, the evidence ought to be taken in his favour and any doubts arising as to the effect of the evidence should be resolved in his favour also. There are passages in the evidence which might throw doubt on the accuracy of his recollection as to what took place a long time ago. The trial took place in 1958 and witnesses were being asked to remember events of 1956. So, in dealing with the facts, where there is a disagreement between the prospective purchaser and the vendor, or between the estate agent and the vendor, I have taken it that the vendor's recollection was accurate. It is not in dispute that an advertisement appeared in a newspaper, that the prospective purchaser was interested in the subject-matter of the advertisement and that the estate agent arranged an appointment with the vendor. The prospective purchaser went to look at the place and saw Mr. and Mrs. Gem there. There was an agreement, it was said, to pay £8,800 in the first instance, but it is clear from the documents that the agreement was originally for £9,000, which subsequently was reduced to £8,800. According to the vendor, it was made clear to the prospective purchaser that he would sell " subject to contract " at £8,800. The vendor's evidence was that he knew nothing about the deposits until the prospective purchaser told him about them later. But one knows from the document—it is not suggested that it is a forgery—that these deposits were paid, and I do not think that I need follow further the sequence of events. The first deposit must have

been made in October, because the prospective purchaser's first visit to this place took place in October and the second one was made on Nov. 1, 1956. The only question is whether, in taking that money as agent, the estate agent was acting within the scope of his authority. A

The case was put by counsel for the vendor in this way. He said that, as a matter of law, an estate agent cannot do that. An estate agent who takes money on deposit takes it as a stake-holder and in no other manner. He does not take it as an agent. The first answer to that is that he did take it as an agent. So far as the estate agent is concerned, that was the capacity in which he said he was to act. I cannot see how it can be said that he took it as a stake-holder. He could not take it as a stake-holder unless he had agreed to be a stake-holder. The term " stake-holder " involves that a person acting in that capacity would act as agent for both parties and not solely as agent for one. Every estate agent in the course of his business of finding a purchaser would, it is conceded, be entitled to take deposits in his capacity as stake-holder. B C

It was sought to rely on a decision in an unreported interlocutory appeal in the Court of Appeal, *Brodard* v. *Pilkington* (3), when DENNING, L.J., presided and I also sat. It was an appeal against a refusal of leave to defend under R.S.C., Ord. 14, and the whole appeal turned on this. The defendant wrote a letter agreeing to repay the deposit paid to him by the plaintiff, and in the face of that admission, which showed him to be acting as stake-holder, he was refused leave to defend. However, in the course of his judgment, although I do not think it was in any way necessary for the decision of the case, DENNING, L.J., said that D

> " in the ordinary way an estate agent receiving a deposit does receive it as stake-holder unless the contrary is said." E

The effect of the defendant's letter was that there was no triable issue. There was an admission by the defendant that he held the money as stake-holder and not as agent for the vendor. The learned lord justice said that the defendant had made the admission that he did not receive it for the principal but received it as a stake-holder, and he said that was what the law would presume in the absence of any evidence to the contrary. I agreed with that judgment. As I understand it, the learned lord justice was saying in that passage that that was what he understood was the ordinary practice of estate agents, and was not purporting to be laying down any proposition of law inconsistent with what had been said by LORD RUSSELL OF KILLOWEN in the *Luxor* case (2). F

In this case we have no expert evidence concerning the practice of estate agents. The county court judge heard no such evidence, though no doubt he had heard many cases in which estate agents were involved, because they do figure largely in cases which come before the courts. In this court we have been referred to several authorities involving estate agents or persons in a like position where the terms of arrangement by which the agent was appointed made it clear that it was within the scope of the agent's authority to take a deposit. I need not refer to those cases. But, with the possible exception of *Brodard's* case (3), where the facts are not sufficiently clearly stated in the report*, we have not seen any case in which the arrangement between the vendor and the agent was merely to find a purchaser without any provision for accepting deposits from any prospective purchasers. So that, so far as I understand it, the question of law whether the action of the agent here was within the scope of his authority is not directly covered by authority and one has to apply first principles. G H I

Those first principles involve looking at the matter through the eyes of the prospective purchaser who goes into a house agent's establishment and is asked for a deposit in connexion with the property which he wants to buy. What should be the attitude of mind of that man? I think that that was the approach made by SOMERVELL, L.J., in *Navarro's* case (1), as appears from the paragraph

* [1953] C.P.L. 275; 159 E.G. 436.

in his judgment which follows the citation from BOWSTEAD ([1951] W.N. at p. 336):

> "All that the plaintiff knew was that the agent was the man who had charge of the letting, and the conclusion which anybody in his position would have drawn was that the landlords were demanding a premium."

In that case the agent extracted what was an illegal premium under the terms of the Rent Restrictions Acts, and the plaintiff was held to be entitled to recover that illegal premium from the landlord as the agent was acting with authority.

The distinction between that case and this is that the agent's ostensible authority, as the learned judge there found, was to conduct the full business of letting the property in question. Counsel for the vendor has pointed out that here all the agent was instructed to do as soon as his function as agent began was to find a purchaser, and on the facts of this case that meant finding a purchaser able and willing to purchase "subject to contract". It is surely relevant to remember that ability to purchase is one of the qualities which one looks for in a purchaser. Accordingly, the requirement for the payment of a sum of money by way of deposit would seem to me permissible as evidence of some ability to purchase, and as some indication that the proposed purchaser was not a man of straw. Further, it is prima facie in the interests of the vendor that the proposed purchaser should give an earnest of his expressed intention to become owner of the property in question. Looking at it through the eyes of a reasonable prospective purchaser, it seems to me that the act of the estate agent in taking a deposit is within the scope of the apparent authority which is given to the agent by his principal. Even though there are no express words here beyond the words "I am the purchaser", I think that the authority extends far enough to enable the agent to receive money as agent for his principal. The admission which counsel for the vendor felt compelled to make in the course of his argument seems to me to tend to support that conclusion, because, if it can be inferred that it would be within the scope of the authority of the estate agent to accept money as stake-holder, i.e., that he is in a position to take money as agent for both, I cannot see why in principle it should be outside the scope of that same authority to take money as agent for his vendor alone, even though nothing has been said by his principal about taking money at all. I rest my judgment on the view that he acted as he did within the scope of his authority, because by taking these deposits he is promoting the purchase which it was his function as agent to bring about.

Therefore, I would dismiss this appeal and uphold the judgment of the learned county court judge.

MORRIS, L.J.: I agree. Whatever be the result of this case, it is unfortunate either for the prospective purchaser or for the vendor. The estate agent was undoubtedly asked by the vendor to find a purchaser. The estate agent therefore had the owner's authority to bring the property to the knowledge of any intending purchaser. The vendor's oral evidence was to the effect that in October, 1956, he instructed the estate agent to find a purchaser, and he said that he mentioned the price by telephone. The property was in the hands of one other agent. The vendor said that he would confirm by letter. I think this must mean that he wrote a letter to the estate agent. We have not seen that letter. Whether it dealt only with the price or with the terms as between the vendor and the estate agent we do not know, but we are not concerned in this case to decide or to express any opinion whether, in the events that happened, the estate agent became en itled to receive commission from the vendor. The prospective purchaser did in fact pay £200 to the estate agent. At the times of the separate payments of £100 there was no contract between the vendor and the prospective purchaser. The whole matter was "subject to contract". There never was a contract. No contract was ever made. It followed, therefore, that the prospective purchaser became entitled to have his £200 back.

If the estate agent had received the £200 as a stake-holder, then the prospective purchaser would be entitled to the £200 from the estate agent. If the estate agent had received the £200 as agent for the vendor, the prospective purchaser would be entitled to receive the £200 from the vendor. The estate agent purported to receive this money as agent for Mr. and Mrs. Gem. He so signed a receipt for the first £100. He signed a receipt for the second £100 " as agent ". It seems to me that, as the prospective purchaser had the receipt, as he presumably had it after the first £100 was paid, as he presumably produced it so as to have a record of the second £100 also made on it, and as he retained the document thereafter, he must be taken to have known that the estate agent was purporting to receive the £200 not as stake-holder but as agent. Therefore, it appears to me that the prospective purchaser cannot say that the estate agent received the money as stake-holder. Did the estate agent then receive the money as agent for the vendor? The vendor says: " He never received it as my agent or on my behalf or with my authority ". The issue in the appeal is whether that is so or not.

There is no record of any express authority from the vendor to the estate agent to ask for or to receive a deposit. Was there, therefore, implied authority in the estate agent to receive the deposit? Was it within the scope of his authority to receive this £200? I have reached the conclusion that, on the facts of this case, it was within the estate agent's authority. The decided cases show what are normally the limitations on the authority of estate agents. In *Wragg* v. *Lovett* (4) ([1948] 2 All E.R. 968), LORD GREENE, M.R., said (ibid., at p. 969):

> " The making of a contract is no part of an estate agent's business, and, although, on the facts of an individual case, the person who employs him may authorise him to make a contract, such an authorisation is not lightly to be inferred from vague or ambiguous language."

That case followed the decision in *Keen* v. *Mear* (5) ([1920] 2 Ch. 574). After referring to certain of the authorities, RUSSELL, J., said (ibid., at p. 579):

> " The result of those cases is, in my opinion, this: that the mere employment by an owner of an estate agent to dispose of a house confers no authority to make a contract; the agent is solely employed to find persons to negotiate with the owner; but, if the agent is definitely instructed to sell at a defined price, those instructions involve authority to make a binding contract and to sign an agreement."

In *Navarro* v. *Moregrand, Ltd.* (1) ([1951] W.N. 335), there was a finding that the second defendant had ostensible authority from the defendant company, as landlords, to conduct the full business of letting the property in question. It seems to me that, if there was authority to conduct the full business of letting the property in question, the landlords would be responsible for what the agent did, even if he demanded a premium in defiance of some statutory provisions.

In the present case we have these circumstances. First, we do know that the vendor instructed the estate agent to find a purchaser. It seems to me that the estate agent was entitled to do anything ordinarily incidental to what he was asked to do. Some of the facts may not be very precisely ascertained, but it appears that, after the prospective purchaser was told that the vendor's business was for sale, he went to visit the premises and saw the vendor and had a discussion with him. It appears that thereafter the prospective purchaser went back and saw the estate agent and told him that he was interested and then paid him the first sum of £100. There followed a second visit to the property by the prospective purchaser; he saw the vendor and there was a discussion between them in regard to price. Again after that visit the prospective purchaser returned and saw the estate agent and it was on that occasion that a further £100 was paid by cheque. Thereafter the vendor decided, for personal reasons,

not to proceed with the matter. He decided not to sell. There is force in the point that has been put to us that it is significant that the vendor then informed the estate agent so that the estate agent could inform the prospective purchaser. Actually the estate agent apparently delayed in so doing. The prospective purchaser later went on a third visit, not pre-arranged, to the vendor's premises and was told by the vendor that he was not going to sell. The vendor expressed surprise that the estate agent had not acquainted the prospective purchaser with that fact.

It seems to me that this case depends, as every case in this branch of activity must do, on its own facts and circumstances, but I have reached the conclusion that on the facts of this case it was reasonably incidental to what the estate agent was instructed to do that he should receive these two sums of £100.

Counsel for the vendor relied strongly on a letter written by the estate agent on Dec. 4, 1956, in these terms:

> " Dear Mr. Ryan, I understand from Mr. Bartlett that you have agreed to purchase the above, particulars of which we brought to your notice some weeks ago, and I propose to transfer the £200 which I hold to your account as a deposit on the above."

" The above " referred to another hotel. Those words are relied on because it is said that there the estate agent was saying that he held the £200 to the prospective purchaser's account. We do not know with certainty whether by that date, Dec. 4, 1956, there had been any request by the vendor to the estate agent to pay the £200 to the prospective purchaser. If the estate agent had received it as agent for the vendor, of course the vendor would be in a position to tell the estate agent what to do with the money. But this letter was really relied on by counsel for the vendor in support of his first submission that the estate agent had received this money as stake-holder. For the reasons that I have given, I consider that that submission cannot be sustained. If the estate agent in fact received the money as agent for the vendor, nothing in this letter as written can change the position or absolve the vendor from the obligation to repay the money so received on his behalf. It seems to me that there was ostensible authority to receive it on his behalf, that it was so received, and that the vendor became obliged to repay it in the events that happened.

I therefore think that the appeal fails.

WILLMER, L.J.: I agree that this appeal must be dismissed. The question before us depends on whether, when the estate agent received the two sums of £100 from the prospective purchaser, and signed the receipt for those two sums, in the first case " as agent for Mr. and Mrs. Gem ", and in the second case " as agent ", he bound the vendor by so doing. As pointed out by HODSON, L.J., the learned judge did not find it necessary to arrive at any very precise findings of fact. In those circumstances, I agree that it is only right, when the vendor appeals to this court, that his case should be judged on the view of the facts most favourable to him, i.e., on the basis of his own evidence.

Looking at the vendor's own evidence in this case is not an uninteresting process. He starts by saying that in October, 1956, he instructed the estate agent to find a purchaser. It seems to me that those instructions must be taken to involve authorising the estate agent to do such acts as might be reasonably necessary to promote a contract with a purchaser. As incidental to that purpose, it may be asked why should not those very instructions carry with them authority to the estate agent to receive a deposit from a prospective purchaser as agent for the vendor? Be that as it may, what seems to me to be the most important feature of the vendor's evidence is this. He followed immediately after the estate agent. The estate agent had gone into the witness-box saying that he was at all times agent for a disclosed principal, the vendor, and that the prospective purchaser ought to sue the vendor and not him, the estate agent.

Following immediately after that evidence, it might have been expected that the first thing the vendor would do when he went into the witness-box would be to deny that he ever gave authority to the estate agent to receive any deposit on his behalf. But, so far as the notes of the learned judge go, there is no trace of the vendor ever making such a denial. Moreover, later in his evidence, when he is dealing with the time after he had called the deal off and the prospective purchaser came to see him, he described how the prospective purchaser said to him: "I have given Pilkington £200 and now he is asking for £600". It might be thought that that was the occasion when the vendor, if he had never authorised the estate agent to receive any deposit on his behalf, would have said so to the prospective purchaser in no uncertain terms. But, apparently, on his own evidence, he never said any such thing. All he did was to advise the prospective purchaser to go to the estate agent and get the £200 back. That is how the case stands on the evidence of the vendor himself.

Nevertheless, it has been forcefully argued on his behalf that an estate agent in this estate agent's position has no authority whatsoever from the vendor for whom he is acting to receive a deposit except in the capacity of stake-holder, i.e., as agent for both parties rather than as agent for the vendor only. On the facts of this case, it seems to me that there are difficulties in alleging that the estate agent took this £200 deposit as stake-holder. For one thing that would be quite inconsistent with the terms of the receipt which the estate agent signed. Moreover, if the estate agent is to be held a stake-holder, that would involve a finding that he was acting as agent for both parties, i.e., that both the vendor and the prospective purchaser had authorised him to receive these sums of money. But any suggestion that authority was given by the prospective purchaser to the estate agent to hold money on his behalf seems to me to break down on the terms of the receipt which he accepted from the estate agent.

Reliance has been placed by counsel for the vendor on the long line of cases terminating in *Wragg* v. *Lovett* (4) ([1948] 2 All E.R. 968), which go to show that in the ordinary way an estate agent has no authority to make contracts on behalf of the vendor. Those cases do not seem to me to touch the point which has arisen in this case, namely, whether an estate agent in the position of Mr. Pilkington has ostensible authority to receive and hold a deposit on behalf of the vendor. It may be said that, if what is said to be deducible from these cases is taken literally, they would equally go to show that no estate agent has authority even to act as stake-holder.

The sheet anchor of the vendor's case is the decision of this court in *Brodard* v. *Pilkington* (3), the Pilkington concerned in that case being incidentally the same gentleman who was concerned in this case. I do not propose to deal with that case in any detail, since it has already been referred to by my Lords. Reliance has been placed principally on the dicta of DENNING, L.J., to which HODSON, L.J., has already referred. I, like my Lord, take the view that in that case DENNING, L.J., must not be taken as intending to lay down any rule of law governing the status and authority of estate agents. The case in that event turned on an admission in a letter by the agent, Mr. Pilkington, to the effect that he was holding the money on behalf of the purchaser. On that admission, in R.S.C., Ord. 14, proceedings, the court came to the conclusion that there was no triable issue which would justify giving leave to defend. If it were really true, as contended, that there is a presumption of law that an estate agent can receive a deposit only as a stake-holder, the question whether or not the agent in that case had made an admission would have been quite irrelevant. No doubt the court would have said straight away: "Of course, the estate agent is liable to repay the deposit because he can be no other than a stake-holder". In fact, however, the court held that, but for the admission made by Mr. Pilkington, the estate agent in that case, there would have been a triable issue. In those circumstances, it seems to me that that case can only

be used as authority for saying that one must ascertain the particular facts in each case and consider what inferences may fairly be drawn therefrom.

The fact is that in this case the vendor appointed the estate agent to find him a purchaser. As pointed out by HODSON, L.J., that did not oblige the estate agent to take any action at all. But, if he did, I apprehend that he must be taken to have acted as agent for the vendor. In those circumstances, if in the course of acting as agent for the vendor, he seeks to obtain a deposit from a prospective purchaser on behalf of the vendor, why is he not acting within his ostensible or apparent authority? Certainly it seems to me to be something which is reasonably incidental to the task of promoting a contract with a prospective purchaser. Is it within the apparent authority of the estate agent in circumstances such as these? I think one may profitably ask oneself the question, what is meant by "apparent authority"? Apparent to whom? The answer to that can only be, I think, apparent to the third party with whom the agent is purporting to deal on behalf of the principal, i.e., in this case "apparent" to the prospective purchaser or to any person in the same position.

If I may refer once again to *Navarro* v. *Moregrand, Ltd.* (1) ([1951] W.N. 335), the view which I am expressing seems to be exactly in accordance with the view expressed by SOMERVELL, L.J. I do not cite the case as in any way governing this case, but merely as illustrative of the proper approach. SOMERVELL, L.J., took the view that, when examining the question of ostensible authority, one must examine it from the point of view of the person with whom the agent is dealing. The question, therefore, is, what would a reasonable man in the prospective purchaser's position think when the estate agent appointed by the vendor asks him in the course of the negotiations for a deposit? Surely any reasonable man in such a position would assume it was within the scope of the agent's authority to receive it on behalf of the principal, all the more so when the agent furnishes him with a receipt signed by himself as agent for the named principal.

In those circumstances, although it must be confessed that we are not exactly following the reasoning of the learned county court judge, I am unable to say that he came to a wrong decision, and, therefore, I agree that the appeal must be dismissed.

HODSON, L.J.: I agree with what has fallen from my Lords about the line of cases to which I omitted to refer including *Wragg* v. *Lovett* (4), beginning with *Hamer* v. *Sharp* (6) ((1874), L.R. 19 Eq. 108) (the effect of which was summarised in the passage read by MORRIS, L.J.), which I think are not of assistance in determining the question before us.

Appeal dismissed.

Solicitors: *J. Tickle & Co.* (for the defendant vendor); *E. E. Pugh & Co.* (for the plaintiff, prospective purchaser).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

Re HASTINGS (No. 3).

[CHANCERY DIVISION (Vaisey and Harman, JJ.), March 5, 6, 1959.]

Habeas Corpus—Practice—Application for habeas corpus in criminal matter—Refusal of application by Divisional Court of Queen's Bench Division—Whether right to apply to Divisional Court of Chancery Division.

H., whose application for a writ of habeas corpus directed to the governor of Liverpool Gaol had been refused by two Divisional Courts of the Queen's Bench Division, composed of different judges, made a like application on the same grounds to a Divisional Court of the Chancery Division.

Held: the applicant had no right to go from division to division or judge to judge of the High Court of Justice applying for a writ of habeas corpus, and when once the proper court according to the rules, a Divisional Court of the Queen's Bench Division, whose order was the order of the one High Court of Justice, had decided the application, the matter was ended; therefore, the Divisional Court of the Chancery Division had no jurisdiction to entertain the application.

Re Hastings (*No. 2*) ([1958] 3 All E.R. 625) applied.

[Editorial Note. The decision in *Re Hastings* (*No. 2*) ([1958] 3 All E.R. 625) distinguished between the positions when, before the Supreme Court of Judicature Act, 1873, application for habeas corpus was made in vacation or in term time. In the former case there was a right to go from judge to judge, as the court was not sitting in banc (see p. 699, letter G, and p. 701, letter D, post). It seems that, if that right survives theoretically, it is now ineffective because the judge would direct the applicant to apply to the appropriate Divisional Court (see p. 699, letter H, and p. 701, letters G and H, post).

As to the courts or judges to whom application for habeas corpus may be made, see 11 HALSBURY'S LAWS (3rd Edn.) 38, 39, paras. 67-69.

For the Supreme Court of Judicature Act, 1873, s. 46, see 18 HALSBURY'S STATUTES (2nd Edn.) 468.]

Cases referred to:

(1) *Eshugbayi Eleko* v. *Nigeria Government* (*Administering Officer*), [1928] A.C. 459; 97 L.J.P.C. 97; 139 L.T. 527; Digest Supp.

(2) *The State* (*Dowling*) v. *Kingston* (*No. 2*), [1937] I.R. 699.

Motion for habeas corpus.

The applicant, Edward Thomas Hastings, applied by originating motion for an order for a writ of habeas corpus. He had been convicted at the Liverpool Crown Court on July 25, 1957, on an indictment containing one count of felony and four counts of misdemeanour, and had been sentenced "to go to prison for four years' corrective training". On Dec. 18, 1957, he appealed against his conviction to the Court of Criminal Appeal, who quashed his conviction on the count of felony but did not alter his sentence. On Mar. 7, 1958, he applied to a Divisional Court of the Queen's Bench for a writ of habeas corpus on the ground that as his conviction for the felony had been quashed and the sentence had not been stated to be concurrent on all counts, there was no conviction against him on which a sentence could be imposed. That application was dismissed (*Re Hastings*, [1958] 1 All E.R. 707).

On July 28, 1958, the applicant appealed to the Court of Appeal against the refusal of the Divisional Court to issue the writ but the court held that they had no jurisdiction to hear such an appeal and dismissed it. On Nov. 4, 1958, another application was made on the same facts to a Queen's Bench Divisional Court composed of different judges. That Divisional Court refused to issue the writ on the ground that it had no jurisdiction to hear the case again (*Re Hastings* (*No. 2*), [1958] 3 All E.R. 625).

A The applicant now applied to a Divisional Court of the Chancery Division for a writ of habeas corpus directed to the governor of Liverpool Gaol. A preliminary point was raised by the respondent that there was no power under statute or rule to set up a Divisional Court of the Chancery Division to hear the application; but by s. 46 of the Supreme Court of Judicature Act, 1873, it was provided that "Subject to any rules of court, any judge of the High Court, B sitting in the exercise of its jurisdiction elsewhere than in a Divisional Court, may reserve . . . any point in a case, for the consideration of a Divisional Court . . ." HARMAN, J., withdrew to enable VAISEY, J., to exercise his jurisdiction elsewhere than in a Divisional Court; and returned when VAISEY, J., had reserved the point for consideration of a Divisional Court. The respondent then raised the point that, the applicant having already obtained the opinion C of the High Court on his application, there remained no jurisdiction in any part of the High Court to entertain his application.

Neil Butter for the applicant.

The Solicitor-General (*Sir Harry Hylton-Foster, Q.C.*), and *Rodger Winn* (for the respondent).

D **VAISEY, J.**, referred to the origin of the matter in the sentence passed at the Liverpool Crown Court, to the application to the Court of Criminal Appeal and to the applications for a writ of habeas corpus to two Divisional Courts of the Queen's Bench Division, with regard to the second of which HIS LORDSHIP continued: That came before LORD PARKER, C.J., who had succeeded LORD GODDARD as Lord Chief Justice, and produced from him a most illuminating E judgment. He dealt with the position in the past and in the present. He pointed out that the old practice by which the applicant for a writ of habeas corpus could go from court to court until he got satisfaction had been abrogated by the fact that since the year 1873 there had only been one court, so that there was no question of going from court to court.

F There then came the further question, which my Lord considered, whether the practice of going from judge to judge still subsisted, and there is no doubt that a certain amount of judicial authority would seem to point to the fact that that right is still an existing right. LORD PARKER, C.J., explained the ancient practice about the necessity of finding someone to deal with an application during vacation. In those days, when a far greater part of the year was taken G up by law vacations than is at present, when the courts were not sitting in banc, if relief was wanted it was necessary to apply to a judge, because that was the only way of ascertaining the will of the judicature. LORD PARKER, C.J., thought that, having regard to modern conditions, that right had been practically abrogated. The rule now is that an application for a writ of habeas corpus must be to a Divisional Court, and it is a little hard to see, if there is a right H to go from judge to judge, what a judge would do when the application was made to him. One would think that all that he could do properly was to have the matter referred to a Divisional Court, and then the applicant would be really where he was if there had been no such right of going from judge to judge as I am now mentioning.

LORD PARKER, C.J., in his judgment, on that second attempt of the present I applicant, came to this final conclusion. He said this ([1958] 3 All E.R. at p. 635):

> "... the applicant having already once been heard by a Divisional Court of the Queen's Bench Division [that being, of course, the previous hearing before LORD GODDARD, C.J., and two judges] is not entitled to be heard again by another Divisional Court of the same division."

I venture to think that it would have been perfectly possible, and I think logical, if LORD PARKER, C.J., had said, "He is not entitled to be heard again by any

tribunal carved out of the one single tribunal, the High Court ". But LORD PARKER, C.J., doubtless was confining himself to the point which was strictly in issue. As the rules provide that such applications must go to a Divisional Court of the Queen's Bench Division, the sentence which I have just read means, I think, that the decision which he was then giving on the second application of the applicant for the issue of a writ of habeas corpus was really that there had been an end of the case when the matter was before LORD GODDARD, C.J. LORD PARKER, C.J., did not think there was anything more that could be done.

The applicant expressed his anxiety to come to the Chancery Division. The application is based, I think, on a complete misconception. The mistake that the applicant made is to assume that the Chancery Division is a separate entity, a separate court, and that either by single judges or by a Divisional Court it can deal with the matter afresh. The applicant uses an expression which, I think, he must suppose to be flattering to us who are sitting here. He says —and I am now quoting from his own affidavit—he has decided to come to a " *complete* hearing before a hitherto unconnected and impartial Bench. This I seek in the Chancery Court ". I hope that this is an impartial Bench, but it is not an independent Bench. Indeed, as LORD PARKER, C.J., has ruled, and with, I think, perfect accuracy, as soon as the Divisional Court of the Queen's Bench Division has come to its conclusion there is an end of the matter. It always has to be remembered that an order is not an order of any particular division or any particular Divisional Court; an order is an order of the High Court. It is beyond my comprehension how we here, judges of the High Court, could be heard to overrule or otherwise interfere with a judgment which was the result of LORD PARKER, C.J.'s hearing before his Divisional Court—how we could be heard to say that the conclusion and the order of our own court, the only court which exists, the High Court of Justice, was wrong, and to say that something else should be done.

When LORD PARKER, C.J., came to a conclusion in the Queen's Bench Divisional Court, acting strictly under the rules, he finally disposed of the application of this present applicant to have a writ of habeas corpus issued to him. I cannot see how this court, or we who are all judges of the High Court, could stultify a decision of the High Court of which we are ourselves constituent parts.

It is a curious thing how hardly this idea of the separate courts dies. One comes across it in many connexions. The Habeas Corpus Act was passed in the reign of Charles II—and we all remember how that monarch with his graceful courtesy apologised to those who surrounded his deathbed for being an unconscionable time a-dying. " Unconscionable time a-dying " is certainly predicated of those courts which we thought were ended, died and were buried, in the year 1873, and yet continually emerge in the minds and in the speech of English people as if they still existed. We are constantly hearing of the " Court of Chancery ". It is three generations since there was such a court. " The Court of Queen's Bench " is referred to in just the same way. There is only one court. There is nothing wrong with these expressions provided that it is always remembered that we who make orders, sitting either as judges dealing with Chancery cases or as judges dealing with Queen's Bench cases, make orders of the High Court, not of our own particular branch or part or emanation of it, but of the one High Court of Justice on behalf of which we all act.

I have no doubt that much more is known to the public about wards of court from the pages of Charles Dickens' novel Bleak House than can be discovered in text-books or historical books of reference. Apart from that a good deal of colour is lent to the suggestion of separate courts by such expressions as " a Chancery judge " or " a Queen's Bench judge ", which mean, respectively, a judge who has been assigned to do the work which is commonly denominated Chancery work, and a judge who is assigned to work which used to be in the old Court of Queen's Bench. By the Supreme Court of Judicature (Consolidation) Act,

1925*, however, the description under which we are appointed is "Justice of the High Court". The main fact which I wish to emphasise in this case is that there is but one High Court. The "Supreme Court" is an expression with a different meaning. There is one High Court to which all Her Majesty's puisne judges, as they are called, belong†. Although it is perfectly proper that I or HARMAN, J., should criticise, or indeed on occasions depart from or refuse to follow a decision which is reached in the Queen's Bench Division, it is quite impossible for us to interfere with an order made there in the same manner.

In this case the Divisional Court of the Queen's Bench Division has reached a decision. For my part I think that we have no jurisdiction to hear this application and I am in favour of dismissing it.

HARMAN, J.: I concur in the conclusion at which my Lord has arrived. It is always sad to be stripped of any illusion, and I, like, I expect, most lawyers, have grown up in the belief that in cases of habeas corpus the suppliant could go from judge to judge until he could find one more merciful than his brethren. That illusion was stripped from me when I read the report of the decision in the Queen's Bench Divisional Court last year‡ in this very case. The decision was based on this, I think, that there never had been such a right. There had been a right to go from court to court; there had been a right in Vacation to go from judge to judge, for the simple reason that the court was not sitting in banc; but there had never been a right in term time to go from one judge to another when the court was available to which the applicant should properly apply.

Counsel for the applicant, for whose argument I for one am much indebted, said that the clou of his case was this, that there still was this right to go from judge to judge, and that if that were not so the whole structure would come to the ground. He naturally relied very strongly on the decision of the Privy Council in *Eshugbayi Eleko* v. *Nigeria Government* (*Administering Officer*) (1) ([1928] A.C. 459), to which we were referred, and no doubt if the observations of LORD HAILSHAM, L.C., there are justified there is much to be said for the existence of the right. I must confess, however, to have had my belief in that judgment very much shaken by the Irish case to which LORD PARKER, C.J., referred and the very cogent judgment of FITZGIBBON, J., in that case, *The State* (*Dowling*) v. *Kingston* (*No. 2*) (2) ([1937] I.R. 699).

I think that the judgment of the Queen's Bench Divisional Court did make it clear that this supposed right was an illusion. If that be right, the rest follows. Nobody doubts that there was a right to go from court to court, as my Lord has already explained. There are no different courts now to go to. The courts that used to sit in banc have been swept away and their places taken by Divisional Courts, which are entirely the creatures of statute and rule. Applications for a writ of habeas corpus are assigned by the rule to Divisional Courts of the Queen's Bench Division, and that is the only place to which a suppliant may go. He will, in the first instance, it is said, have a right to go to one judge, but the only result of that, except in a case of the most extreme urgency, would be that the judge would direct him to go on to the proper tribunal, namely, the Divisional Court. Even if the right to go from one to another were now existing it would not, in practice, be any bulwark of the liberty of the subject, for the only result of going from one judge to another would be that the applicant would find himself before the Divisional Court. Nobody doubts that if he has a decision of the Divisional Court then he will not be able to get it again.

LORD PARKER, C.J., and his colleagues were very cautious not to go further than the court, so to call it, of Queen's Bench. It may be that they were afraid of treading on Chancery toes; and so the applicant was encouraged, it may be

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* See s. 2 (4); 5 HALSBURY'S STATUTES (2nd Edn.) 341.

† See ibid., s. 2.

‡ *Re Hastings* (*No. 2*) ([1958] 3 All E.R. 625).

by the very limitation of the language, to present himself before this tribunal. Logically, however, as my Lord has already observed, the judgments pronounced in the Queen's Bench Divisional Court apply to the whole High Court of Justice, and it was only diffidence that prevented our brethren of the Queen's Bench from saying so. In my judgment this application, therefore, is precluded by the absence of the ancient but imaginary right to go round and round and round from judge to judge when the term is in progress. There never was such a thing; there is not now; and this applicant, having had the judgment of the High Court, cannot have another one.

I concur respectfully in what LORD PARKER, C.J., says at the end of his judgment, namely, that it does seem a pity that, this being a criminal case, there is no appeal. It would seem it would be a good step, as LORD GODDARD, C.J., was frequently heard to observe, if there was a right or some means of taking a case like this to the House of Lords in order that the subject should not feel that he had a grievance. But that is a matter not within our province. All we can do is to dismiss the application.

Application dismissed.

Solicitors: *Official Solicitor* (for the applicant); *Treasury Solicitor* (for the respondent).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

R. *v.* CHANDOR.

[COURT OF CRIMINAL APPEAL (Lord Parker, C.J., Cassels and Barry, JJ.), December 1, 2, 1958.]

Criminal Law—Evidence—Admissibility—Similar offences—Indecent assault —Whether admissible to help to determine whether one alleged meeting took place.

Where, in cases of alleged sexual assaults on children, the evidence of a child deals only with the alleged assault on him or her and the defence is that the alleged meeting between the accused and the child never took place, evidence of other incidents between the accused and other children is not relevant to determine whether the alleged meeting took place; although evidence of a succession of incidents may properly be admissible to help to determine the truth of one incident on questions of identity, intent or guilty knowledge or to rebut a defence of innocent association (see p. 704, letter F, post).

C., a schoolmaster, was tried on five charges of indecent assault on boys, involving three different boys, alleged to have been committed at different times and at different places. There was no corroboration. C.'s defence was that none of the alleged incidents had taken place. In his summing-up to the jury, the recorder, having pointed out that there was no corroboration and given the usual warning, directed the jury that " where there is a series of these incidents deposed to by witnesses of this kind, where you are told that a succession of these incidents happened, it may help you to determine the truth of the matter, provided that you are satisfied that there is no collaboration between the children to put up a false story ". On appeal against the convictions,

Held: the direction to the jury was a misdirection, for the reasons stated at letter G above, and the convictions would be quashed.

R. v. *Campbell* ([1956] 2 All E.R. at p. 276) explained.

Appeal allowed.

[As to the admissibility of evidence of similar sexual offences, see 10 HALSBURY'S LAWS (3rd Edn.) 445, para. 820; and for cases on the subject, see 14 DIGEST (Repl.) 431-433, *4185-4207*.]

Cases referred to:

(1) *R.* v. *Campbell*, [1956] 2 All E.R. 272; [1956] 2 Q.B. 432; 120 J.P. 359; 3rd Digest Supp.

(2) *R.* v. *Sims*, [1946] 1 All E.R. 697; [1946] K.B. 531; [1947] L.J.R. 160; 175 L.T. 72; 2nd Digest Supp.

(3) *Harris* v. *Public Prosecutions Director*, [1952] 1 All E.R. 1044; [1952] A.C. 694; 116 J.P. 248; 3rd Digest Supp.

Appeal.

Mr. Kenneth Francis Chandor was convicted on Oct. 18, 1958, at Croydon Borough Quarter Sessions on five charges of indecent assault on boys and was sentenced by the recorder to six months' imprisonment on each count concurrently. His defence was that the alleged offences never took place at all and he appealed against his conviction. The facts and the relevant passages from the summing-up of the recorder are set out in the judgment.

N. N. McKinnon, Q.C., and *D. A. Hollis* for the appellant.

J. L. E. MacManus for the Crown.

LORD PARKER, C.J., delivered the following judgment of the court: The appellant is a man of twenty-nine years of age and of excellent character. He was a schoolmaster at a secondary boys' school at Croydon, and the alleged offences took place on five occasions between May, 1956, and June, 1958, on three different boys aged thirteen to fifteen years. His defence from the outset and at the trial was that the alleged incidents never took place at all and that the boys' stories were merely products of their imagination. It is clear, therefore, from what I have said, that a most careful direction was needed as to the admissibility of evidence of other incidents in determining the truth of any one incident.

In the course of his summing-up the learned recorder pointed out that there was, as indeed was right, no corroboration at all in this case and he gave the jury the usual warning. He continued in these terms:

> " Where there is a series of these incidents deposed to by witnesses of this kind, where you are told that a succession of these incidents happened, it may help you to determine the truth of the matter, provided that you are satisfied that there is no collaboration between the children to put up a false story. That is what the Court of Criminal Appeal has laid down in 1956* as a proper direction to give to a jury. You are entitled to take into account what Smith and Whibley have said in considering the evidence of Edwards, not as corroboration of what Edwards has said, because if there are a series of these incidents you may probably take the fact that there have been other incidents deposed to to help you to dispose satisfactorily of the issue, provided you are satisfied there has not been any collaboration between the children to put up a false story . . . I should also tell you there is another phase of the present case which you are entitled to take into account in dealing with any one incident; for example, in one of the assaults deposed to by Edwards you are entitled to take the evidence of the other witnesses into account, and that is in relation to any case where it can be said that the real defence was not ' I was not there; I never was anywhere near the place ', but that this was a perfectly innocent meeting with the boy; you are entitled to take that into account to see whether that rebuts the defence of innocent behaviour."

* *R.* v. *Campbell* ([1956] 2 All E.R. 272).

Those two passages in the summing-up were undoubtedly based on a passage in the judgment of the court in *R.* v. *Campbell* (1) ([1956] 2 All E.R. 272). That was a case dealing only with questions of corroboration, but at the end of the judgment LORD GODDARD, C.J., added this (ibid., at p. 276):

> " As we are endeavouring in this judgment to deal comprehensively with the evidence of children we may perhaps endeavour to give some guidance to courts who have from time to time to deal with cases of sexual assaults on children where the evidence of each child deals only with the assault on him or her self. In such cases it is right to tell a jury that because A says that the accused assaulted him, it is no corroboration of his evidence that B says that he also was the victim of a similar assault though both say it on oath. At the same time we think a jury may be told that a succession of these cases may help them to determine the truth of the matter provided they are satisfied that there is no collaboration between the children to put up a false story. And if the defence is one of innocent association by the accused with the children, the case of *R.* v. *Sims* (2) ([1946] 1 All E.R. 697), subsequently approved on this point by the House of Lords in *Harris* v. *Public Prosecutions Director* (3) ([1952] 1 All E.R. 1044), shows that such evidence can be given to rebut the defence."

Now the first part of that passage before the reference to a defence of innocent association is in very general terms. Unqualified it would appear to cover a case where the accused was saying that the incident in question never took place at all. To take an incident in the present case, the accused said that in respect of an alleged offence with a boy—I think it was Edwards at View Point—he, the accused, had never met the boy at View Point at all. Yet, if this passage in *R.* v. *Campbell* (1) is unqualified it would apply to just such a case. We do not think that the passage in *R.* v. *Campbell* (1) was ever intended to cover that. Indeed, so far as we know the authorities have never gone so far as that, nor do we see how they could. Evidence that an offence was committed by the accused against B at Croydon could not be any evidence that the accused met A in the Lake District and committed an offence there. There are, of course, many cases in which evidence of a succession of incidents may properly be admissible to help to determine the truth of any one incident, for instance, to provide identity, intent, guilty knowledge or to rebut a defence of innocent association. On such issues evidence of a succession of incidents may be very relevant, but we cannot say that they have any relevance to determine whether a particular incident ever occurred at all.

That really is sufficient to dispose of this case, and it is unnecessary to deal with the second passage in the summing-up in respect of a defence of innocent association. We would only observe that in the case of a schoolmaster and his pupil there may be nothing suspicious in the association which calls for explanation. However, having regard to the view we have taken as to the passage in *R.* v. *Campbell* (1) and the summing-up based thereon it is unnecessary to deal with that. It follows that the conviction must be quashed and the appeal allowed.

Appeal allowed.

Solicitors: *Wilders & Sorrell* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* E. COCKBURN MILLAR, *Barrister-at-Law.*]

Re TAPP (*deceased*). MASTER AND FELLOWS OF GONVILLE AND CAIUS COLLEGE, CAMBRIDGE AND OTHERS *v.* INLAND REVENUE COMMISSIONERS AND ANOTHER.

[COURT OF APPEAL (Jenkins, Romer and Ormerod, L.JJ.), February 13, 16, 17, 18, March 16, 1959.]

Estate Duty—Passing of property—Annuity—Continuing annuity—Bequest of annuity to three persons during joint lives and life of survivor equally—One half of annuity passing to last survivor—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 1, *s.* 2 (1) (*b*), *s.* 7 (7) (*b*).

By his will a testator gave his residuary real and personal estate to his trustees on trusts for conversion and investment and directed his trustees to hold the resulting investments and the investments from time to time representing the same (called his trust fund) on trust to pay out of the income thereof to his wife during her life an annuity "and out of the remainder of such income to pay the following annual payments, viz., (a) the sum of £1,500 per annum during the life of my said wife . . . and after her death the sum of £3,000 per annum to my sister [C.] my nephew [A.] and my niece [P.] or such one or more of them as shall for the time being be living and if more than one of them shall be living to be received by them in equal shares." The testator's wife predeceased the testator, who died in 1936. In 1937 C. died, and in 1956 A. died. In connexion with A.'s death estate duty was claimed under the Finance Act, 1894, s. 2 (1) (b) and s. 7 (7) (b) on the "slice" of the capital of the trust fund producing the half share of the annuity which had been payable to A. during his life.

Held: estate duty was payable under s. 1 of the Act of 1894 in respect of the actuarial value as at A.'s death of an annuity of £1,500 per annum for the life of P., because, on the true construction of the will, the annuity was one continuing annuity of £3,000 (see p. 710, letter D, post), and on A.'s death a one half share of that annuity passed to P. (see p. 713, letters A and B, post).

Re Cassel ([1927] 2 Ch. 275) and *Re Duke of Norfolk* ([1950] 1 All E.R. 664) applied.

Re Payton ([1951] 2 All E.R. 425) distinguished.

Re Weigall's Will Trusts ([1956] 2 All E.R. 312) overruled.

Appeal dismissed.

[As to successive interests in a single annuity, see 15 HALSBURY'S LAWS (3rd Edn.) 11, para. 18; and for cases on the subject, see 21 DIGEST 7, 9, 10, *21, 34-42*.

For the Finance Act, 1894, s. 1, s. 2 (1) (b) and s. 7 (7), see 9 HALSBURY'S STATUTES (2nd Edn.) 348, 350, 364.]

Cases referred to:

(1) *Re Cassel, Public Trustee* v. *Mountbatten*, [1927] 2 Ch. 275; 96 L.J.Ch. 483; 137 L.T. 785; Digest Supp.

(2) *Re Norfolk* (*Duke*), *Public Trustee* v. *Inland Revenue Comrs.*, [1949] 2 All E.R. 701; *affd.* C.A., [1950] 1 All E.R. 664; [1950] Ch. 467; 2nd Digest Supp.

(3) *Re Austin Motor Co. Ltd.'s Policies, Re Payton, Payton* v. *Inland Revenue Comrs.*, [1951] 2 All E.R. 425; [1951] Ch. 1081; 2nd Digest Supp.

(4) *Re Weigall's Will Trusts, Midland Bank Executor and Trustee Co., Ltd.* v. *Weigall*, [1956] 2 All E.R. 312; [1956] Ch. 424; 3rd Digest Supp.

(5) *Cowley* (*Earl*) v. *Inland Revenue Comrs.*, [1899] A.C. 198; 68 L.J.Q.B. 435; 80 L.T. 361; 63 J.P. 436; 21 Digest 7, *27*.

Appeal.

This was an appeal by the Inland Revenue Commissioners from an order of

DANCKWERTS, J., dated July 29, 1958, made on an originating summons issued by the trustees of the will of William Munro Tapp, deceased, under the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 3, for the determination of the question (among others) whether on the true construction of the said will estate duty became payable on the death on July 31, 1956, of Arthur Gerard Sentance Tapp (a) under the Finance Act, 1894, s. 1, on the value at that date of a continuing annuity of £1,500 per annum for the remainder of the life of Phyllis Maude Fawell or (b) under s. 2 (1) (b) of the said Act on the capital value of the proportion of the residuary estate of the said testator which was required to produce an annuity of £1,500 per annum or (c) on some other and what sum. DANCKWERTS, J., held estate duty was payable in accordance with alternative (a).

Sir Lynn Ungoed-Thomas, Q.C., and *E. Blanshard Stamp* for the defendants, the Inland Revenue Commissioners.

John Pennycuick, Q.C., and *R. Cozens-Hardy Horne* for the plaintiffs.

The defendant, Phyllis Maude Fawell, did not appear and was not represented.

Cur. adv. vult.

Mar. 16. **JENKINS, L.J.,** read the following judgment of the court: This is an appeal by the Inland Revenue Commissioners from a judgment of DANCKWERTS, J., dated July 29, 1958, in proceedings brought against them by the present trustees of the will of William Munro Tapp, deceased, for the determination by the court of a question concerning the estate duty payable on the death of Arthur Gerard Sentance Tapp (hereinafter called "the deceased") in respect of his interest under a trust contained in the testator's will for the payment out of the income of the trust fund thereby constituted of an annuity of £3,000 to three named beneficiaries including the deceased (who was the second of the three to die) or such one or more of them as should for the time being be living and if more than one in equal shares.

The question in the appeal is whether, having regard to the terms of this trust, there was on the death of the deceased a passing under the Finance Act, 1894, s. 1, of property, in the shape of the share original and accruing of the annuity to which he was entitled at the time of his death, and which then became payable for life to the last survivor of the three named beneficiaries, to be valued actuarially as at his death; or whether such share constituted an interest ceasing on his death in property in the shape of the trust fund out of the income of which the annuity was payable, so as to give rise to a notional passing under s. 2 (1) (b) of that Act of a "slice" of the capital of the trust fund to be valued in accordance with s. 7 (7) (b).

The will is dated June 16, 1933. The testator's wife named in the will died in his lifetime. After her death he married again and in contemplation of such re-marriage he made a codicil dated Sept. 23, 1935, by which (so far as material for the present purpose) he confirmed his will. The testator died on Jan. 23, 1936, and his will and codicil were duly proved on May 7, 1936. The only provisions of the will to which it is necessary to refer for the present purpose are those contained in cl. 9. By that clause the testator made a general residuary devise and bequest to his trustees on trusts for conversion and investment and directed his trustees to hold the resulting investments and the investments from time to time representing the same (thereinafter referred to as his trust fund) on trust to pay out of the income thereof to his wife, Kate Garrett Tapp (who, as already mentioned, predeceased him), during her life the annual payment therein mentioned

> "and out of the remainder of such income to pay the following annual payments, viz., (a) the sum of £1,500 per annum during the life of my said wife Kate Garrett Tapp and after her death the sum of £3,000 per annum to my sister Catherine Alway my nephew Arthur Gerard Sentance Tapp [the

deceased] and my niece Phyllis Fawell or such one or more of them as shall for the time being be living and if more than one of them shall be living to be received by them in equal shares."

Catherine Alway died on June 29, 1937, and it is interesting to note that, in accordance with the official practice then followed, for which support is to be found in *Re Cassel, Public Trustee* v. *Mountbatten* (1) ([1927] 2 Ch. 275) and *Re Duke of Norfolk, Public Trustee* v. *Inland Revenue Comrs.* (2) ([1950] 1 All E.R. 664, in the Court of Appeal), estate duty was claimed and paid on her death under s. 1 of the Act on the actuarial value for the lives of the deceased and Phyllis Fawell and the survivor of them of the one-third share (viz., £1,000 per annum) of the annuity of £3,000 which then accrued to the deceased and Phyllis Fawell for their joint lives and the life of the survivor of them under cl. 9 of the will. The deceased died on July 31, 1956, and thereupon the Estate Duty Office, reversing their previous practice on the strength of the decisions in *Re Austin Motor Co. Ltd.'s Policies, Re Payton, Payton* v. *Inland Revenue Comrs.* (3) ([1951] 2 All E.R. 425), in the Court of Appeal and *Re Weigall's Will Trusts, Midland Bank Executor and Trustee Co., Ltd.* v. *Weigall* (4) ([1956] 2 All E.R. 312), claimed duty on his death under s. 2 (1) (b) and s. 7 (7) (b) of the Act on the "slice" of the capital of the trust fund producing the half share (viz., £1,500) of the annuity which had theretofore been payable to the deceased during his life. The trustees took the view that the less onerous method of assessment adopted in the case of Catherine Alway was right, and should be followed in the case of the deceased. The Estate Duty Office, however, maintained their claim under s. 2 (1) (b) and s. 7 (7) (b) and the present proceedings ensued.

The trustees, relying on *Re Cassel* (1) and *Re Duke of Norfolk* (2), contend that the trust declared by cl. 9 of the will created one single and continuing annuity payable out of the income of the trust fund during the period until the death of the last survivor of the three named beneficiaries and that on the death of the deceased there was a passing, within the meaning of s. 1 of the Act, of the share (viz., one-half) of that continuing annuity to which he was entitled at his death from his beneficial enjoyment to that of Phyllis Fawell. If that view is right, then it is common ground that the estate duty payable on the death of the deceased should be charged under s. 1 on the principal value of the property so passing, i.e., the principal value actuarially ascertained as at the death of the deceased of an annuity of £1,500 per annum for the life of Phyllis Fawell, as the last survivor of the three named beneficiaries.

The Inland Revenue Commissioners, on the other hand, relying on *Re Payton* (3) and *Re Weigall's Will Trusts* (4), contend that there was in this case no passing of property on the death of the deceased within the meaning of s. 1. They make this submission on the ground that, having regard to the terms of this particular trust, the annuity was not for estate duty purposes property at all, but a mere chose in action or collection or series of choses in action which could have no existence as property apart from the beneficial interests therein. According to this argument, as we understand it, on the death of Catherine Alway her right to receive one-third (or £1,000 per annum) of the annuity ceased, and a like proportion of the annuity ceased with her right to receive it, leaving nothing which could pass on her death, because her part of the annuity, and her right to receive it, were in truth one and the same thing. The subsequent division in accordance with the trust of the part of the annuity which had been payable to Catherine Alway between the deceased and Phyllis Fawell in equal shares is on this view accounted for as due to a new and distinct right, springing up in them on Catherine Alway's death, to the receipt during their joint lives in equal shares of a yearly sum equal to the yearly sum theretofore payable to Catherine Alway. Similarly, it is claimed that on the death of the deceased his right to receive one-half (or £1,500) of the annuity, and with it a like proportion of the annuity, ceased, and a new and distinct right sprang

up in Phyllis Fawell to receive during the remainder of her life a yearly sum equal to the yearly sum theretofore payable to the deceased. It follows, in the commissioners' submission, that the relevant provisions of the Act are to be found in s. 2 (1) (b) and s. 7 (7) (b). In their submission, the effect of the trust for duty purposes was to confer on the deceased "an interest ceasing on his death", in the shape of his share original and accruing of the annuity, in "property" in the shape of the trust fund out of the income of which the annuity was payable, and that accordingly this property is to be deemed by virtue of s. 2 (1) (b) to have passed on the death of the deceased "to the extent to which a benefit accrues or arises by the cesser of such interest". It is common ground that if this view is right the value for duty purposes of the benefit accruing or arising from the cesser of the deceased's interest must under s. 7 (7) (b) be taken as being "the principal value of an addition to the property" (i.e., the trust fund under the will) "equal to the income to which the interest extended".

By the judgment under appeal, the learned judge made a declaration to the effect that duty was, as contended by the trustees, payable under s. 1 of the Act on the value at the death of the deceased of a one-half share in a continuing annuity of £3,000 per annum for the remainder of the life of Phyllis Fawell as the last survivor of the three named beneficiaries. The learned judge regarded himself as bound so to hold by the authority of *Re Duke of Norfolk* (2). The commissioners contend that he ought to have followed *Re Payton* (3) in preference to *Re Duke of Norfolk* (2) and by doing so to have reached a contrary conclusion.

We should next refer to the four cases already noticed, beginning with *Re Cassel* (1). In that case a testator bequeathed "Brook House and contents" and the stables held therewith, the premises being held on leases expiring in 1995, to trustees for successive tenants for life and directed that

> "the rent outgoings rates and taxes for the time being payable in respect of the . . . premises and keeping the same and the contents thereof insured against fire and burglary and in a proper state of preservation shall always be paid by my trustees out of the income of my residuary personal estate."

On the death of the first tenant for life the question arose whether the varying periodical payments falling to be made out of income under the above-stated direction attracted estate duty under s. 1 of the Act on the ground that there was a passing within the meaning of that section of property in the shape of the benefit of the annual sum payable in accordance with the direction above stated, or under s. 2 (1) (b) on the ground that they constituted for the purposes of that section an interest ceasing on the death of the deceased tenant for life. RUSSELL, J., considered himself bound by *Earl Cowley* v. *Inland Revenue Comrs.* (5) ([1899] A.C. 198), though against his own inclination, that the case before him was one in which there was a passing within the meaning of s. 1, with the result that that section must be applied to the exclusion of s. 2 (1) (b). Having thus reached the conclusion that s. 1 was applicable, RUSSELL, J., said ([1927] 2 Ch. at p. 280):

> "What then is the property which passes on Mrs. Cassel's death? In my opinion the true answer is the benefit of the annual sum payable under the special clause. I have already in my previous judgment ([1926] Ch. 358) indicated the nature of this provision. Its duration is for a term which must expire in 1995. It may expire earlier if Brook House is sold: but in view of the benefits conferred by the special clause this event, though possible, is improbable. In substance, the trustees are bound for a period of time to apply an annual sum of varying amount for the benefit of the person for the time being entitled under the will to the enjoyment

of Brook House and contents. What passes is the right to enjoy the benefit of that annual sum. That is the property which passed on the death of Mrs. Cassel."

In *Re Duke of Norfolk* (2) there was a devise of freehold hereditaments to the testator's wife as his sole executor and trustee for a term of one thousand years on trust to pay out of the income thereof any annuity or annuities bequeathed by him, followed by a bequest to her as such sole executor and trustee of an annuity of £2,000 to commence from his death and to continue to be payable during the joint lives of two named persons (who were father and son) and the life of the survivor of them, and to be paid to the father during his life and after his death to the son, subject in both cases to certain protective trusts. On the death of the father in the lifetime of the son a question comparable to the question now in issue arose in regard to the estate duty payable in respect of this annuity. It is important to observe that in *Re Duke of Norfolk* (2) it was not in dispute that on the true construction of the will and codicils in that case the interest in question was one continuing annuity for the longer of the lives of the two annuitants, and could not be regarded as comprising two successive annuities the first ceasing and the second commencing on the death of the father. It is further to be noted that the argument for the Crown was not to the effect that there was no passing of the annuity within the meaning of s. 1 in respect of which duty could be claimed, and consequently that recourse must be had to s. 2 (1) (b). Admittedly, there was a passing of the annuity under s. 1, which on the principles laid down in *Cowley's* case (5) excluded recourse to s. 2 (1) (b), so far as the annuity itself was concerned. It was, however, argued that it was nevertheless open to the Crown to claim in the alternative that, so far as the property charged with the annuity was concerned, the father's life interest in the annuity was an interest in that property which ceased on his death within the meaning of s. 2 (1) (b) and accordingly brought about a notional passing on the father's death to the extent to which a benefit accrued or arose by the cesser of such interest, thus attracting duty on a "slice" of the capital of the property ascertained as provided in s. 7 (7) (b). These arguments were rejected by the court as contrary to the principles laid down in *Cowley's* case (5) and also on the ground that the continuing character of the annuity made s. 2 (1) (b) and s. 7 (7) (b) wholly inappropriate. There was a further argument to the effect that even if duty could only be claimed under s. 1 as on an actual passing of the annuity on the death of the father the property which passed was not simply the right to receive the annuity during the residue of the life of the son but the proportion of the corpus of the property charged corresponding to the proportion of the income thereof required to produce the annuity. This argument was likewise rejected, and in the result it was held that on the death of the father there was an actual passing of the annuity under s. 1 and that the annuity must be valued for duty purposes as consisting of the right to receive £2,000 per annum from the death of the father for the residue of the life of the son.

We have been invited by counsel for the commissioners to distinguish *Re Duke of Norfolk* (2) from the present case on the strength of the differences in the terms of the relevant dispositions in the two cases and also to discount its effect as an authority on the ground that it proceeded to a great extent on admissions in regard to matters vital to the question raised in the present case. We agree that the continuing character of the annuity in *Re Duke of Norfolk* (2) was not disputed, and having regard to the terms in which it was given we think it plainly was a continuing annuity. We also agree that the elaborate argument for the Crown was not based on the contention that there was no passing of the annuity under s. 1, but on the contention that, given such a passing, duty could nevertheless be exacted on a "slice" of capital either under s. 2 (1) (b) or s. 7 (7) (b) or by analogy to the case of the cesser by death

of a life interest in an aliquot share of a fund. Nevertheless we think that it was necessary to a proper decision of the case that the court should state the principles governing the liability to duty on the death of a person entitled during his life to a continuing annuity bequeathed for the benefit of several persons in succession. Accordingly we think that we should accept as binding on us in any comparable case the conclusions expressed by this court in *Re Duke of Norfolk* (2). These conclusions were to the effect that *Re Cassel* (1), if not actually binding on this court, was right in principle (see per SIR RAYMOND EVERSHED, M.R. ([1950] 1 All E.R. at pp. 668, 669); per SOMERVELL, L.J. (ibid., at p. 671); and per JENKINS, L.J. (ibid., at p. 673)), and accordingly that where (as in *Re Duke of Norfolk* (2)) a continuing annuity is payable out of the income of a trust fund to two or more persons in succession there is a passing within the meaning of the Finance Act, 1894, s. 1, on the death of each of the persons so entitled (other than the last to die) of property in the shape of the annuity, the value of which for estate duty purposes is the value as at the death of the person dying of the annuity for the residue of the period for which it is payable. We do not think there is any material ground of distinction between the annuity in *Re Duke of Norfolk* (2) and the annuity in the present case.

On the true construction of cl. 9 of the will in the present case the annuity is in our judgment a continuing annuity. The trust, as we construe it, is to make one continuous annual payment of £3,000 out of the income of the trust fund to the three named beneficiaries or such of them as shall for the time being be living during one entire period, viz., the period until the death of the last survivor of the three named beneficiaries. We see no justification in the language used for splitting the annual payment of £3,000 into, first, three annuities of £1,000 each payable to one of the three named beneficiaries for his or her life; secondly, two fresh annuities of £500 each springing up on the death of the first beneficiary to die and the consequent cesser of such beneficiary's annuity, one of such fresh annuities of £500 being payable to each of the two surviving beneficiaries during his or her life; and thirdly, one fresh annuity of £1,500 springing up on the death of the second beneficiary to die and the consequent cesser of such beneficiary's original and additional annuities of £1,000 and £500, such fresh annuity of £1,500 to be paid to the last surviving beneficiary during his or her life.

We cannot accept the contention urged on behalf of the commissioners to the effect that *Re Duke of Norfolk* (2) is distinguishable from the present case on the strength of two features of the gift in *Re Duke of Norfolk* (2) which have no counterpart here, viz., (a) the devise to the trustee of freehold hereditaments for a term of one thousand years on trust to pay out of the income thereof any annuity or annuities bequeathed by the testator; and (b) the gift of the £2,000 annuity to the trustee in trust for the persons successively entitled. The devise of the freehold hereditaments in question for the term of one thousand years on trust as aforesaid was no more than a usual conveyancing method of subjecting the income of freeholds to a trust for payment of an annuity or annuities; and the distinction sought to be drawn between a gift out of income of an annuity to a trustee in trust for persons in succession, as in *Re Duke of Norfolk* (2), and a plain trust to pay an annuity out of the income of a fund to persons in succession, as in the present case, is to our minds for the present purpose a distinction without a difference. More significant, in our view, are the points of similarity between the two cases, viz., (a) that the effect of the gift was to subject the income of the freehold hereditaments in *Re Duke of Norfolk* (2), and of the trust fund in the present case, to a trust for payment of an annuity to persons in succession; (b) that the annuity given took the form of one continuous annuity or annual payment of the prescribed amount of £2,000 in

Re Duke of Norfolk (2) and of £3,000 in the present case; and (c) that the duration of the annuity was measured by the life of the survivor of the father and the son in *Re Duke of Norfolk* (2) and by the life of the last survivor of the three named beneficiaries in the present case. We would add that the intermediate gift of the annuity to the trustee in *Re Duke of Norfolk* (2) may well have been due to the circumstance, noticed in the report in the All England Law Reports, though not in the Law Reports, that the interests of the father and the son in the annuity were made subject to certain protective trusts (see the report of the case before WYNN-PARRY, J., in [1949] 2 All E.R. 701). Accordingly, subject to the effect of *Re Payton* (3), to which we should next refer, we are of opinion that this case, like *Re Duke of Norfolk* (2), is a s. 1 case, with the result that duty is payable on the property passing, that is the annuity, which must be actuarially valued as at the death of the deceased as an annuity payable during the residue of the life of Phyllis Fawell.

Re Payton (3) was concerned with two contractual pensions payable under certain group policies effected by the Austin Motor Co., Ltd., for the purpose of providing pensions for their employees. The scheme of benefits enabled an employee to take, in lieu of a pension for his own life only, a pension payable to himself during his life and thereafter to his wife if she survived him during her life. Mr. E. L. Payton, the employee concerned, exercised, with respect to each of two pensions to which he was entitled, the option of converting them so as to include his wife if she survived him. The policies securing the benefits accruing to employees constituted contracts between the insurers and the company but contained a clause under which the company declared itself to be a trustee of the benefits for the persons entitled thereto. On the death of Mr. Payton leaving his wife him surviving the Estate Duty Office claimed duty on the footing that his death gave rise to an actual passing of the pensions within the meaning of s. 1 of the Act. His widow contended that there was no passing under s. 1, but that the pensions to which she became entitled in possession on the death of Mr. Payton fell in each case within s. 2 (1) (d) as being an annuity or other interest purchased or provided by the deceased, which was accordingly to be deemed to pass "to the extent of the benefit accruing or arising . . . on the death of the deceased". That view was greatly to the advantage of the widow, as Mr. Payton's estate was very large and a passing under s. 1 would entail aggregation whereas a notional passing under s. 2 (1) (d) would not.

It was held by this court (affirming WYNN-PARRY, J.) that the case fell within s. 2 (1) (d) and not s. 1. SIR RAYMOND EVERSHED, M.R. (delivering the judgment of the court) said ([1951] 2 All E.R. at p. 429):

> "Counsel for the Crown, therefore, goes further and says that under this contract there has been created a single and identifiable (and intelligible) item of property, viz., the benefit of the society's covenant with the company to pay what we may call the Payton last survivor pension throughout its term, which piece of property is enjoyed successively and is enforceable successively by Mr. Payton and Mrs. Payton. On this basis he contends that the case is in pari materia with *Re Duke of Norfolk's* case (2). We have been unable to accept the argument. If the society's covenant had been with the company to pay the latter during some period—e.g., a fixed period or the life of the longest liver of a number of named persons—a certain annual sum, and if the company had then declared itself a trustee of the annual sum or of the benefit of the covenant for A and B successively, it may well be (though we do not so decide) that the case would have been covered by the *Duke of Norfolk's* case (2). But the effect of his contract seems to us to be otherwise. Adhering (as enjoined by counsel for the Crown to do) to the actual terms of the bargain, there is here no covenant with the company to pay the company anything. There is a covenant with the company to pay 'the pension', i.e., the annual sum of £x by monthly instalments, to Mr.

Payton during the period from his retirement to his death and then to pay the same pension, i.e., the same annual sum by like instalments, to the plaintiff (if she survives Mr. Payton) during the rest of her life. Though the distinction be a fine one there does not seem to us to be in the latter case, in any real sense of the term, any single and continuing proprietary interest distinct from the beneficial interests, under the contract, of Mr. Payton and the plaintiff respectively, which proprietary interest can be said to 'pass' on Mr. Payton's death . . . In the *Duke of Norfolk's* case (2) this court held that the case before them was covered by *Re Cassel* (1), which it thought (having regard to later affirmation and notwithstanding certain criticisms made of the judgment of RUSSELL, J.) binding at least on the Court of Appeal: see the judgment of Sir RAYMOND EVERSHED, M.R. ([1950] 1 All E.R. at p. 669); but it held also that the annuity bequeathed by the first and second codicils, being an item of property separate and distinct from the beneficial interests therein, 'passed' on the death of the first annuitant within the meaning of s. 1 of the Act of 1894.

"In our judgment the present case is essentially different from the *Duke of Norfolk's* case (2) and also from *Re Cassel* (1). In each of those cases, the annuity arose out of specified trust property—the provisions of the will directed the trustees to raise the amount of the annuity yearly out of the income of the trust funds, for securing which in the *Duke of Norfolk's* case (2) a term of years was also created. The annuity so raised was given to the trustees to hold (in the *Duke of Norfolk's* case (2)), or was to be applied by the trustees (*Re Cassel* (1)) on trust for certain persons successively. In the present case the only rights and interests subsisting or capable of subsisting arise exclusively out of the terms of the contract of insurance. The only right of property which, according to the suggestion of the Crown, emerges from the respective policies is a chose in action. But a mere chose in action cannot, in our judgment, be considered or comprehended apart and separately from the right to enjoy, by the terms of the contract, the benefit contracted to be given. If there be any rights or interests of the company as distinct from the separate and individual rights of the pensioners they seem, accordingly, to us altogether too spectral to be fairly analogous to the interests of the trustees in the *Duke of Norfolk's* case (2) or the *Cassel* case (1), or to be fairly regarded as 'passing' on the death of Mr. Payton within the meaning of the Finance Act, 1894, s. 1."

These passages make it perfectly plain that *Re Payton* (3) was regarded by the court as a wholly different case from *Re Duke of Norfolk* (2), the pensions in the former case being purely contractual and not payable out of the rents of a landed estate (as in *Re Duke of Norfolk* (2)) or out of the income of a trust as in the present case. The interests arising out of the policies of insurance in *Re Payton* (3) could aptly be described as the Master of the Rolls described them, as "mere choses in action"; but we must say we deprecate the application of that description to an annuity payable out of the income of a fund under a trust. So far from casting doubt on *Re Duke of Norfolk* (2) it appears to us that *Re Payton* (3) re-enforces its authority.

In *Re Weigall's Will Trusts* (4), HARMAN, J., followed *Re Payton* (3) on the ground that on the true construction of the gift with which he was concerned

> "the two annuities did not constitute one piece of property which came into existence on the death of the testator and which passed from the brother to the widow on his death, but on his death a new beneficial interest arose which was now vested in the widow . . ."

In other words, in the view taken by the learned judge of the construction of the gift before him the case was not one of a continuing annuity. We find ourselves unable to accept that construction of the gift in question, and are accordingly of opinion that *Re Weigall's Will Trusts* (4) was wrongly decided.

Be that as it may, in the present case, in our judgment, there was a single continuing annuity. On the death of the deceased his life interest in one half of the annuity no doubt came to an end. But the annuity did not cease. It continued to be payable, with the difference that the half share thereof which had theretofore been payable to the deceased during his life became payable to Phyllis Fawell as the last survivor of the three named beneficiaries. Accepting as we must the principles laid down in *Cowley's* case (5) with regard to the respective functions of s. 1 and s. 2 of the Act, that seems to us to be a reasonably plain case of "passing" within the meaning of s. 1, and we think it would be impossible to hold otherwise consistently with *Re Duke of Norfolk* (2) and *Re Cassel* (1). Still less is it possible to hold consistently with these cases that a continuing annuity payable under a trust out of the income of a fund to two or more persons in succession or (by parity of reasoning) to several persons and the survivors or survivor of them does not constitute property capable of passing on the death of each successive taker other than the last.

For these reasons we are of opinion that this appeal fails and should be dismissed.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *Solicitor of Inland Revenue*; *Charles Russell & Co.* (for the plaintiffs).

[*Reported by* HENRY SUMMERFIELD, ESQ., *Barrister-at-Law.*]

PERRY *v.* STOPHER.

[COURT OF APPEAL (Hodson, Morris and Willmer, L.JJ.), March 6, 9, 1959.]

Arbitration—Costs—Discretion of arbitrator—Judicial exercise—Plaintiff partly successful ordered to pay costs—No need to state reasons.

A plaintiff builder claimed in an action in a county court £54 balance for building work done. The proceedings were referred to arbitration under s. 89 of the County Courts Act, 1934, and the plaintiff succeeded in respect of some only of the disputed matters, and was awarded £11. The arbitrator's award stated "I award the defendant costs on scale 3". No reason for the award of costs was stated. On appeal against the refusal of the county court judge to set aside so much of the award as related to costs,

Held: (i) the arbitrator was not under a duty to state in his award his reasons for awarding costs to the defendant.

Dictum of LORD GODDARD, C.J., in *Lewis* v. *Haverfordwest Rural District Council* ([1953] 2 All E.R. 1599) explained.

(ii) it had not been shown that the arbitrator had erred in law in his award of costs, having regard particularly to the small proportion of the claim which the plaintiff recovered; and accordingly the award of costs would not be set aside.

Dicta of DIPLOCK, J., in *Heaven & Kesterton, Ltd.* v. *Sven Widaeus A/B* ([1958] 1 All E.R. at pp. 424, 422) applied by MORRIS, L.J., and WILLMER, L.J.

Appeal dismissed.

[Editorial Note. In relation to the stating of reasons regard should be had to s. 12 of the Tribunals and Inquiries Act, 1958, which requires reasons to be given for the decisions of certain tribunals. Arbitrations, as such, do not come within the scope of that enactment, but, e.g., an arbitration otherwise than by agreement under Sch. 6 to the Agricultural Holdings Act, 1948, does (Tribunals and Inquiries Act, 1958, Sch. 1, Part 1, para. 1 (b)).

As to the arbitrator's discretion in awarding costs, see 2 HALSBURY'S LAWS (3rd Edn.) 47, para. 103; and for cases on the subject, see 2 DIGEST (Repl.) 720-723, *2323-2362.*]

Cases referred to: A

(1) *Campbell (Donald) & Co.* v. *Pollak*, [1927] A.C. 732; 96 L.J.K.B. 1132; 137 L.T. 656; 43 Digest 335, *1570*.

(2) *Ritter* v. *Godfrey*, [1920] 2 K.B. 47; 89 L.J.K.B. 467; 122 L.T. 396; Digest (Practice) 854, *4002*.

(3) *Pitkin* v. *Sanders & Forster, Ltd.*, (1923), 128 L.T. 789; 16 B.W.C.C. 5; 34 Digest 482, *3980*. B

(4) *Lewis* v. *Haverfordwest Rural District Council*, [1953] 2 All E.R. 1599; 2 Digest (Repl.) 720, *2329*.

(5) *Meyer* v. *Leanse*, [1958] 3 All E.R. 213.

(6) *Heaven & Kesterton, Ltd.* v. *Sven Widaeus A/B*, [1958] 1 All E.R. 420.

(7) *Harris* v. *Petherick*, (1879), 4 Q.B.D. 611; 48 L.J.Q.B. 521; sub nom. *Harris* v. *Patherick*, 41 L.T. 146; Digest (Practice) 848, *3948*. C

Appeal.

The plaintiff appealed with leave against an order of His Honour JUDGE RICE JONES made on July 31, 1958, at Croydon County Court, refusing to set aside the part of an award of an arbitrator relating to costs, by which he had ordered the plaintiff to pay the defendant's costs although the plaintiff had been awarded £11 out of a total of £54 claimed. The plaintiff contended that the order as to costs should be set aside on the ground that no reasons had been given for not awarding costs to the " successful party ". D

R. A. R. Stroyan for the plaintiff.

M. R. Hoare for the defendant.

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HODSON, L.J.: This is an appeal from an order of His Honour JUDGE RICE JONES dated July 31, 1958, by leave given by the learned county court judge, from his refusal to set aside the award of an arbitrator made under s. 89 of the County Courts Act, 1934, sub-s. (1) of which provides:

> " The judge may, with the consent of the parties to any proceedings, order the proceedings to be referred to arbitration (whether with or without other matters within the jurisdiction of the court in dispute between the parties) to such person or persons and in such manner and on such terms as he thinks just and reasonable." F

The second sub-section deals with revocation, and sub-s. (3), as amended by the Administration of Justice Act, 1956, s. 31 (4), is as follows:

> " On any such reference the award of the arbitrator, arbitrators or umpire shall be entered as the judgment in the proceedings and shall be as binding and effectual to all intents as if given by the judge: Provided that the judge may, if he thinks fit, on application made to him within such time as may be prescribed by county court rules, set aside the award, or may, with the consent of the parties, revoke the reference or order another reference to be made in the manner aforesaid." G H

This was an application to the judge to set aside, not the whole of the award, but only that part of it which dealt with costs, although the section under which these proceedings were taken only provides for setting aside an award and does not add " or any part thereof "; but the only question which we need consider is whether the learned judge was right in law in taking the course which he did take in refusing to set aside an award containing, as is the submission of the plaintiff, a judicial exercise of discretion about costs. I

The claim was a claim by the plaintiff, who was a builder employed by the defendant to carry out work on a house in Mitcham. No estimate was given and the work was charged for on a time and material basis when finished, plus a profit to the plaintiff. After the work had been finished, the defendant objected to the way in which some of the work had been done and put his own value on the work which had been properly done at £397, whereas the plaintiff

A sought to charge £455. The actual difference between the parties at the hearing amounted to £54, having been reduced from £58. The defence raised several points, stated by the arbitrator to be sixteen in number, claiming that the work was badly done by the plaintiff, or not done, or not done to the defendant's order. With regard to some of these matters the plaintiff succeeded and with regard to others he failed and, although we know the number of matters on B which the plaintiff succeeded and on which he failed, we do not know how much time was spent over that part of the dispute on which the plaintiff failed and how much over that part on which he succeeded. The findings of the arbitrator are set out in detail showing expressly what he found in this itemised claim, and at the conclusion, he awarded the plaintiff £11 14s. 2d. as against the £54 claimed, and then he did what has provoked disagreement, he awarded the C defendant costs on county court scale 3.

The discretion of the arbitrator as to costs is to be exercised judicially in the same way as any other exercise of discretion. The proposition is stated in RUSSELL ON ARBITRATION (16th Edn.), p. 252:

> " . . . the discretion must be exercised judicially, and it will be reviewed D by the court to the same extent as a judge's order as to costs will be reviewed upon an appeal."

In all cases where the exercise of discretion as to costs is concerned, the relevant authority is *Donald Campbell & Co.* v. *Pollak* (1) ([1927] A.C. 732), where one of the matters emphasised by the House was that the discretion

> " must be exercised judicially, and the judge ought not to exercise his E discretion against a successful party on grounds wholly unconnected with the cause of action ",

but, so far as matters connected with the cause of action are concerned, the tribunal has a discretion which is unfettered.

The submission in this case is to me the novel one that, the order for costs being an unusual one in the sense that, having partly succeeded, the plaintiff F was ordered to pay the defendant's costs, the arbitrator should have stated a reason for so finding. I say at once that, in my judgment, there is no authority for such a submission at all.

I begin with *Donald Campbell & Co.* v. *Pollak* (1) and the speech of LORD ATKINSON, on which the plaintiff sought to rely, because I think the words of G LORD STERNDALE, M.R., in *Ritter* v. *Godfrey* (2) ([1920] 2 K.B. 47) quoted by LORD ATKINSON must have been very much in the mind of LORD GODDARD in the case principally relied on by the plaintiff. LORD STERNDALE, M.R., in *Ritter* v. *Godfrey* (2) said (ibid., at p. 52):

> " But there is such a settled practice of the courts that in the absence of special circumstances a successful litigant should receive his costs, that it H is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the judge at the trial, and this court cannot interfere with his discretion."

I LORD ATKINSON said ([1927] A.C. at p. 814):

> " My Lords, I think this judgment of LORD STERNDALE contains a clear, condensed and accurate statement of the law and of the prevailing practice on the points with which it deals."

After *Donald Campbell & Co.* v. *Pollak* (1) had overruled the actual conclusion in *Ritter* v. *Godfrey* (2), but affirmed his expression of view as to costs in it, LORD STERNDALE, M.R., used these words in *Pitkin* v. *Sanders & Forster, Ltd.* (3) ((1923), 128 L.T. 789 at p. 790):

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> " In this case, therefore, we have to see if the judge had any grounds for the exercise which he made of his discretion; and if there were any grounds on which he could exercise his discretion in the way in which he did, we cannot interfere."

So far I do not think any language found in the cases indicates that the tribunal is required to state its reasons before it exercises its discretion in a particular way, even when it makes an order as to costs which may be or appear to be unusual.

B

On its facts, this case is not such a clear case as one in which a plaintiff wholly succeeds or wholly fails. It is a case of an itemised claim where, in the event, the plaintiff has succeeded to a far less extent than the defendant. Even assuming, however, that an unexpected order was made in it, in my opinion there is no justification for the contention that, in departing from the rule, it is necessary for a judge or an arbitrator to say " I am departing from the rule for " this, that or some other reason. The cases show that where, in departing from the rule, the tribunal gives a reason which is wrong in law, or where on the face of the record there was an error of law in the exercise of the discretion, an appellate court can interfere.

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Counsel for the plaintiff relied in the end, almost solely, on *Lewis* v. *Haverfordwest Rural District Council* (4) ([1953] 2 All E.R. 1599), in which *Donald Campbell & Co.* v. *Pollak* (1) was applied. It was a Special Case Stated by an arbitrator. The arbitrator made an award assessing the compensation payable to an applicant, the tenant and occupier of a smallholding at Haverfordwest, at £156 and awarded further that each party should bear its own costs. The applicant moved for an order for the award to be set aside in so far as it related to costs, and that the council should pay the applicant's costs. LORD GODDARD, C.J., referred to a decision of DEVLIN, J., and followed *Donald Campbell & Co.* v. *Pollak* (1), which re-affirmed what had been said in the Court of Appeal in *Ritter* v. *Godfrey* (2) to the effect that there was a settled practice of the courts that in the absence of special circumstances a successful litigant should receive his costs and that it was necessary to show some grounds for exercising the discretion of refusing an order which would give them to him, and that the discretion must be judicially exercised. LORD GODDARD, C.J., said that those words " judicially exercised " were always somewhat difficult to apply, but they meant that the arbitrator must not act capriciously and must, if he were going to exercise his discretion, show a reason connected with the case and one which the court could see was a proper reason. Those are the passages on which reliance is placed. LORD GODDARD, C.J., said further ([1953] 2 All E.R. at p. 1599):

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> " In this case the arbitrator was asked why he made this order as to costs, and he answered: ' I had several reasons for awarding that each party should bear its own costs, and one of those was that I had no evidence that during the long time between the event and the date of the arbitration any serious effort had been made by either party to settle the question '."

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That was a quotation, and then LORD GODDARD went on ([1953] 2 All E.R. at p. 1600):

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> " The question had to be settled at some time, and why should [the council's] failure to take steps to settle or to make the tender place them in a better position than they might otherwise have been? They made no effort to settle, and the applicant did not bring his proceedings, but he has brought his proceedings now, and he is entitled to recover the compensation which [the statute] gives him and which the [council] had apparently made no effort to pay. I do not think that it is a judicial exercise of discretion to say that because neither party did anything, the successful party will not be awarded the costs. That seems to me to be contrary to what

A was said in *Donald Campbell & Co.* v. *Pollak* (1), that it is the settled practice of the court that in the absence of special circumstances a successful litigant should receive his costs. I cannot find that the reason mentioned by the arbitrator is a special circumstance, and, therefore, I think that the arbitrator was wrong in not awarding the successful applicant his costs."

B The learned Lord Chief Justice was there clearly applying himself to the reason which had been stated in that case, the reason stated by the arbitrator in answer to the inquiry made by him, and, in my opinion, was not purporting to do that which seems to me to be directly contrary to what had been said in all the authorities about costs; authorities with which he was familiar, and C of which he was always mindful, having a most remarkable and retentive memory. It seems incredible to me to suppose that he could have intended to go outside that line of authorities to which he expressly referred in his judgment. It is quite true that, as counsel for the plaintiff argues, if taken out of their context, the words " if he is going to exercise his discretion he must show a reason connected with the case " might require that to be done indepen- D dently of the circumstances of the case, but, in my judgment, if the words could be read separately and outside their context—which I do not think is right—they would be against the current of authority. I am satisfied that LORD GODDARD did not intend to say anything of the kind; that all that he was doing was pointing to the reason which had been shown in that case and, in that context, saying that the arbitrator must show a reason which was connected with the case, and one that the court could see was a proper reason. E That really disposes of this appeal in favour of the defendant, in my opinion.

The subsidiary ground put forward by counsel for the plaintiff was that no material was shown on the face of the award for an exercise of discretion in the way in which the arbitrator exercised it. I cannot accept that submission. It was clear on the face of the award that the claim was a much exaggerated claim in relation to the amount actually awarded, and it was also clear that F the plaintiff had failed on the important issues. So it is not a case in which, on the face of the award, nothing is shown which justifies the arbitrator exercising his discretion by making an order such as he made.

This particular section, s. 89, of the County Courts Act, 1934, with reference to arbitrations was considered by this court recently in *Meyer* v. *Leanse* (5) ([1958] 3 All E.R. 213), where a learned county court judge had set aside an G award of an arbitrator, taking the view that he had a wider discretion than the High Court when setting aside an award. This court pointed out that that was wrong and that he must act on the same principles as the High Court in setting aside an award. Apart from some similarity of facts, the only relevance of that case to this is that the question of costs was considered. The arbitrator had awarded the plaintiff a third of his costs, taking the view H that the claim was exaggerated and that one head of it had failed. It has no bearing on counsel's point that it is necessary to show a reason, because there the reason was shown; but the judgment of the court given by PARKER, L.J., referred to the question of costs (ibid., at p. 217):

> " . . . I, again like the judge, am quite satisfied that whatever view one I might have taken oneself in regard to the award of costs, it certainly cannot be said that in doing what he did the arbitrator erred in law."

I say that in order to emphasise that, in dismissing this appeal, I am not in any way seeking to say that the exercise of the discretion as to costs was necessarily exercised in the way in which some other equally right-minded person might have exercised it in this case. All I am concerned to say is that there is no ground of appeal in law, because it has not been shown that the arbitrator erred in that respect, and, as to the special point made on behalf

of the plaintiff, because it is unnecessary for an arbitrator, in exercising his discretion as to costs, to state in terms the reason for which he departs from what may be regarded as the usual course. I would dismiss this appeal.

MORRIS, L.J.: I agree. After the award of the arbitrator in this case the plaintiff made an application to the county court judge to set aside the award and he stated his grounds in the following words:

> "That the discretion of the arbitrator as to the award of costs has not been exercised judicially in that costs were awarded against the successful party in the absence of some reason connected with the case."

The words "the successful party" there used at once raise an inquiry as to who was the successful party in this arbitration.

Counsel for the plaintiff has developed two main submissions. His first was that in this arbitration, under s. 89 of the County Courts Act, 1934, the arbitrator, having regard to his award, should have set out his reasons for making the order as to costs that he made. The final words of the award were as follows:

> "Award the plaintiff £11 14s. 2d. in respect of his claim. I award the defendant costs on scale 3."

The authority on which counsel for the plaintiff relied for that submission that the arbitrator was under an obligation to state his reasons was *Lewis* v. *Haverfordwest Rural District Council* (4) ([1953] 2 All E. R. 1599), and in particular these words used by LORD GODDARD, C.J. (ibid.):

> "... it has been laid down in the House of Lords ... that there is a settled practice of the courts that, in the absence of special circumstances, a successful litigant should receive his costs, and that it is necessary to show some grounds for refusing an order which would give them to him. The discretion to refuse that order must be judicially exercised. Those words 'judicially exercised' are somewhat difficult to apply, but they mean that the arbitrator must not act capriciously and must, if he exercises his discretion to refuse the usual order, show a reason connected with the case which the court can see is proper."

In relying on those words, counsel for the plaintiff says that the only way in which a court can see whether there is a proper reason is if a reason appears on the face of the award. It seems to me, however, that those words of LORD GODDARD, C.J., must be considered in the light of the circumstance that in that particular case the arbitrator was asked why he had made the order as to costs that he made, that the arbitrator gave his reasons in response to that request, and that those reasons were then available and open for examination by the court. It does not seem to me that LORD GODDARD was considering the question whether an arbitrator must state his reasons, and I do not think that LORD GODDARD was laying down any such proposition.

The present situation differs from that in *Heaven & Kesterton, Ltd.* v. *Sven Widaeus A/B* (6) ([1958] 1 All E. R. 420), a decision of DIPLOCK, J. There the umpire filed an affidavit in which he stated his reasons for making the order he made as to costs, and DIPLOCK, J., said this (ibid., at p. 422):

> "If, in reply to this notice of motion, nothing had been said by the umpire (who is, of course, not a party to these proceedings) as to the reasons why he had made an award of that kind, I do not think that there would have been any grounds on which I could have interfered with his award."

Again, he said (ibid., at p. 423):

> "Had the umpire in the present case put in no affidavit and given no reasons, there might have been little that the buyers could have said to me, but, as he has in fact filed an affidavit in which he has given his reasons for

making his award as to costs, I am entitled to look at those reasons and see whether he has exercised his discretion judicially."

It is also right to observe that the language used by LORD GODDARD was used immediately after he had mentioned *Donald Campbell & Co.* v. *Pollak* (1) ([1927] A.C. 732), re-affirming *Ritter* v. *Godfrey* (2) ([1920] 2 K.B. 47), and his language bears a resemblance to the words used in *Ritter* v. *Godfrey* (2) in regard to a case tried before a judge alone.

It does not seem to me that counsel for the plaintiff has made out his proposition that the arbitrator was obliged to set out the reasons which had guided him in making the order as to costs that he made.

The second and remaining submission of counsel for the plaintiff was that it does not appear in this case that there was material on which the arbitrator could properly have made any such order as he made. We have the whole of the award before us. It shows clearly that the arbitrator had a number of items to consider and that he found in favour of the defendant on the majority of those items. He found that the defendant was, or had been, under an obligation to incur expense in putting right some of the work defectively done by the plaintiff. Just by way of illustration, one item of complaint was that the service for the water closet flush was taken across the bath, and the award deals with this item as follows:

> "This pipe has also been altered by defendant. Fixed across the bath (as the plaintiff admits he did) it would be very unsightly and the defendant is entitled to the cost of the alteration."

It would appear from the face of the award that there might be grounds for thinking that the defendant was the successful party in this case before the arbitrator. The plaintiff succeeded in recovering £11 after having claimed a much larger sum. It is to be remembered, however, that we are not in any way called on to express any opinion as to what order we think we might have made if we had been in the arbitrator's position. In this connexion, it may be useful to refer to one other sentence from DIPLOCK, J.'s judgment in *Heaven & Kesterton, Ltd.* v. *Sven Widaeus A/B* (6) ([1958] 1 All E.R. at p. 424). He said:

> "That to fail on one important issue in a case is a matter which can and should be taken into consideration in dealing with costs needs no authority; and to put forward an exaggerated claim on which the claimant succeeds on only a small part is a matter which can result in his being ordered to pay the costs, despite his success as to a small part, again, I think, needs no authority, but, if authority be needed, it is to be found as long ago as 1879 in *Harris* v. *Petherick* (7) ((1879), 4 Q.B.D. 611)."

On this part of the case it seems to me that counsel for the plaintiff cannot show that it appears from the face of the award that this was an order that should not have been made. I think the appeal fails.

WILLMER, L.J.: I agree that the appeal fails. I find myself at one with my brethren in thinking that LORD GODDARD, C.J., by his dictum in *Lewis* v. *Haverfordwest Rural District Council* (4) ([1953] 2 All E.R. 1599), cannot have intended to lay down any rule of universal application. If he did intend to lay down any such rule, in my judgment, he would have been flying in the face of what was said by the House of Lords in *Donald Campbell & Co.* v. *Pollak* (1) ([1927] A.C. 732). It is significant that the dictum of LORD GODDARD referred to follows very shortly after a reference to that House of Lords' decision, which seems to indicate that LORD GODDARD had it very much in mind. In those circumstances I do not think that he can be taken as intending to lay down any rule of universal application. It should be observed that in the particular case with which he was dealing the arbitrator had in fact given a reason, but a reason which did not commend itself to the court. In the present case the arbitrator has given no reason for the conclusion as to costs at which he arrived.

It seems to me, if it is proper to refer to authority on a matter which is so eminently one of discretion, I could not do better than adopt what was said by DIPLOCK, J., in *Heaven & Kesterton, Ltd.* v. *Sven Widaeus A/B* (6) ([1958] 1 All E.R. 420) in a passage which was referred to by the learned judge in his judgment in the present case. DIPLOCK, J., said (ibid., at p. 422):

> " I have no doubt that the umpire in an arbitration of this kind has power to deprive a successful claimant of his costs and, indeed, to order a successful claimant to pay the costs of the other side in appropriate circumstances. The mere fact, therefore, that on the face of the award the buyers have succeeded as to the sum of £73 but have nevertheless been ordered to pay the costs of the sellers would, in my view, of itself be no ground for setting aside the award."

That seems to me to be a perfectly correct statement with regard to the discretion of the umpire. It should be remembered, however, that the whole of the argument for the plaintiff here has been based on the hypothesis that the arbitrator made an " unusual " award, in the sense that he directed that the successful party should pay the costs of the unsuccessful party. That hypothesis deserves some detailed examination, because, unless it is established, counsel for the plaintiff does not ever get to the proposition for which he contended, and in support of which the dictum of LORD GODDARD, C.J., was cited. One may well ask: " Who was the successful party in this case? " As my Lord has pointed out, the plaintiff may be said to have been successful so far as £11 is concerned, but equally it may be said that the defendant has been successful as far as some £40 is concerned. One wonders what the plaintiff would have said if, as he had just finished reading the award of the arbitrator, some friends of his had come up to him and warmly congratulated him on the " success " he had achieved in his case. I apprehend that the plaintiff would have regarded himself as having substantially failed in his claim. If so, the plaintiff having substantially failed in his claim, but the defendant not having wholly succeeded in defeating the claim, it seems to me that it was open to the arbitrator to take almost any course with regard to the costs in the exercise of his discretion, and we have not got the information which would justify us, as I see it, in criticising the course which he did take. We do not know, for instance, exactly what he thought of the plaintiff's claim. He may have thought it was a very grossly inflated claim. For all we know he may have thought the costs incurred in the arbitration were very largely caused by the plaintiff's unsuccessful attempt to justify his exorbitant charges. We just do not know.

In these circumstances, it seems to me quite impossible for us to say that in a case of this sort—in which, as I have emphasised, the discretion as to costs was very much at large—the arbitrator has failed to exercise his discretion either judicially or properly. Accordingly, in my judgment, the learned county court judge came to a correct conclusion in refusing to interfere, and I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *W. Timothy Donovan* (for the plaintiff); *A. du H. Rawlence*, Croydon (for the defendant).

[*Reported by* F. A. AMIES, ESQ., *Barrister-at-Law.*]

UNION NATIONALE DES CO-OPERATIVES AGRICOLES DE CEREALES *v.* ROBERT CATTERALL & CO., LTD.

[COURT OF APPEAL (Lord Evershed, M.R., and Pearce, L.J.), March 13, 1959.]

Arbitration—Foreign arbitration—Enforcement of award—Danish award—Enforceable in Denmark only after court order—Whether award "final"—Arbitration Act, 1950 (14 *Geo.* 6 *c.* 27), *s.* 26, *s.* 36 (1), *s.* 37 (1) (*c*) (*d*).

A contract provided (according to the English translation) that "all differences arising out of the present contract will be judged by the Arbitration Chamber of Copenhagen which will settle without appeal with the powers of an amicable arbitrator". The rules regulating the Arbitration Chamber provided (para. 14 of the rules) that the "awards made by the committee in respect of the soundness of the goods contracted for shall be final. An award made can only be appealed against to the appeal court attached to the committee for which the following rules are applicable . . . The appellant shall be informed of the time within which he must file his appeal in writing . . . If the presidency decides that the appeal cannot be made or that it has not been properly filed in due time, the award made by the judgment and arbitration committee shall be final". The presidency had power "in special cases" to decide "that an award cannot be appealed against unless the appellant gives security". Differences arose between the parties to the contract and the arbitration committee of the Chamber made an award in favour of the buyers. The sellers wished to appeal, and the presidency said that an appeal would be entertained on terms of a payment into the Danish court. The sellers refused to make the payment. The buyers applied for leave to enforce the award under the Arbitration Act, 1950, s. 36 (1) and s. 26 as a judgment or order. Evidence as to Danish law showed that the award was not directly enforceable in Denmark until a judgment had been obtained from the Danish court based on the award, and that on application to the Danish court there would be no re-hearing but formal defects could be raised before the court as objections to the award, e.g., that the rules governing the arbitration proceedings had not been complied with. No judgment of the Danish court had been obtained and the sellers contended that the award had not "become final in the country in which it was made" within those words in s. 37 (1) (d) of the Act of 1950.

Held: the award was enforceable under s. 36 (1) and s. 26 (1) of the Arbitration Act, 1950, as a judgment or order for the following reasons—

(i) Part 2 of the Act of 1950 was intended to put a foreign award in the same position as an English award, for which purpose the finality of an award must be distinguished from its enforcement, and, though the award was not by Danish law enforceable by execution, it was final within the meaning of s. 37 (1) (d) of the Act of 1950, its enforcement in England being a question of English law (see p. 726, letters F to I, and p. 727, letter F, post).

(ii) this was a reasonably clear case and therefore appropriate to the procedure under s. 36 (1) and s. 26 (see p. 725, letter C, post).

Dictum of SCRUTTON, L.J., in *Re Boks & Co. and Peters, Rushton & Co.* ([1919] 1 K.B. 491) applied.

(iii) paragraph 14 of the rules conferred the widest discretion on the presidency to decide on what terms an appeal should be allowed, and accordingly the award was "in conformity with the law governing the arbitration procedure" within s. 37 (1) (c) of the Act of 1950 (see p. 724, letters F to H, and p. 727, letters D and E, post).

Appeal dismissed.

[As to enforcement of foreign arbitration awards, see 2 HALSBURY'S LAWS

(3rd Edn.) 52-54, paras. 114-118; and for cases on the subject, see 2 DIGEST (Repl.) 700, *2126-2128*. A

For the Arbitration Act, 1950, s. 26, s. 36 (1) and s. 37 (1), see 29 HALSBURY'S STATUTES (2nd Edn.) 112, 118, 119.]

Case referred to:

(1) *Re Boks & Co. and Peters, Rushton & Co.*, [1919] 1 K.B. 491; 88 L.J.K.B. 351; 120 L.T. 516; 2 Digest (Repl.) 701, *2133*. B

Interlocutory Appeal.

This was an appeal with leave of the court from an order of HINCHCLIFFE, J., dated Feb. 18, 1959, dismissing the sellers' appeal from the order of Master CLAYTON, dated Jan. 15, 1959. The buyers, by their originating summons dated Nov. 27, 1958, applied for an order pursuant to the Arbitration Act, 1950, s. 36 (1), for leave to enforce an award dated Oct. 6, 1958, in the same manner as a judgment or order to the same effect. Master CLAYTON made the order prayed for. An appeal to HINCHCLIFFE, J., was dismissed and the sellers now appealed to the Court of Appeal on the grounds that (a) the award was a foreign award which had not become final in the country, namely, Denmark, in which it was made, and (b) that the award had not been made in conformity with the law governing the arbitration procedure. C D

H. P. J. Milmo for the sellers.

W. P. Grieve for the buyers.

LORD EVERSHED, M.R.: By a contract made on Aug. 31, 1956, between the present appellants as sellers and the Union Nationale des Co-operatives Agricoles de Cereales as buyers, provision was made for the sale of certain wheat seeds of a rather special character. The contract contained, according to the English translation, the following provision: E

> "All differences arising out of the present contract will be judged by the Arbitration Chamber of Copenhagen which will settle without appeal with the powers of an amicable arbitrator." F

The last three words, " an amicable arbitrator ", come a little unusually to an English eye, but nothing, I think, turns on what the exact implication of the adjective may be. The words, " without appeal ", are in fact a translation of the French " en dernier ressort ", which might be translated more literally as " in the last resort ". That variation of phraseology may have a bearing in regard to one of the points which I will mention presently. There was a difference arising out of the contract, and the matter, accordingly, went before the tribunal mentioned, the Arbitration Chamber of Copenhagen. That Chamber's transactions appear to be regulated by general rules of the most formal character, and those rules, in the English language, form one of the exhibits in the case. I need not take time to read many of the terms of those rules, but para. 14 concerns appeals. In view, however, of what I have just said in reference to the terms of the contract, it is to be observed that this is what you might call an internal appeal within the ambit of the Arbitration Chamber itself; it is not a reference to an appeal to the ordinary courts of Denmark or to any outside tribunal. Paragraph 14 opens with the formula: G H

> " The awards made by the committee in respect of the soundness of the goods contracted for shall be final. An award made can only be appealed against to the appeal court attached to the committee for which the following rules are applicable." I

Later, under the same heading, there is this rule:

> " The appellant shall be informed of the time within which he must file his appeal in writing . . . The presidency of the committee (the president and the vice-presidents) are to decide whether the conditions prescribed for

A the appeal exist and whether or not the appeal has been properly filed in due time. If the presidency decides that the appeal cannot be made or that it has not been properly filed in due time, the award made by the judgment and arbitration committee shall be final. The presidency shall in special cases decide on recommendation [which admittedly means " on application "] of a party that an award made cannot be appealed against unless the appel-
B lant gives security, sufficient in the opinion of the presidency, for the amount which he is liable to pay under the award . . ."

Paragraph 15 of the rules, substituting for " abiding by ", the words " submitting to " (which I think is the sense of it) reads:

" By submitting to the judgment and award made by the committee, the
C parties have unconditionally subjected themselves to the committee's (including the appeal court's) decision both in substance and in form, and this decision shall not in any way be overruled and set aside by the law courts . . ."

The difference having come before the arbitration committee of the Chamber, an award in favour of the respondents, the buyers, for a sum which is said to
D be £183,000 odd, was made. The date of that award was the beginning of October, 1958. The sellers said that they wished to appeal. The presidency, after first stating the view that no appeal lay, ultimately, and after an application in effect by the buyers, said that they would entertain an appeal on terms of payment into the Danish court, which the sellers were unwilling to accept. The appeal procedure within the Arbitration Chamber, therefore, went
E out of the picture. Thereupon, the award of £183,000 odd on the face of it being unchallenged, the present application was made under the relevant sections of the Arbitration Act, 1950, for an order to enforce the award.

At this stage I should refer to such sections of the Arbitration Act, 1950, as appear to be relevant. I turn first to s. 26, which provides generally, but not in reference to foreign awards:

F " An award on an arbitration agreement may, by leave of the High Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect . . ."

The question of foreign awards is covered by Part 2 of the Act beginning with s. 35, and sub-s. (1) of that section enacts what foreign awards are within the
G scope of that part of the Act. So far as is relevant, the present award is brought within the scope of the Act by virtue of the fact that certain protocols and conventions have been made, the terms of which are set out in the schedules to the Act, being dated in 1923 and 1927, and by virtue of certain Orders in Council*, Denmark and France, and parties resident in those countries, are, as regards awards, brought within the scope of Part 2. Section 36 (1) to my mind is of
H importance, for it provides:

"A foreign award shall, subject to the provisions of this Part of this Act, be enforceable in England either by action or in the same manner as the award of an arbitrator is enforceable by virtue of s. 26 of this Act."

Expressing it in less precise language perhaps, the effect, I apprehend, of that sub-section is that a foreign award, subject to the provisions of this part of the
I Act and particularly to the provisions of the next section, is put in the same position quoad enforcement as an award of an English arbitrator. Section 37 contains the conditions for enforcement of foreign awards, and much of the argument in this case turns on that section. Sub-section (1) is as follows:

" In order that a foreign award may be enforceable under this Part of this

* Arbitration (Foreign Awards) No. 1 Order, 1930 (S.R. & O. 1930 No. 674) (Denmark) and Arbitration (Foreign Awards) No. 2 Order, 1931 (S.R. & O. 1931 No. 669) (France).

Act [like an English award] it must have . . . (c) been made in conformity with the law governing the arbitration procedure; (d) become final in the country in which it was made . . ." A

Sub-section (2) I can pass over. Sub-section (3) provides:

"If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in paras. (a), (b) and (c) of sub-s. (1) of this section [but not (d)] the court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal." B

Finally, I briefly refer to s. 39: C

"For the purposes of this Part of this Act, an award shall not be deemed final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made."

In the well known text-book, RUSSELL ON ARBITRATION, that last section has the rubric "Meaning of 'final award'". That, perhaps, is rather an overstatement because I do not read s. 39 as being a definition or as meaning that in the absence of proceedings for contesting the validity of an award, an award must be final, though it may be of some weight as indicating that some onus is thrown on a party against whom an award has been made to challenge it, where it may be challenged, if he desires to contest its effect. For the purposes of this appeal I do not myself place reliance on s. 39. D

The points taken and put with characteristic force by counsel for the sellers arise under para. (c) and para. (d) of s. 37 (1), and of those, the latter is the more important. I will, therefore, try to dispose quite briefly of the point under para. (c), which is to the effect that the award was not made in conformity with the law governing the arbitration procedure. The point is founded on the narrative which I have given about appeals to the appeal court within the Chamber, and it rests on the language of para. 14 of the rules, and particularly the words, "The presidency shall in special cases decide", etc. Put interrogatively, counsel for the sellers says: What are special cases, and why should the terms which the presidency here impose be conclusive against me? In my judgment the short answer to that is that the effect of this provision is that in these cases of appeal the widest discretion is plainly given to the presidency. That fact is emphasised by the preceding sentence, which reads, it will be recalled: E F G

"If the presidency decides that the appeal cannot be made or that it has not been properly filed in due time, the award made by the judgment and arbitration committee shall be final."

So here I read this part of the paragraph as meaning that it is a matter for the discretion of the presidency to say, according to the circumstances of each particular case, whether in their view they are such, viz., special enough, to require or to justify the making of a condition such as the rest of the paragraph envisages. Briefly, therefore, I cannot see that a case has been made to establish failure on the part of this award to have been made in conformity with the law governing the arbitration procedure. H

Paragraph (d), however, is more formidable, and on that counsel for the sellers has directed the main part of his armament. In the final analysis the challenge really turns on the meaning of the word "final". As a prelude to what follows, I bear in mind the directions which were laid down in *Re Boks & Co. and Peters, Rushton & Co.* (1) ([1919] 1 K.B. 491). In this court SWINFEN EADY, M.R., accepted the practice as stated in the then current edition of RUSSELL ON ARBITRATION*, and its language is as follows ([1919] 1 K.B. at p. 497): I

* 9th Edn. at p. 322.

A "'Now that under s. 12 of the Arbitration Act, 1889, an award may be enforced as a judgment or order, although the right to bring an action is not thereby taken away, the necessity for an action no longer exists to the same extent as formerly; but an action is still the proper mode of procedure . . . where the validity of the award or the right to proceed upon it is so doubtful that leave to enforce it under the above section cannot be obtained.' B In my opinion that is applicable to the present case, and the validity of the award is so doubtful that leave to enforce it in a summary manner ought not to be given."

The matter is put perhaps rather more favourably to sellers by Scrutton, L.J., who said (ibid., at p. 497) that he accepted the view of the Master of the Rolls, which coincided with his own experience, "namely, that this summary C method of enforcing awards is only to be used in reasonably clear cases." I will, therefore, assume that if we are to uphold the view taken by Hinchcliffe, J., we must be of opinion that this is a reasonably clear case.

I turn back first to the Arbitration Act, 1950. The contest turns on the question: is this award final? The question, however, seems to me to depend on s. 37 (1) (d). We are not here concerned with what use might be given to the D word "final" for other purposes, e.g., what might be said to be the effect of it in the convention in Sch. 2 to the Act of 1950. It must be borne in mind as a background that if the conditions are satisfied, a foreign award is to be put in pari materia, so to speak, with an English award. The question, therefore, is: Has it become final, as we understand that phrase, in the country in which it was made? The question whether it is final in Denmark will depend no doubt E on Danish law, but the Danish law is directed to showing whether it is final as that word is understood in English. On the face of the matter, as I have narrated the facts, it would appear plain enough that, according to the bargain made between these two parties, this award is final. The two contracting parties have said that they would submit their differences to this Arbitration Chamber, which will settle "en dernier ressort" the matter in dispute. They have by F necessary implication submitted to the rules and regulations of the Danish tribunal, one of which, para. 14, according to the language already read, states that if the presidency decide against an appeal, then the award is final. If the matter, therefore, rested alone on the documents and the bargain as I find it in the documents, final, I would have said, within the section it must be.

It is, however, necessary to see what the Danish law is, and on that matter G there have been filed certain affidavits. Mr. Heyman made an affidavit for the respondents. His qualifications are not in doubt; he is a qualified Danish lawyer and a barrister of the English bar. He said in the final paragraph of his affidavit:

"According to the aforesaid laws and constitution [which is a reference to the Danish tribunal], the award of Oct. 6, which was made in conformity H with the law governing the arbitration procedure is final and binding by virtue of the failure of the respondent to fulfil the conditions for an appeal laid down by the said Arbitration Committee."

But then the matter was taken up by an affidavit by Mr. Mikkelsen, who represented the sellers in the arbitration proceedings and who is also a member of the Danish Bar. Paragraph 3 of his affidavit reads thus:

I "In my opinion under the laws of Denmark the aforementioned award has not and will not become final unless and until it is laid before and acknowledged by the Danish court which to the best of my knowledge, information and belief [and he is quite correct] has not been done."

He then refers in support of his opinion to a text-book*. The passage in the text-book is this (in translation):

* This book was Frivillig Voldigift (meaning voluntary arbitration) by Bernt Hjejle.

"An arbitral award need not be final because it is valid (but if it has become final, it must of course always be considered as valid). It will not be final until no more objections can be raised to it. In Denmark no time limit is fixed for raising objections to the validity of an arbitral award, nor are there any principles in law frustrating objections by prescription or preclusion. Therefore, any person will have to obtain legal confirmation in Denmark of his arbitral award made in Denmark before seeking enforcement in a foreign country according to the Geneva Protocol of the said award."

It will be convenient to complete the evidence by reference to the further affidavit of Mr. Heyman in reply. He says:

"According to Danish law one cannot obtain execution of a Danish arbitration award in Denmark unless a judgment has been obtained from the court based on the award. At the hearing of the action [I agree with counsel for the sellers that that obviously means an application or whatever is the appropriate procedure for obtaining a judgment in the Danish court] the defendant is however confined to objections of a formal nature, e.g., that the arbitration tribunal's procedure rules have not been complied with. The court will not, apart from these formal defects, rehear the case . . . I respectfully agree with Mr. Thorvald Mikkelsen that unless and until the arbitration award referred to in para. 4 of my previous affidavit has been before the Danish courts, it would be open to the respondent to complain that the award suffers from formal defects."

At first sight it might appear that Mr. Heyman is saying that according to the law of the country in which this award was made, viz., Denmark, the award is not final as that word is used in s. 37 (1) (d). I have come myself to the clear conclusion that that is not right. If it were so (as I think it must follow and there is much force in this point which counsel for the buyers made) it would mean that one could never in fact enforce an award as such in such cases as this; one would have to wait until one got the judgment of the court of the country where the award was made, and then one would not be enforcing the award but the judgment. I venture again to refer to the vital fact, as I think, that Part 2, and the conditions to be complied with, is intending to put a foreign award in the same condition as an English award. Looking more closely at the evidence, it seems to me that what clearly has arisen here is a confusion—I am not using the word, and I certainly do not intend to, in a sense critical of the deponents—between finality as intended by the section and enforceability. Reverting to the text-book writer, I think that is made clear enough. He says that an award once final, of course must be valid, and speaks of an award not necessarily being final because it is valid. Those are somewhat philosophical considerations. He goes on, it will be observed, to speak of the possibility of taking objections, contemplating, as it seems to me, perhaps rather as s. 37 (3) does, a challenge being made by the aggrieved party in the appropriate court of competent jurisdiction. But when he comes to his conclusion, introduced by the word " therefore ", it is clear that the text-book writer is concerned with enforcement:

" Therefore, any person will have to obtain legal confirmation . . . before seeking enforcement."

The question of enforcement here is a matter of English law. Can the award now be enforced by the terms of the Arbitration Act, 1950? It seems to me, with all respect to the argument of counsel for the sellers, that it is reasonably clear that it can. This award is, to my way of thinking, final according to the bargain made and according to the law of Denmark so far as it is concerned with the problem with which we are presented. It is no doubt not enforceable directly in Denmark or anywhere else; but it is, I think, final within the contemplation of the section. I would add that there is here, so far as I know, no question of

A any formal challenge. I agree with counsel for the sellers that when it speaks of formal defects, the language, according to the deponents (and particularly is that shown by Mr. Heyman's own affidavit), is not limited to defects on the face of the award, mere matters of form; it will extend to compliance with the rules under which the award was given. There is, so far as I know, no challenge on that basis; indeed, no precise challenge, so far as I know, at all.

B The matter is not one which admits of useful elaboration, and I, therefore, say no more than that I have come to a clear conclusion in my own mind, in conformity with that of the learned judge, that for the purposes of s. 37 (1) (d) this award must be treated as having become " final " according to the relevant law of Denmark, and, that being so, the conditions in other respects being satisfied, s. 36 (1) applies to it and it is enforceable in the same way as an English C award. I would, therefore, dismiss the appeal.

PEARCE, L.J.: I agree with all that my Lord has said. The question here is whether it is reasonably clear that the award has been made in conformity with the law governing the arbitration procedure and is final in the country in which it was made, viz., Denmark, so as to satisfy s. 37 (1) (c) and (d) of the D Arbitration Act, 1950. That depends on a consideration of the rules and regulations of the Copenhagen judgment and Arbitration Committee and the affidavits as to Danish law. As to the point that it was not in conformity with the law governing the arbitration procedure, I see no force in it. The rules provide that the presidency shall decide whether an appeal can be made and in special cases shall decide that an award made cannot be appealed against unless security is E given by payment of the full amount payable under the award. If it is decided that there can be no appeal, then the award is final. I see nothing to show that the presidency was not entitled to make the order that they made in this particular case.

In my view the award has also become final in the English sense of that word. The buyers did not wish to have any adjournment under s. 37 (3) so as to entitle F them to contest the validity of the award. If it were necessary to recover a Danish judgment before the award becomes final, then that judgment could be enforced, as has been pointed out, quite apart from the provisions of the Arbitration Act, 1950, and those provisions would be valueless. It is true that for the purposes of enforcement, an application has to be made to the Danish courts, but that is not the test here. The test is whether the award is final within the meaning of s. 37 (1) (d). In my view, for the reasons given by my Lord, it is. I, therefore, would also dismiss this appeal.

Appeal dismissed. Leave to appeal to the House of Lords granted.

Solicitors: *P. R. Kimber* (for the sellers); *Rowe & Maw* (for the buyers).

[*Reported by* F. GUTTMAN, ESQ., *Barrister-at-Law.*]

Re GREATER LONDON PROPERTIES, LTD.'S LEASE. TAYLOR BROS. (GROCERS), LTD. *v.* COVENT GARDEN PROPERTIES CO., LTD.

[CHANCERY DIVISION (Danckwerts, J.), March 11, 12, 1959.]

Landlord and Tenant—Lease—Covenant against assignment without consent—Consent not to be unreasonably withheld in the case of an assignment to a respectable and "responsible" assignee—Proposed assignee a subsidiary company of large well-known company—Guarantee by holding company required by landlord as a condition of consent—Whether consent unreasonably withheld.

By a lease dated Feb. 15, 1938, a shop was let for a term of thirty-five years from Sept. 29, 1937, at a rent of £225 a year exclusive of rates. The lease contained the usual repairing covenants and a covenant by the lessees not to assign the premises without the written consent of the lessors, but the consent was not to be unreasonably withheld in the case of an assignment to "a respectable and responsible assignee". In 1957 the tenants applied to the landlords for permission to assign the premises to a company (referred to hereinafter as "the proposed assignee company"), which was in substance a wholly owned subsidiary of A.B., Ltd., a large and well-known combine (referred to hereinafter as "the holding company"). The assignee company had a nominal capital of £50,000 and an issued share capital of £14,000. Three of its directors were directors of the holding company. The assignee company's balance sheet and profit and loss account for the year ended Mar. 30, 1957, showed considerable fixed assets, current assets of £52,493, but there were current liabilities of £257,153, including £215,028 payable to the holding company on demand. This sum had been largely applied in acquiring fixed assets. The net profits (after deducting outgoings including, e.g., rent, and after deducting income tax) were £16,471. Evidence was available to show that the proposed assignee company's profits for the year ending Mar. 30, 1958, would be greater than those for the previous year. The landlords alleged that the proposed assignee company was not a "responsible assignee" and refused to give their consent to the proposed assignment unless the holding company guaranteed the payment of the rent and the performance of the covenants contained in the lease.

Held: the landlords' consent had been unreasonably withheld and the lease could be assigned to the proposed assignee company without any licence by deed because

(i) as a practical matter the holding company would not, by demanding payment of £215,028, wreck the proposed assignee company, whose position as a subsidiary company in the combine was a source of strength rather than of weakness; and

(ii) having regard to the trading profits of the proposed assignee company it was a "responsible" assignee for this lease.

Willmott v. *London Road Car Co., Ltd.* ([1910] 2 Ch. 525) applied.

[Editorial Note. The provision against unreasonably withholding consent to an assignment of a lease, which is implied by the Landlord and Tenant Act, 1927, s. 19 (1), does not contain the description "responsible" which was in the covenant in the present case, but the present case shows that the proposed assignee company was considered to be a reliable tenant for the lease (see p. 732, letter I, post); and the decision should, accordingly, be relevant in determining whether consent was unreasonably withheld within the statutory proviso. The statutory proviso was not applicable to and did not override the express provision of the covenant in the present case, despite the words "notwithstanding any

express provision to the contrary " in s. 19 (1); see *Moat* v. *Martin* ([1949] 2 All E.R. 646).

As to the effect of unreasonably withholding consent to an assignment of a lease, see 23 HALSBURY'S LAWS (3rd Edn.) 634, para. 1340; and for cases on the subject, see 31 DIGEST (Repl.) 423-427, *5506-5535*.]

Case referred to:

(1) *Willmott* v. *London Road Car Co., Ltd.*, [1910] 2 Ch. 525; 80 L.J.Ch. 1; 103 L.T. 447; 31 Digest (Repl.) 423, *5508*.

Adjourned Summons.

The plaintiffs, Taylor Bros. (Grocers), Ltd., were the tenants of premises comprising a shop known as 76, High Street, Yiewsley, Middlesex, under a lease, dated Feb. 15, 1938, and granted to their predecessors in title by the predecessors in title of the landlords, Covent Garden Properties Co., Ltd., the defendants. The lease was for a term of thirty-five years from Sept. 29, 1937, and contained a covenant by the lessees not to assign the premises without the consent of the lessors, but the consent was not to be unreasonably withheld in the case of an assignment to a respectable and responsible assignee. On or about June 15, 1957, the plaintiffs agreed to assign the lease to Coombe Bakery (Teddington), Ltd., for the residue of the term, subject to the consent of the defendants. The proposed assignee was a subsidiary of Allied Bakeries, Ltd., and the defendants refused to consent to the proposed assignment unless Allied Bakeries, Ltd. guaranteed the payment of the rent and performance of the covenants and conditions contained in the lease.

By their originating summons, dated June 13, 1958, the plaintiffs asked for a declaration (a) that, on the true construction of the lease and in the events which had happened, the refusal of the defendants to grant a licence to assign the lease to Coombe Bakery (Teddington), Ltd. was unreasonable, and (b) that, notwithstanding such refusal, the plaintiffs were entitled to assign the lease to Coombe Bakery (Teddington), Ltd. without any licence from the defendants.

H. Heathcote-Williams, Q.C., and *J. W. Wellwood* for the plaintiffs, the tenants.
L. A. Blundell for the defendants, the landlords.

DANCKWERTS, J.: The lease, dated Feb. 15, 1938, which was made between predecessors in title of the defendants and the plaintiffs, respectively, was for a term of thirty-five years from Sept. 29, 1937, so that in 1958 a little over fourteen years had still to run. The amount of the rent was £225 per annum, and there were repairing covenants of the usual type. The tenant was liable for the rates, which, one would suppose, would not make for a very great increase in the obligations in respect of the amount of the rent. The covenant against assignment, which is the material covenant in this case, is in these terms:

> ". . . that the lessees shall not nor will assign underlet or part with the possession of the premises hereby demised or any part thereof (save a letting of the upper part for a term not exceeding three years at a rack rent for which no consent or licence shall be necessary) without the consent in writing of the lessors first had and obtained but such consent shall not be unreasonably withheld in the case of an assignment or underlease of the whole of the premises hereby demised to a respectable and responsible assignee or underlessee whose references shall have been first submitted to the lessors for approval."

The provision in regard to a letting of the upper part is immaterial.

The proposed assignee is a company, Coombe Bakery (Teddington), Ltd., which has a nominal capital of £50,000 and an issued share capital of £14,000, of which substantially the whole is held by a company called Greater London Bakeries, Ltd., which in turn has its capital wholly owned by Allied Bakeries, Ltd., the last company being a very big combine in this particular field of trade

and very well known. Consequently, in substance, Coombe Bakery (Teddington) Ltd., is a wholly owned subsidiary of Allied Bakeries, Ltd., although there is an intermediate holding company. References were duly submitted to the defendants and, apparently, were satisfactory, as no point was ever raised in regard to them.

The matter arises in this way. When the defendants were asked for their consent to the assignment of the lease, the defendants' solicitors, in a letter dated Oct. 11, 1957, wrote:

> " Further to our letter of yesterday's date, we have now heard from [the defendants] with their instructions regarding [the plaintiffs'] application for a licence to assign the above premises to the Coombe Bakery (Teddington), Ltd. Subject to the licence being in a form approved by the clients and to Allied Bakeries, Ltd. guaranteeing the payment of the rent and performance of the covenants and conditions contained in the lease, [the defendants] are prepared to consent to the proposed assignment."

Then there are some other matters to which I need not refer. On Dec. 18, the solicitors for the proposed assignee wrote to the plaintiffs' solicitors saying:

> " Further to our letter of [Dec. 4] we have now obtained some further information from [the proposed assignee]. For the year ended Mar. 30, 1957, the profits of the company [the proposed assignee] before tax were £33,407, after tax £24,186, leaving, after deduction of a loss carried forward, £16,471 net profits after tax. If necessary, evidence could be produced of even greater profit in the course of the current year."

The plaintiffs were not willing to agree to a guarantee by Allied Bakeries, Ltd., as they considered that it was unjustified and they felt, rightly or wrongly, that a question of principle was involved, because, if the landlords of all subsidiaries were entitled to ask for guarantees by the holding company, they conceived that the matter could produce a good deal of extra complication. The information which was available to the defendants at the date of the application and down to the issue of the originating summons herein—which was on June 13, 1958—was such information as they could obtain from an examination of the proposed assignee's particulars in the Companies Register; secondly, a balance sheet and profit and loss account down to Mar. 30, 1957; and, thirdly, the information supplied in the letter of Dec. 18, 1957, which, it should be observed, states that even greater profits had been obtained in the course of the current year (the year ending Mar. 30, 1958) and offering, if necessary, to produce evidence of that.

There is no suggestion that the proposed assignee is not a respectable company, but the contention on behalf of the defendants is that it is not a " responsible " company. A great many cases* have been cited to me, quite properly, but there is no doubt in my mind as to the principles which are to be applied in a case of this kind, and it will be sufficient for my purposes if I refer to some statements in the judgments of the Court of Appeal in *Willmott* v. *London Road Car Co., Ltd.* (1) ([1910] 2 Ch. 525). The point in that case was whether a company could be a respectable and responsible person, and the court held that it could. SIR H. H. COZENS-HARDY, M.R., said (ibid., at p. 531):

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* In addition to *Willmott* v. *London Road Car Co., Ltd.* (1) the following cases were cited by counsel: *Ideal Film Renting Co.* v. *Nielsen*, [1921] 1 Ch. 575; *Parker* v. *Boggan*, [1947] 1 All E.R. 46; *Treloar* v. *Bigge*, (1874), L.R. 9 Exch. 151; *Shanly* v. *Ward*, (1913), 29 T.L.R. 714; *Young* v. *Ashley Gardens Properties, Ltd.*, [1903] 2 Ch. 112; *Evans* v. *Levy*, [1910] 1 Ch. 452; *Re Gibbs & Houlder Brothers & Co., Ltd.'s Lease, Houlder Brothers & Co., Ltd.* v. *Gibbs*, [1925] Ch. 575; *Vienit, Ltd.* v. *W. Williams & Son (Bread Street), Ltd.*, [1958] 3 All E.R. 621; *Lee* v. *Carter (K.), Ltd.*, [1948] 2 All E.R. 690; *Premier Confectionery (London) Co., Ltd.* v. *London Commercial Sale Rooms, Ltd.*, [1933] Ch. 904; *Tredegar* v. *Harwood*, [1929] A.C. 72; *Bates* v. *Donaldson*, [1896] 2 Q.B. 241; *Re Town Investments, Ltd., Underlease, McLaughlin* v. *Town Investments, Ltd.*, [1954] 1 All E.R. 585; *Balfour* v. *Kensington Gardens Mansions, Ltd.*, (1932), 49 T.L.R. 29.

A

> "Suppose the words had simply been that consent should not be withheld in the case of a responsible person, I cannot bring myself to doubt that in that case a company which was admitted to be responsible in the sense of being able to discharge all obligations in respect of rent and covenants under the lease would be a responsible person within the meaning of that covenant, and therefore a person with respect to whom consent could not be refused."

B

FLETCHER MOULTON, L.J., said (ibid., at p. 536):

> "I cannot see why the words 'respectable' and 'responsible' should not have been inserted in order to exclude corporations that did not carry on business in a reputable manner or were not equal to the burdens of the covenants and therefore not responsible, and not with any intention to exclude corporations generally."

C

Then the matter was put very succinctly by FARWELL, L.J. (ibid., at p. 537) where he said:

D

> "The responsibility relates to financial capacity, and it has hardly been argued, and I think it is not arguable, that that is not as applicable to a corporation or limited company as to an individual."

It is plain from those passages that the responsibility in question is not an abstract one but is related to the particular circumstances of the case and, above all, to the amount of the obligations which the company is going to undertake; E that is to say, the amount of the rent and the burden of the covenants and other obligations contained in the lease. It is not a theoretical matter. Counsel for the plaintiffs seems to me to be perfectly correct when he says that the matter must be approached having regard to the circumstances and in a practical and realistic manner. In my judgment, the matter has to be approached and has to F be decided in that way, and not with regard to what I might describe, without any offensive intent, as a point which might be taken by a pedantic chartered accountant.

Let us turn to the balance sheet and profit and loss account of the proposed assignee for the year ended Mar. 30, 1957. In the balance sheet very considerable fixed assets* are shown, and current assets are shown at a figure of £52,493. G As against that there are shown, according to the description in the balance sheet, "current liabilities" amounting to £257,153, which includes "due to holding company, £215,028" and £7,380 "due to fellow subsidiary companies". In the profit and loss account it appears that for the year in question there was a surplus on operating, subject to certain items below, of £31,312, and this surplus was obtained after discharging all of the liabilities of the proposed H assignee during its operations, including all the rents which were payable by the proposed assignee, which has a number of shops. Then there are "rents receivable and sundry revenue," £4,359; "proceeds of consequential loss insurance claim," £42,357; "surplus on fire insurance claim," £1,030, and "income from investment," £35; making a total of £79,093. From this there is then deducted I the considerable sum of £41,448 for depreciation and certain sums for auditors' remuneration, directors' emoluments and a pension, reducing the net balance of profits to £33,407. Then there is deducted income tax on profits for the period, less an adjustment, which reduced the net figure after taxation to £24,186, which is the sum stated in the letter of Dec. 18, 1957†. Then there is a loss brought

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* In a balance sheet these final assets were shown as at Mar. 31, 1956, at an aggregate value of £232,593 after allowing depreciation.

† See ante, p. 730, letter D.

forward from the previous period, which reduces the sum to £16,471; the sum of £4,878 is written off in respect of goodwill, and the result is an amount of £11,593, which is all paid over to the shareholders (and we know who they are) in the form of a dividend.

It was contended on behalf of the defendants that, in view of the matters which I have stated, the proposed assignee was not a responsible person standing on his own feet. One of the matters criticised was the payment of the whole of the profit in dividends to the shareholders, in effect ultimately to Allied Bakeries, Ltd. The other criticism is that there is a sum of £215,028 appearing as a current liability and that the holding company, to whom that sum is owed, could at any time demand, as is admitted to be possible, payment of that sum and wreck the proposed assignee, the subsidiary company. The first observation which one makes with regard to that is that the proposed assignee, obviously, could discharge its obligations even though it might have to resort to raising money on the security of its fixed assets, which, as shown on the balance sheet—and I have no reason to believe that the balance sheet is not an honest one—very much exceed in value the total of the obligations. Further, it has been explained to me that actually this method of financing a company is a very convenient and economical method, because it avoids the payment of interest on mortgages or debentures or, indeed, on bank loans. It was admitted on behalf of the landlords that the money which had been raised had been largely applied in acquiring fixed assets and had not been squandered away in things which were consumed and no longer represented by assets. Apparently, this association of companies regards this method of financing as more satisfactory than financing in any other way. Theoretically, of course, it is perfectly possible that the demand might be made. Lawfully, a demand could be made to the proposed assignee for payment of the whole of this large sum at any moment, but, having regard to the fact that the proposed assignee is a subsidiary of the creditor, as a practical matter it seems to me to be quite out of the question that any such demand would be likely to be made. The holding company, Allied Bakeries, Ltd., can have no interest except to keep its subsidiary company going as part of its trading amalgamation and it seems unthinkable, as a practical matter, that the proposed assignee is going to be brought to an end suddenly by reason of a demand for this debt. Therefore, it seems unrealistic, although, no doubt, a perfectly clear point can be argued on the basis of the accounts by treating the figures as a theoretical exercise without any regard to probable facts.

Actually, however, this method of financing the proposed assignee and its ownership by Allied Bakeries, Ltd., so far from being a source of weakness to the proposed assignee, is a source of strength, because, if one looks at the matter in a practical way, the proposed assignee has all the resources of Allied Bakeries, Ltd., and its prestige behind it and is able, therefore, to trade satisfactorily in a manner in which it probably would not be able to do otherwise. Control is, in one sense, in the hands of Allied Bakeries, Ltd., because, apart from the ownership of the shares, three of the directors, including Mr. Garfield Weston (who is very well known in this field of trade) are directors of Allied Bakeries, Ltd. There are two working directors, but obviously the majority can secure the will of Allied Bakeries, Ltd., and, therefore, Allied Bakeries, Ltd. have got control in addition to that which they can exercise through ownership of the shares. Regarding the financial situation of the proposed assignee, however, in a practical, reasonable manner, and remembering that it is trading at a profit and that the profits applied by virtue of the control of Allied Bakeries, Ltd., are so applied after the discharge of all the proposed assignee's current outgoings like rent, it seems to me absurd to pretend that the proposed assignee would not be a reliable tenant in respect of the discharge of a rent of £225 a year and

A the performance of the covenants in the lease. No doubt, it would be very nice for the defendants to have the additional support for their rent of a guarantee from Allied Bakeries, Ltd., but, in my view, they are not entitled to demand anything of the sort. Accordingly, I take the view that, in refusing their consent except on that condition, the defendants refused their consent unreasonably and the plaintiffs are entitled to disregard that requirement in the lease.

B

Declaration accordingly.

Solicitors: *Claude Barker & Partners* (for the plaintiffs); *Simmons & Simmons* (for the defendants).

[*Reported by* R. D. H. OSBORNE, ESQ., *Barrister-at-Law.*]

C

D

PRACTICE NOTE

E

Counsel—Fees—Refresher fees—Privy Council.

The registrar begs to notify parties in appeals to Her Majesty in Council that the practice of allowing on taxation of costs only ten guineas a day as refresher fees to both senior and junior counsel is to be discontinued. On taxation of costs of appeals set down for hearing after May 8, 1959, the registrar may in his discretion allow refresher fees to counsel in excess of ten guineas. On refreshers which are allowed the junior will have the usual two-thirds of the senior's fee.

F

Mar. 17, 1959.

NEWCASTLE CITY COUNCIL *v.* ROYAL NEWCASTLE HOSPITAL.

[PRIVY COUNCIL (Viscount Simonds, Lord Cohen, Lord Somervell of Harrow and Lord Denning), February 12, 16, 17, March 19, 1959.]

Privy Council—Australia—New South Wales—Rates—Exemption—Land owned by public hospital—No physical use of land—"Used"—"Occupied"—New South Wales Local Government Act, 1919 (*No.* 41 *of* 1919), *s.* 132 (1) (*d*).

The respondent hospital, which was a public hospital and which received patients suffering from tuberculosis, owned 291 acres of land just outside the hospital grounds. The land was still in its virgin state and was traversed by ridges and gullies, which were heavily timbered, with a good deal of underwood. The gullies were steep and rough, and some of them were so steep that they were impassable. There was very little flat land. The land was vacant land and there was no evidence sufficient to establish that it was used by patients or by the nursing staff. The land had been acquired by the hospital in a series of parcels between 1926 and 1946 and it was found that the land was acquired and owned for the purposes of the hospital, i.e., to keep the atmosphere clear and unpolluted, to prevent building on the land and so act as a barrier against the approach of factories and houses, to provide quiet and serene surroundings for the patients, and to give room to expand the activities of the hospital. The appellant city council claimed that the hospital was liable to pay rates on this land. The hospital claimed exemption under the New South Wales Local Government Act, 1919, s. 132 (1) (d)*, which exempted land belonging to, inter alia, any public hospital and which was used or occupied by the hospital for the purposes thereof.

Held: the hospital was not liable to pay rates on the land since it was "used" by the hospital for the purposes of the hospital within the meaning of s. 132 (1) (d), because the hospital purposely got fresh air, peace and quiet by virtue of its ownership of the land.

QUAERE whether the land was "occupied" by the hospital.

Appeal dismissed.

[As to rateable occupation in English law, see 27 HALSBURY'S LAWS (3rd Edn.) 352, 353, para. 782.]

Appeal.

Appeal by special leave by Newcastle City Council from an order of the High Court of Australia (WILLIAMS, WEBB, FULLAGAR, KITTO and TAYLOR, JJ.), dated Mar. 21, 1957, affirming an order of the Supreme Court of New South Wales (OWEN, J., ROPER, C.J., in Equity, and MAGUIRE, J.), dated June 18, 1956, dismissing the city council's appeal from a verdict and judgment of RICHARDSON, J., dated June 25, 1955, in favour of the respondent, Royal Newcastle Hospital, in an action by the city council for the recovery of £4,001 9s. 8d. for rates levied by the city council for the years 1946 to 1952 inclusive on the hospital's land at New Lambton. The facts are set out in the judgment of the Board.

B. J. M. MacKenna, Q.C., and *P. R. Oliver* for the appellant city council.

Gordon Wallace, Q.C. (of the Australian Bar) and *J. G. Le Quesne* for the respondent hospital.

LORD DENNING: In the city of Newcastle, New South Wales, there is a hospital called the Royal Newcastle Hospital, which receives patients suffering from tuberculosis. It has about a hundred beds. It is set in grounds laid out with lawns and gardens. These grounds cover 17½ acres and are enclosed with a ring fence. Outside the fence the hospital owns 18½ acres of rough ground marked off

* The terms of s. 132 (1) (d) are set out at p. 735, letter F, post.

by five white posts. Beyond this rough ground the hospital owns 291 acres of land which is still in its virgin state. These 291 acres are traversed by ridges and gullies, which are heavily timbered, with a good deal of underwood. The gullies are steep and rough, some of them so steep that they are impassable. There is very little flat land. There are a few bush tracks, one of which is well defined; but there was no evidence sufficient to establish that it was used by patients or by the nursing staff. There was, in short, no physical use of the 291 acres by the hospital. It was just vacant land.

The appellant city council claims that the respondent hospital is liable to pay rates on these 291 acres for the years 1946 to 1952 inclusive. It does not seek to make the hospital liable on either the 17½ acres or the 18½ acres, but only on the 291 acres. The sum claimed is £4,001 9s. 8d. At the hearing of the action, RICHARDSON, J., held that the 291 acres were exempt from rates. His decision was affirmed by a majority of the Supreme Court of New South Wales (ROPER, C.J., and MAGUIRE, J., with OWEN, J., dissenting) and their decision was in turn affirmed by a majority of the High Court of Australia (WILLIAMS, WEBB and TAYLOR, JJ., with FULLAGAR and KITTO, JJ., dissenting). It should be noticed at the outset that rates are levied in New South Wales, not on the occupiers as in England, but on the owners; and they are calculated, not by reference to the annual value as in England, but by reference to the unimproved capital value; and all land, occupied or unoccupied, is subject to the payment of rates unless it can be brought within one of the statutory exceptions. English rating decisions are, therefore, not of much help.

The hospital is undoubtedly liable to pay rates on these 291 acres, unless the land comes within s. 132 (1) (d) of the Local Government Act, 1919, which exempts

> "land which belongs to any public hospital, public benevolent institution, or public charity, and is used or occupied by the hospital, institution or charity, as the case may be for the purposes thereof."

The hospital acquired the land in a series of parcels from 1926 to 1946, namely, ninety-two acres in 1926, four acres in 1934, and 220 acres in 1946. There is no doubt that the hospital acquired all the land for the purposes of the hospital. Indeed, when the latest portion of it (220 acres) was compulsorily acquired in 1946, the Government Gazette expressly stated that it was "resumed for the purposes of the Newcastle Hospital". According to the evidence, these purposes were to keep the atmosphere clear and unpolluted; to prevent building on the land and so act as a barrier against the approach of factories and houses; to provide quiet and serene surroundings for the patients; and to give room to expand the activities of the hospital. The land was undoubtedly *acquired and owned* for those purposes. But was it *used* or *occupied* for those purposes? That is the question.

Their Lordships are of opinion that it was *used* for those purposes. Counsel for the city council submitted that an owner of land could not be said to use the land by leaving it unused; and that was all that had been done here. Their Lordships cannot accept this view. An owner can use land by keeping it in its virgin state for his own special purposes. An owner of a powder magazine or a rifle range uses the land he has acquired nearby for the purpose of ensuring safety even though he never sets foot on it. The owner of an island uses it for the purposes of a bird sanctuary even though he does nothing on it, except prevent people building there or disturbing the birds. In the same way this hospital gets, and purposely gets, fresh air, peace and quiet, which are no mean advantages to it and its patients. True it is that the hospital would get the same advantages if

the land were owned by the Crown or by a trust which had determined to keep it in a natural state, or by an owner who was under a restrictive covenant not to build on the land. But the advantages then would be fortuitous, or at any rate outside the control of the hospital. Here they are intended, and that makes all the difference. A

In these circumstances, it is unnecessary for their Lordships to consider whether the 291 acres were " occupied " by the hospital; but in view of the argument submitted to them, their Lordships would say a few words on it. The hospital was undoubtedly in legal possession of the 291 acres; for the simple reason that, where no one else is in possession, possession follows title. But legal possession is not the same as occupation. Occupation is a matter of fact and only exists where there is sufficient measure of control to prevent strangers from interfering: see POLLOCK AND WRIGHT ON POSSESSION, pp. 12, 13. There must be something actually done on the land, not necessarily on the whole but on part in respect of the whole. No one would describe a bombed site or an empty unlocked house as " occupied " by anyone; but everyone would say that a farmer " occupies " the whole of his farm even though he does not set foot on the woodlands within it from one year's end to another. Their Lordships have some doubt whether these 291 acres were " occupied " by the hospital, because they were not fenced in or enclosed in any way, and it is difficult to say they were so much linked with the hospital grounds as to form part of an entire whole. But it is unnecessary to come to a conclusion on the point. B C D

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant city council must pay the costs. E

Appeal dismissed.

Solicitors: *Kimbers* (for the appellant city council); *Light & Fulton* (for the respondent hospital).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]

[END OF VOLUME ONE.]

BIBL. LONDIN. UNIV.